

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

NORTHWEST LANDOWNERS ASSOCIATION, MIKE
DRESSER, SANDRA SHORT, and SWENSON LIVING
TRUST,

Plaintiffs/Appellants/Cross-Appellees,

and

NORTH DAKOTA FARM BUREAU, INC.,

Intervenor-Plaintiff/Appellants/Cross-Appellees,

-vs-

STATE OF NORTH DAKOTA, NORTH DAKOTA
INDUSTRIAL COMMISSION, 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, DREW WRIGLEY in his
official capacity as Attorney General of North Dakota
and as a member of the North Dakota Industrial
Commission, and DOUG GOEHRING in his official
capacity as Agriculture Commissioner of North Dakota
and as a member of the North Dakota Industrial
Commission,

Defendants/Appellees,

and

SCS CARBON TRANSPORT, LLC, SCS PERMANENT
CARBON STORAGE, LLC, and SUMMIT CARBON
SOLUTIONS, LLC,

Intervenor-Defendants/Appellees/Cross-Appellants,

and

MINNKOTA POWER COOPERATIVE, BASIN ELECTRIC
POWER COOPERATIVE, and DAKOTA GASIFICATION CO.,

Intervenor-Defendants/Appellees.

Supreme Ct. 20240298

**District Ct. 05-2023-CV-
00065**

Northeast Judicial District

**On Appeal from Judgment Dated August 29, 2024
The Honorable Swain Benson, District Court Judge
Bottineau County District Court, Northeast Judicial District**

**APPELLEE BRIEF OF THE STATE OF NORTH DAKOTA
(Oral Argument Requested)**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] Whether North Dakota’s pore space amalgamation statutes (N.D.C.C. §§ 38-22-10, 38-25-08) are properly the subject of a facial Taking challenge.

[¶2] If North Dakota’s pore space amalgamation statutes are properly the subject of a facial Taking challenge, whether such challenge would be time-barred as to the carbon dioxide amalgamation statute (N.D.C.C. § 38-22-10).

[¶3] Whether the NWLA Plaintiffs’ facial Taking challenges to the survey statutes (N.D.C.C. §§ 32-15-06, 24-05-09) are time-barred.

[¶4] Whether Plaintiffs’ due process claims are improperly pleaded Takings claims.

[¶5] Whether Plaintiffs established standing to bring a non-delegation challenge against the good cause exception statute (N.D.C.C. § 38-22-03(7)).

[¶6] If the merits for any of Plaintiffs’ various claims are reached on this appeal, whether any of the challenged statutes are facially unconstitutional.

INTRODUCTION

[¶7] In this action, Plaintiffs facially challenge the constitutionality of five different statutes invoking at least four different theories of constitutional violation.

[¶8] However, the main target of Plaintiffs’ shotgun-pleaded lawsuits is a facial Taking challenge to N.D.C.C. § 38-22-10. That statute, enacted in 2009, establishes a process by which the State can pool (or “amalgamate”) property interests in pore space reservoirs with shared ownership for the storage of carbon dioxide when—and only when—the majority of the owners for that reservoir wish to develop the reservoir for that purpose.

[¶9] In bringing this litigation, Plaintiffs hope to build upon this Court’s decision in *Northwest Landowners Ass’n v. State*, 2022 ND 150, 978 N.W.2d 679 (“*NWLA I*”). But the two cases have little in common beyond both involving pore space.

[¶10] For one, unlike in *NWLA I*, the statutes challenged here did not impact any property interests by their mere enactment, making a facial Taking challenge to them improper. The District Court properly disposed of Plaintiffs’ challenge to the oil and gas amalgamation statute (N.D.C.C. § 38-25-08) on that basis, (R248:8:¶28), but could have disposed of their challenge to the carbon dioxide amalgamation statute on that ground as well.

[¶11] For another, *if* the pore space amalgamation statutes were susceptible to a facial Taking challenge, *then* they would be subject to either a six-year or a ten-year statute of limitation. Under either, the time to challenge the carbon dioxide amalgamation statute (N.D.C.C. § 38-22-10) as a facial Taking has long passed, and the District Court did not err in dismissing Plaintiffs’ challenge to that statute on that basis. (R248:5:¶16).

[¶12] And for a third, on the merits, the doctrine of correlative rights fundamentally distinguishes this case from *NWLA I*. Pore space capable of commercial development exists as underground reservoirs, similar to oil and gas reservoirs. And like oil and gas reservoirs, no single owner can utilize their portion of the reservoir, nor foreclose the use of their portion, without impacting the interests of all the other reservoir owners.

[¶13] The individual rights protected by the Takings Clauses are important. But for resources with shared ownership, so too are the rights of the majority of owners. The doctrine of correlative rights has evolved to address that tension. And under that doctrine—long followed in this State—it is well within the State’s regulatory power to pool ownership interests into development units at the behest of the majority of owners, while also ensuring that every impacted owner still receives his or her equitable share. *Texaco Inc. v. Indus. Comm’n*, 448 N.W.2d 621, 622 n.1 (N.D. 1989) (“[T]he constitutionality of oil and gas conservation legislation, including compulsory pooling, is well established.”).

[¶14] The ability to commercialize pore space may be new, but the State’s authority to pool reservoir resources with shared ownership is not. In that sense, this is simply the latest verse in an old song, and fundamentally different than the statute at issue in *NWLA I*.

[¶15] Plaintiffs’ grab-bag of other constitutional challenges should also be rejected.

[¶16] The facial Taking challenges to certain survey statutes (N.D.C.C. §§ 32-15-06, 24-05-09) are time-barred for the same reasons that a facial Taking challenge to the carbon dioxide amalgamation statute is, as the District Court properly held. (R248:5:¶16). But even if the merits of these challenges are reached, they run headlong into the Court’s recent decision in *SCS Carbon Transport LLC v. Malloy*, 2024 ND 109, 7 N.W.3d 268.

[¶17] The due process claims (substantive and procedural) are derivative of the flawed Taking claims, and that alone is a sufficient basis to dismiss them, as the District Court held. (R248:8:¶29). But more fundamentally, when there is an explicit source of constitutional protection against challenged conduct, due process claims are precluded. Plaintiffs’ attempt to repackage the Taking claims as due process claims should be rejected.

[¶18] Finally, the non-delegation challenge to the good cause exception statute (N.D.C.C. § 38-22-03(7)) should be rejected. No exception has been granted, or even considered, under this provision. And absent any injury, Plaintiffs lack standing for this claim. But even if the merits of this challenge are reached, Section 38-22-03(7) does not violate the non-delegation doctrine when it is read in conjunction with the rest of Chapter 38-22.

STATEMENT OF THE CASE AND FACTS

I. Primer on Carbon Capture and Storage

[¶19] Carbon capture and storage (“CCS”) is a technologic development that allows for capturing carbon dioxide (“CO₂”) before it enters the atmosphere and storing it safely underground. (R185:4:¶¶8-9) (Harju Expert Report). The underground rock formations

used for CCS “can be thought of as a tight, rigid sponge.” *Id.* at ¶10. Cavities in these rock formations are referred to as “pore space.” *Id.*; *see also id.* at p.28 (illustration).

[¶20] North Dakota’s geology is exceptionally suitable for CO₂ storage. *Id.* at ¶15. And North Dakota has led the nation in developing regulations for CCS, being the first state in the country to receive primary authority for regulating CCS operations. *Id.* at ¶¶16-17. CCS has the potential to bring significant additional income to many landowners in the State. However, the ability to develop commercially viable CCS operations is contingent upon the development of pore space reservoirs with shared ownership. *Id.* at ¶21

[¶21] The geologic reservoirs needed for viable CCS operations are large—covering tens to hundreds of square miles—and CO₂ injected into those reservoirs will migrate within the geologic formations unimpeded by surface boundaries. *Id.* at ¶¶22-24.

[¶22] The development of pore space reservoirs consequently shares many features with the development of oil and gas reservoirs. *Id.* at ¶26. And in the realm of oil and gas development, pooling and unitization have long been utilized to prevent waste and ensure all owners are able to benefit from the development of their interests. *Id.* at ¶¶27-28.

[¶23] For both oil and gas development and pore space development, it is impossible for any single owner in a multi-owner reservoir to develop their interests without impacting the interests of other owners. Likewise, no single owner can *prohibit* the development of their interests without impacting the interests of other owners. *Id.* at ¶¶28-29.

[¶24] If there was not a mechanism to compel the pooling of a shared oil and gas reservoir at the behest of the majority of owners, a single owner could deny everyone the ability to profit from the reservoir’s common resource, and the oil and gas in the reservoir could go unrecovered, to the detriment of the other owners and society at large. *Id.* at ¶33. The

same principle applies to pore space development for CO2 storage. *Id.* at ¶34.

[¶25] North Dakota is a powerhouse for the production of coal, oil, natural gas, and ethanol. *Id.* at ¶36. Many landowners, communities, our State’s economy, and our regional power grid rely heavily upon those industries, which face significant long-term threat from increasing federal regulation of CO2 emissions. *Id.* at 38. The potential impact of CCS to our State’s economy, the long-term reliability of our power grid, and the well-being of our residents simply cannot be overstated. *Id.* at ¶¶49-54. And the overwhelming majority of landowners given the opportunity to profit from it are voluntary participants. *See* (R187:8-9:¶14) (Helms Decl.) (noting participation rates of 80.3% to 96.71%).

[¶26] The Court is at an important crossroad for how to conceptualize property rights for shared pore space reservoirs. Since North Dakota is a leader in this field, there is not much caselaw from other jurisdictions to look to. However, while CCS may be new, the correlative rights doctrine is not. This Court is at the forefront of deciding how that doctrine will be applied to pore space reservoirs—similar to how courts of the early twentieth century addressed its application to shared oil and gas reservoirs.¹

II. Procedural Background.

[¶27] NDFB’s recitation of the procedural history for this case is fairly presented (NDFB Br. ¶¶6-10), and the State adopts those paragraphs.

¹ While the primary target of Plaintiffs’ challenge is CO2 storage, the storage of oil and gas, addressed by N.D.C.C. § 38-25-08, follows similar principles. Re-injecting oil and gas temporarily into pore space reservoirs can reduce flaring during “boom” periods of production, and the diffusion of oil and gas injected into a pore space reservoir is similar to the diffusion of CO2 injected into a pore space reservoir. (R185:18:¶¶60, 65).

LAW AND ARGUMENT

I. Standard of Review

[¶28] “Whether the district court properly granted summary judgment is a question of law that [this Court] review[s] de novo.” *SCS Carbon*, 2024 ND 109, ¶5 (citation omitted).

[¶29] “Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal.” *Teigen v. State*, 2008 ND 88, ¶7, 749 N.W.2d 505. “This Court exercises the power to declare legislation unconstitutional with great restraint.” *Id.*

[¶30] “When attacking the constitutionality of a statute, the scales are weighed in favor of the statute. The challenger must overcome a strong presumption of constitutionality.” *State v. Tweed*, 491 N.W.2d 412, 418 (N.D. 1992). “Any doubt must be resolved in favor of [] constitutionality,” *id.*, and “[t]he presumption ... is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court’s judgment, beyond a reasonable doubt,” *Capps v. Weflen*, 2014 ND 201, ¶15, 855 N.W.2d 637 (citation omitted).

[¶31] The presumption of constitutionality is especially strong in North Dakota, as we are one of only two States (the other being Nebraska) that requires a supermajority of the Supreme Court to declare a statute unconstitutional. N.D. Const. art. VI, § 4.

II. Plaintiffs’ Facial Taking Challenges to the Pore Space Amalgamation Statutes (N.D.C.C. §§ 38-22-10, 38-25-08) Should Be Rejected.

[¶32] “[A] property owner has a claim for a violation of the Takings Clause as soon as [1] a government [2] takes his property [3] for public use [4] without paying for it.” *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019). Plaintiffs’ complaints allege that the pore space amalgamation statutes fall into the *per se*, physical invasion category of Takings. *See* (R122:¶43) (NDFB Compl.); (R118:13:¶54) (NWLA Am. Compl.); *cf.* *NWLA I*, 2022 ND 150, ¶23 (discussing that category of Taking claim).

A. The Amalgamation Statutes Are Not Subject to a Facial Taking Challenge

[¶33] In this lawsuit, Plaintiffs made the strategic decision to only assert facial, as distinct from as-applied, Taking challenges to the pore space amalgamation statutes. *See* (R122:¶¶49) (NDFB Compl.); (R118:13:¶54) (NWLA Am. Compl.). “[T]hat decision comes at a cost.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

1. Facial vs As-Applied Challenges in the Takings Context.

[¶34] There is “an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Where there is “no concrete controversy concerning” a law’s “effect on specific parcels of land,” the “only issue ... is whether the ‘mere enactment’ of the [law] constitutes a taking.” *Id.* at 495.

[¶35] In other words, to allege a facial Taking claim is to allege a statute, by its very enactment, took away property rights. *See Sorum v. State*, 2020 ND 175, ¶ 21, 947 N.W.2d 382 (“[a] facial challenge ... violation, if any, occurs at the point of enactment ...”); *accord, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (“In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest.”).

[¶36] Where, as here, any alleged Taking of property interests would necessarily “depend on future action by a government official,” *NWLA I*, 2022 ND 150, ¶15, the statute does not, by the simple fact of its enactment, constitute a facial Taking.

2. The Pore Space Amalgamation Statutes Did Not Affect Any Property Interests by Their Enactment.

[¶37] The pore space amalgamation statutes challenged in this appeal both require

intervening, discretionary government actions *before* there could be any potential impact to anyone’s property rights—specifically, they would require the Industrial Commission to order an amalgamation of interests in a given pore space reservoir. The District Court thus did not err when it determined that “important distinction” means N.D.C.C. § 38-25-08 “is not amenable to a facial constitutional challenge.” (R248:8:¶27). And while the District Court disposed of the challenges to N.D.C.C. § 38-22-10 on statute of limitation grounds instead, (R248:5:¶16), it could have disposed of them on this basis as well.

[¶38] Plaintiff NDFB makes a few attempts to dispute this straightforward holding, none of which should be embraced by the Court (as far as the State can discern, the NWLA Plaintiffs do not appear to directly present argument on this point).

[¶39] First, NDFB argues the District Court “effectively forecloses pore space owners from ever being able to mount a facial challenge.” NDFB Br. ¶¶58-59. But that argument is premised on the faulty notion that every statute needs to be susceptible to a facial Taking challenge. Where, as here, a statute does not impact property interests by its mere enactment, there is nothing amiss about “foreclosing” facial Taking challenges to it. Indeed, the U.S. Supreme Court has noted that in Takings cases it is “particularly important” that “the constitutionality of statutes ought not be decided except in an actual factual setting.” *Keystone Bituminous*, 480 U.S. at 494 (citation omitted).

[¶40] Second, NDFB argues that the District Court’s dismissal of Plaintiffs’ facial Taking claims “undermines [the] declaratory judgment statutes” by “effectively requir[ing] an actual injury to occur.” NDFB Br. ¶¶62-63. But the District Court did not decline to reach the question pending an actual injury; it held that a statute which does not facially take anything is not susceptible to a facial Taking claim. Moreover, the suggestion that the

declaratory judgment act permits courts to render opinions absent actual or imminent injury is simply incorrect. *Brandvold v. Lewis and Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶8, 803 N.W.2d 827 (“Even in actions seeking a declaratory judgment ..., “[o]ur law is well established that courts cannot give advisory opinions.”) (citation omitted).

[¶41] Third, NDFB argues that, like in *NWLA I*, “the Court need only interpret the language of the statute and the relevant constitutional provisions to determine whether there is a conflict.” NDFB Br. ¶¶64-66. But this Court resolved the facial Taking claim in *NWLA I* after explaining the statute at issue there was alleged to have “ha[d] an immediate unconstitutional legal effect” “upon enactment.” 2022 ND 150, ¶14. Here, by contrast, the mere enactment of the amalgamation statutes could not plausibly have “completed a taking of constitutionally protected property rights.” *Id.* at ¶15.

[¶42] Fourth and finally, Plaintiffs argue the impropriety of bringing a facial Taking claim in this case should be ignored because, rather than directly affecting a Taking, “the Legislature granted the Commission authority [it] cannot possess,” and “[n]o future action by government officials will make the Pore Space Statutes constitutional.” NDFB Br. ¶¶64-67; *see also* *NWLA Br.* ¶69 (“Appellants do not claim that the challenged statutes effectuated a taking of their property upon enactment...”). But that argument runs away from what was actually pleaded. *Cf.* (R122:¶49) (NDFB Compl.) (alleging the statutes “on their face, affect a taking of private property without payment of just compensation”); (R118:13:¶54) (*NWLA Am. Compl.*) (same). Either Plaintiffs’ allegation is that the statutes affected a Taking of their property upon enactment, or it isn’t. And if it isn’t, Plaintiffs lack standing to facially challenge statutes that they don’t allege caused them injury. *E.g., Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶¶13-14, 669 N.W.2d 82.

[¶43] “For a host of good reasons, courts usually handle constitutional claims case by case, not en masse.” *Moody*, 603 U.S. at 723. Takings claims are no exception. To allege a facial Taking claim is to allege that a statute, by its very enactment, took away property rights. However, the pore space amalgamation statutes challenged here cannot plausibly be understood as affecting anyone’s property interests by their mere enactment. Plaintiffs’ decision to plead these challenges solely as facial Taking claims is thus a fatal defect.

B. If the Amalgamation Statutes Are Subject to a Facial Takings Claim, Then the Challenges to N.D.C.C. § 38-22-10 Are Time-Barred.

[¶44] Even if Plaintiffs had properly pleaded facial Taking claims, any such challenge to the carbon dioxide storage statute (N.D.C.C. § 38-22-10) would be time-barred. As noted *supra*, to allege a facial Taking claim is to allege a statute, by its very enactment, took away property rights. *E.g.*, *Sorum*, 2020 ND 175, ¶21 (“[a] facial challenge ... violation, if any, occurs at the point of enactment ...”); *accord Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 50–51 (1st Cir. 2011) (“it is clear that a facial takings challenge accrues at the time the offending statute or regulation is enacted or becomes effective”).

[¶45] The District Court thus did not err when it found the facial Taking challenges to N.D.C.C. § 38-22-10 (enacted in 2009; N.D. S.L. 2009, ch. 318, § 1) would be time-barred regardless of whether it applied the six-year period for an implied contract (*Hager v. City of Devils Lake*, 2009 ND 180, ¶¶32-34, 773 N.W.2d 420) or the catch-all ten-year period (N.D.C.C. § 28-01-22). (R248:5:¶15). Plaintiffs’ contrary arguments should be rejected.

1. Statutes of Limitation Apply to Constitutional Facial Taking Claims.

[¶46] Plaintiffs’ first contention is that constitutional claims cannot be subject to a statute of limitations, citing a variety of cases largely from the First Amendment and civil rights

contexts. See NWLA Br. ¶¶73-76; see also NDFB Br. ¶¶42-47.

[¶47] The Ninth Circuit has succinctly explained the error of this argument:

[Plaintiff] argues that because in other contexts the Supreme Court has allowed challenges to statutes long after they were enacted, [plaintiff] should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point. This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced—in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Levald, 998 F.2d at 688; accord, e.g., *Hillcrest Prop., LLC v. Pasco Cnty.*, 754 F.3d 1279, 1282 (11th Cir. 2014) (citing *Levald* for this point); *Kuhnle Brothers, Inc. v. Cnty. of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) (same).

[¶48] Plaintiffs do not cite any case holding that facial Taking claims are categorically excluded from statutes of limitation, nor is the State aware of any.

2. Statutes of Limitation Apply to Declaratory Judgment Actions.

[¶49] Plaintiffs' next contention is that claims seeking declaratory judgment, rather than compensation, are immune from statutes of limitation. See NDFB Br. ¶¶30-31; NWLA Br. ¶69. But “[t]his argument is meritless.” *Levald*, 998 F.2d at 688 (explaining that argument would “mak[e] a mockery of the statute of limitations by the simple expedient of creative labelling—styling an action as one for declaratory relief rather than for damages”) (quoting *Gilbert v. City of Cambridge*, 932 F.2d 51, 57-58 (1st Cir. 1991)).

[¶50] Indeed, this Court has already held that a claim seeking declaratory judgment on an alleged Taking is subject to the statute of limitations. *Bala v. State*, 2010 ND 164, ¶13, 787 N.W.2d 761. And that holding “is consistent with the overwhelming weight of

authority from other jurisdictions.” *Weavewood, Inc. v. S & P Home Inv., LLC*, 821 N.W.2d 576, 580 & n.2 (Minn. 2012) (compiling cases holding “statutes of limitations bar a declaratory judgment action to the same extent as a nondeclaratory action”).

[¶51] Plaintiffs do not cite any case holding facial Taking claims are excluded from statutes of limitation when they seek a declaratory judgment, nor is the State aware of any.

3. Plaintiffs’ Other Statute of Limitation Arguments Fail.

[¶52] The NWLA Plaintiffs argue, for the first time on appeal, that their facial Taking challenge to N.D.C.C. § 38-22-10 isn’t untimely because the statute wasn’t “actionable” until North Dakota received Class VI primacy from the EPA in 2018. NWLA Br. ¶¶20, 77-79. This Court generally does not consider arguments “raised for the first time on appeal.” *Viscito v. Christianson*, 2015 ND 97, ¶13, 862 N.W.2d 777. But even if the Court considers this argument, it fails. As noted *supra*, a facial Taking claim is an allegation that the statute effected a Taking upon enactment. *E.g., Sorum*, 2020 ND 175, ¶21. Nothing on the face of the statute delayed its effective date or made its effectiveness contingent on the State receiving Class VI primacy. *Cf. State v. Olson*, 176 N.W. 528, 532 (N.D. 1920) (“it is a general rule ... that statutory enactments take effect upon their passage and approval...”). Once again: either the amalgamation statutes effected a Taking upon their enactment or they didn’t. If they did, then the relevant statute of limitations began to run upon enactment. And if they didn’t, a facial Taking claim isn’t proper to begin with.

[¶53] NDFB argues that the District Court “conflated NDFB’s claim with a regulatory taking claim.” NDFB Br. ¶¶48-49. NDFB’s argument appears to be that since it isn’t seeking compensation, it isn’t raising a regulatory taking claim and the District Court’s citation to *Juarbe-Jimenez* was erroneous. *Id.* But NDFB is mistaken. *Juarbe-Jimenez* is squarely on-point; contrary to NDFB’s suggestion, the relief sought there wasn’t

compensation, but rather, like here, “a declaration that [the challenged rule] is unconstitutional, and an injunction prohibiting its enforcement.” 659 F.3d at 48.

[¶54] NDFB also argues that if its claim was a regulatory Taking claim (which it denies, *see supra*), then *Corner Post, Inc. v. Brd. of Governors of Fed. Res. Sys.*, 603 U.S. 799 (2024), should guide the analysis. NDFB Br. ¶¶50-53. But *Corner Post* is inapposite; that decision was limited to interpreting specific statutory text for when causes of action accrue to allege an agency exceeded its rulemaking authority under the APA. *Id.* at 804. It does not purport to speak to when a facial Taking claim accrues. And as addressed *supra*, to allege a facial Taking is to allege a statute, by its enactment, took away property rights.

[¶55] Finally, NDFB argues that enforcing a statute of limitation would be contrary to the purpose of statutes of limitation and “concerns of fairness.” NDFB Br. ¶¶54-56. But generalized notions of fairness can’t save Plaintiffs’ defective pleading. And in any event, the fact that a facial Taking challenge to N.D.C.C. § 38-22-10 is now barred by the statute of limitations (whether the six- or ten-year limit applies the Court need not here decide), does not deprive any impacted landowner from bringing an as-applied Taking challenge if or when their pore space interests are subjected to an amalgamation order they oppose. *Cf. MHC Fin. P’ship Two v. City of Santee*, 234 Fed.App’x 439, 440 (9th Cir. 2007) (affirming that the plaintiff’s “facial takings claims were ripe but time barred,” even while it’s “as-applied takings claims were properly dismissed as unripe.”).

C. The Pore Space Amalgamation Statutes Are a Proper Exercise of the State’s Authority Under the Correlative Rights Doctrine.

[¶56] Although this Court is generally “a court of review, not of first view,” *Bolinske v. Sandstrom*, 2022 ND 148, ¶23, 978 N.W.2d 72 (citation omitted), it “may affirm the district court on any basis properly before it,” *State v. Otto*, 2013 ND 239, ¶7, 840 N.W.2d 589;

see also Harvey v. Harvey, 2016 ND 251, ¶14, 888 N.W.2d 543 (Crothers, J., concurring in part) (noting the Court’s “long-standing philosophy of affirming a correct result reached on incorrect reasoning”). Consequently, while the District Court declined to reach the merits of Plaintiffs’ facial Taking claims, (R248:9:¶32), they were thoroughly argued below and provide this Court with an alternate basis to affirm.

1. Not Every Limitation on Property Rights Is a Constitutional Taking.

[¶57] Both the Federal and State Constitutions prohibit taking private property for public use without just compensation. Our State Constitution provides broader private property rights (N.D. Const. art. I, § 16) than the Federal Constitution (U.S. Const. Amend. V), so a statute that passes muster under the State Constitution should satisfy the Federal one. *See NWLA I*, 2022 ND 150, ¶16 (“The North Dakota Constitution provides overlapping and broader protection against government interference with property rights....”).

[¶58] But not every limitation on individual property rights is a constitutional Taking. When confronted with a Takings claim under either constitution, the first question courts must address is whether the challenged limitation involves “a property interest that is constitutionally protected.” *NWLA I*, 2022 ND 150, ¶19.

[¶59] The distinction between those limitations on property rights analyzed as Takings, and those that are not, is whether the “bundle of rights” acquired by the owner when he or she obtained title was traditionally understood as potentially subject to that type of limitation. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“the property owner necessarily expects the uses of his property to be restricted ... by various measures newly enacted by the State in legitimate exercise of its police powers.”). And “many government-authorized physical invasions will not amount to takings because they are

consistent with longstanding background restrictions on property rights.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021).

[¶60] Relatedly, “[t]here is a distinction between the state’s police power and its power of eminent domain.” *Bala*, 2010 ND 164, ¶9. As this Court has explained, “[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment.” *Id.* (quoting *Eggleston v. Pierce Cnty.*, 64 P.3d 618, 623 (Wash. 2003)); *see also* 29A C.J.S. Eminent Domain § 8 (Dec. 2024 update) (“Police-power restrictions on the uses of property are properly treated as part of the burden of common citizenship” and “not a taking that would generally ... give rise to a constitutional cause for complaint.”).

2. The Correlative Rights Doctrine Has Long Been Applied to Resource Reservoirs with Shared Ownership.

[¶61] The U.S. Supreme Court has long recognized that when shared reservoirs are at issue, the correlative rights of all owners come into play, and legislation designed to protect those correlative rights is a valid exercise of the State’s police power, even if it means limiting one individual owner’s rights over the property. *See Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210-12 (1900) (statute limiting an owner’s right to vent natural gas from a shared reservoir is not a constitutional Taking because it “prevent[s] the waste of the common property”); *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 185 (1950) (“This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners ...”).

[¶62] Unsurprisingly, North Dakota has also long recognized, in the oil and gas context, that when it comes to reservoirs with multiple owners, a minority of owners do not have veto power to prevent the majority from developing their shared resource. *Texaco*, 448 N.W.2d at 622 n.1 (rejecting Takings challenge to forced pooling order because “the

constitutionality of oil and gas conservation legislation, including compulsory pooling, is well established”); *see also Cont’l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶¶16-17, 559 N.W.2d 841 (“The police powers of the state are properly exercised when the Industrial Commission ... compels pooling.”); *Slawson v. N.D. Indus. Comm’n*, 339 N.W.2d 772, 774 (N.D. 1983) (“The purposes of pooling are to prevent the physical and economic waste that accompany the drilling of unnecessary wells and to *protect the correlative rights* of landowners over a reservoir.”) (emphasis added).

[¶63] As this Court stated many decades ago:

In this case, approximately ninety-eight per cent of those owning interests in the field have signed [the] unitization agreement. If one or more persons ...could, by refusing to sign the agreement, make it inoperative and thus defeat the entire conservation program for the field, ... all conservation efforts could be blocked. If this were possible, the appellants could force the operator of such unit to either give them an unreasonably greater share of the production than they are entitled ... [or] defeat the entire conservation program and thus leave large amounts of oil and gas in the pool ... unrecovered. Surely, ... such a result would be unjust. ...

Syverson v. N.D. State Indus. Comm’n, 111 N.W.2d 128, 133-34 (N.D. 1961) (minority of owners “may not ... prevent other interests in the field from developing adjoining tracts”).

[¶64] This Court has further defined the concept, explaining, in the context of oil and gas development, there are “two aspects of the doctrine of correlative rights: (1) ... *each person has a right to produce* oil from his land...[;] *and* (2) a right ... to be protected against damage to a common source of supply and *a right to a fair and equitable share....*” *Hanson v. Indus. Comm’n*, 466 N.W.2d 587, 591 (N.D. 1991) (citation omitted) (emphases added).

[¶65] North Dakota is not an outlier on this. To the contrary, “[a]s held by all the courts which have passed upon the question, compulsory pooling or unitization statutes or ordinances are valid.” 37 A.L.R.2d 434 (Mar. 2022 update); *see also* 1A Summers Oil and Gas § 6:17 (3d ed.) (Nov. 2022 update) (“The statutes expressly authorizing compulsory

pooling and unitization of oil and gas production are a valid exercise of the police power of the state to prevent waste and protect correlative rights. The constitutionality of these statutes is no longer open to doubt.”) (compiling cases).

3. The Correlative Rights Doctrine Applies to Pore Space Amalgamation.

[¶66] The pore space amalgamation statutes challenged in this action fall squarely under the correlative rights doctrine. For carbon dioxide storage, N.D.C.C. § 38-22-10 was enacted within a framework that ensures all property owners subjected to an amalgamation order are compensated for the development of their interests. The Industrial Commission cannot amalgamate interests until after a hearing is held and a finding is made that “the storage operator has made a good-faith effort to get the consent of all persons who own the storage reservoir’s pore space.” N.D.C.C. § 38-22-08(4). At least sixty percent of the owners must consent to the project. N.D.C.C. § 38-22-08(5). The Industrial Commission must also find that the pore space storage reservoir is “in the public interest” and that “all nonconsenting pore space owners are or will be equitably compensated.” N.D.C.C. § 38-22-08(11), (14); *see also Fisher v. Cont’l Res., Inc.*, 49 F.Supp.3d 637, 648 n.3 (D.N.D. 2014) (“North Dakota’s laws relating to the underground storage of carbon dioxide require that all non-consenting pore space owners be compensated.”).²

[¶67] As discussed *supra*, pore space reservoirs, like oil and gas reservoirs, do not cleanly correspond with surface estate boundaries. Moreover, both exist as reservoirs where developing one owner’s interests will necessarily require development of the other owners’ interests, with the Industrial Commission regulating and facilitating the development of the

² The statutory framework to amalgamate pore space interests for oil and gas storage is similar in the material respects. *See* N.D.C.C. § 38-25-05(5), (6), (12), (18).

shared resource. As with oil and gas reservoirs, no single owner of a pore space reservoir can develop, nor foreclose developing, their portion of the reservoir without impacting the interests of the other owners.

[¶68] As one commentator has summarized it:

[T]he law should recognize that pore-space owners have common or ‘correlative’ rights to the use of pore space. Why? Because one pore space user cannot ‘fence in’ its pore-space use any more than a landowner can ‘fence out’ its neighbor’s pore-space use. Given this reality, ... the correlative-rights doctrine recognizes that each pore-space owner must have a fair opportunity to use a fair and common share of pore space, necessarily including pore space beneath neighboring property.

Owen L. Anderson, *Carbon Sequestration: A Fresh Look at an Essential Tool in the War on Climate Change*, Oil, Gas & Energy Law Intelligence, 27-28 (Jul. 2023) (R190).

[¶69] In short, while the individual protections provided by the Takings Clause are important, they are not absolute. And when reservoirs with multiple owners are involved, the State’s ability to regulate for the general welfare includes the ability to facilitate their development at the behest of the majority of owners, rather than allowing a minority of owners to preclude development of a shared resource to the detriment of all. *E.g., Hanson*, 466 N.W.2d at 591 (correlative rights include a right to develop one’s interests *and* a right to receive an equitable share); *Bala*, 2010 ND 164, ¶9 (while “[e]minent domain takes private property for a public use,” “the police power regulates its use...”).

4. NWLA I Is Distinguishable in Fundamental Respects.

[¶70] Plaintiffs’ Taking challenges to the pore space amalgamation statutes rely heavily upon *NWLA I*, and the suggestion that the statutes challenged in this action are like the statute that was challenged there. *See* NWLA Br. ¶¶11, 13, 16, 18, 23, 30, 39, 49; NDFB Br. ¶¶15-16, 23, 56, 65, 70-72. But the statutes are fundamentally different.

[¶71] In *NWLA I*, the Court was addressing a new statute that purported to “strip[] surface owners of their rights to exclude others from pore space [or] demand compensation for its use.” 2022 ND 150, ¶ 20, 978 N.W.2d 679. To assess whether that statute was a Taking, the Court “examine[d] the historical scope of a surface owner’s rights to the underlying pore space,” and, after walking through decades of State statutes and caselaw, explained “North Dakota law has long established that surface owners have a property interest in pore space.” *Id.* at ¶¶20-22. “Therefore,” the Court concluded, “because S.B. 2344 deprives surface owners from demanding compensation for physical occupation of their property, S.B. 2344 is an unconstitutional taking on its face.” *Id.* at ¶27. That’s not this case.

[¶72] In contrast to the statute at issue in *NWLA I*, the pore space amalgamation statutes recognize landowners’ interest in their pore space. But more than that, they protect *all* landowners’ correlative rights to receive value from their property. They ensure that the majorities of landowners who may wish to develop their interests will not be denied the ability to profit from their property interests by a minority of owners who may resist development of the shared resource. And they ensure that any minority of owners who don’t want to develop the shared resource will nonetheless receive their equitable portion of the compensation. The State is not “taking” any property from the owners.

[¶73] To be sure, *NWLA I* rejected the State’s assertion of regulatory power in that case and stated “government-authorized physical invasions of property ... are a *per se* taking ... because government-authorized physical invasions take away the landowner’s right to exclude.” 2022 ND 150 ¶¶25, 31-33. But that statement cannot be read as broadly as Plaintiffs urge in challenging the amalgamation statutes at issue here.

[¶74] The Court in *NWLA I* was addressing the statute at issue in *NWLA I*, and that

decision contains no discussion of the communal nature of pore space reservoir ownership, nor of the correlative rights doctrine, nor of the State’s authority and duty to protect the correlative rights of all owners with an interest in shared resources.

[¶75] When correlative rights are implicated, this Court has been clear that an owner’s right to exclude can give way to the development rights of the majority. For example, a dissenting property owner’s right to exclude entry cannot prevent the drilling of a horizontal well through force-pooled property—a direct, physical invasion—because giving a dissenting landowner a right to exclude in that context “would make an Industrial Commission’s forced pooling order ineffectual.” *Farrar Oil*, 1997 ND 31, ¶17.

[¶76] Moreover, looking at the bigger picture, the statement that “government-authorized physical invasions of property ... are a *per se* taking” cannot be taken literally to mean every government-authorized physical invasion of private property is a *per se* Taking.

[¶77] To the contrary, “many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.” *Cedar Point*, 594 U.S. at 160. That is why there isn’t a constitutional Taking every time law enforcement enters private property to conduct a search. *Id.* And that is why there isn’t a constitutional Taking every time there is a “limited, innocuous intrusion by pre-condemnation surveyors.” *SCS Carbon*, 2024 ND 109, ¶28.

[¶78] That is also why there isn’t a constitutional Taking every time the Industrial Commission compels the pooling and development of oil and gas reservoirs. *Farrar Oil*, 1997 ND 31 at ¶17; *accord, e.g., Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955, 963-64 (La. 1986) (“when the Commissioner ... has declared that landowners share a common interest in a reservoir of natural resources ... such common interest does not permit one

participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developing its resources fully and efficiently”); *Texas Oil & Gas Corp. v. Rein*, 534 P.2d 1277, 1278-79 (Okla. 1974) (upholding forced pooling, rejecting entitlement to a jury trial on damages, and declaring that the eminent domain statute “has no application to the present case”).

[¶79] In short, *NWLA I* does not control this case, and the statute challenged in that action is fundamentally different from the amalgamation statutes challenged here.

* * * *

[¶80] Pore space reservoirs capable of commercial development are remarkably similar to oil and gas reservoirs, and it has long been established that the State has authority to facilitate the development of oil and gas reservoirs with shared ownership by ordering their forced pooling—even if that means developing the reservoir over the objection of a minority of owners. Nonetheless, the amalgamation statutes challenged here did not affect property interests by their mere enactment, and Plaintiffs’ decision to plead their challenges to those statutes as facial Takings claims is a fatal pleading defect.

[¶81] But if the merits of those claims are reached on this appeal, the Court should recognize that the amalgamation of interests for the development of pore space reservoirs is simply another way of exercising the State’s long-established authority to protect the correlative rights for all owners of resources with shared ownership.

III. Plaintiffs’ Facial Taking Challenge to the Survey Statutes (N.D.C.C. §§ 32-15-06, 24-05-09) Should Be Rejected.

[¶82] For their next cause of action, the NWLA Plaintiffs (though not NDFB) continue to pursue a lost cause, claiming that N.D.C.C. §§ 32-15-06 and 24-05-09 are facial Takings despite this Court’s recent decision in *SCS Carbon*, 2024 ND 109.

[¶83] The NWLA Plaintiffs’ attempt to argue around *SCS Carbon* is unavailing. But before the merits of those claims are even reached, Plaintiffs’ decision to plead those claims solely as facial Takings causes them to also be outside the statute of limitations.

A. The Facial Taking Challenges to the Survey Statutes Are Time-Barred.

[¶84] In the same way that Plaintiffs’ facial Taking challenges to the carbon dioxide amalgamation statute are time-barred, the NWLA Plaintiffs’ facial Taking challenges to the Survey Statutes (N.D.C.C. §§ 32-15-06, 24-05-09) are similarly time-barred.

[¶85] The Survey Statutes (last amended 1985 and 2007, respectively; N.D. S.L. 1985, ch. 82, § 77; N.D. S.L. 2007, ch. 293, § 14) are all well beyond either the six- or ten-year statutes of limitation, and the District Court did not err in so finding. (R248:5:¶16). Plaintiffs do not articulate any basis for considering the applicability of the statutes of limitation to the survey statutes differently than for the amalgamation statutes.

[¶86] To be sure, this Court did address N.D.C.C. § 32-15-06’s facial constitutionality in *SCS Carbon*, but two things distinguish that case on the point. First, the applicability of statutes of limitation was not raised in *SCS Carbon*. *Cf., e.g., City of Bismarck v. McCormick*, 2012 ND 53, ¶14, 813 N.W.2d 599 (decisions are only precedential for “points decided therein”); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”). And second, unlike in *SCS Carbon*, Plaintiffs here have not brought any as-applied challenges that may require resolution of a facial validity question. *Cf.* 2024 ND 109, ¶¶17-18 (noting “we must resolve Landowners’ facial constitutional challenge” because the district court authorized “the full scope of authority permitted by the entry statute” on the plaintiffs’ lands).

B. This Court Has Already Held That the Survey Statutes Reflect a Longstanding Background Restriction on Property Rights.

[¶87] When the Court addressed this question in *SCS Carbon*, it concluded: “Because survey access is a longstanding background restriction, Landowners cannot demonstrate that they have a constitutionally protected interest in excluding limited, innocuous intrusion by pre-condemnation surveyors.” 2024 ND 109, ¶28; *see also id.* at ¶¶25-27 (tracing the “historical pedigree ... of entry for surveys and examinations”). If the merits are reached here, that holding forecloses the facial Taking challenge to the survey statutes.

[¶88] The NWLA Plaintiffs nonetheless press this claim, arguing the *SCS Carbon* decision “does not answer” what happens if “the surveys cause damage to the land, or impact the value of the property...” NWLA Br. ¶59. But this Court did answer that question in *SCS Carbon*, explaining such challenges could be brought as as-applied challenges in an appropriate case. *See* 2024 ND 109, ¶36 (“Nothing we say here forecloses further proceedings if Summit enters the land and it is ‘damaged’ within the meaning of art. I, § 16, [or] unnecessarily and unreasonably interferes with its ordinary use.”).

[¶89] The NWLA Plaintiffs’ other arguments relating to the survey statutes (NWLA Br. ¶¶57-64) simply re-litigate this Court’s decision in *SCS Carbon*. The NWLA Plaintiffs made the strategic decision to plead their challenges to the survey statutes as facial Takings, declining to allege any specific examples of property being damaged or impacted due to the survey statutes. As with their decision to only plead facial Taking challenges to the amalgamation statutes, “that decision comes at a cost.” *Moody*, 603 U.S. at 723.

IV. Plaintiffs’ Due Process Claims Are Improperly Pleaded Restatements of Their Facial Taking Challenges and Should Be Rejected.

[¶90] As the District Court recognized, Plaintiffs’ due process claims are “rooted in Plaintiffs’ takings claims” and fail for the same reasons. (R248:8-9:¶¶29-31). The District

Court did not err in so concluding. *E.g., Cole-Kelly v. Yee*, 2023 WL 2480749, *4 n.6 (N.D. Cal. Mar. 13, 2023) (“Plaintiffs’ claims that the alleged taking also violated [] due process ... are derivative and fail for the same reason.”); *Hillcrest*, 754 F.3d at 1283 (applying the “accrual rules for facial takings claims to facial substantive due process claims”).

[¶91] NDFB doesn’t appear to challenge this holding or offer much argument that its due process claims can stand alone. *Cf.* NDFB Br. ¶66 n.3 (stating, in a footnote, the District Court erred in dismissing the due process claims “for the same reasons as discussed above” for the Taking claims). And while the NWLA Plaintiffs dedicate several paragraphs to arguing their due process claims are separate from their Taking claims, NWLA Br. ¶¶42-51, no authorities cited in their brief are on-point for that proposition.

[¶92] Further, when there is “an explicit textual source of constitutional protection” against the challenged conduct, due process claims are precluded. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Thus, “a claim that a statute precludes private property owners from excluding others ... must be analyzed under the ... Takings Clause.” *Madison v. Graham*, 316 F.3d 867, 870-71 (9th Cir. 2002) (“substantive due process claims are precluded where the alleged violation is addressed by the explicit textual provisions of the ... Takings Clause”); *Montgomery v. Carter Cnty.*, 226 F.3d 758, 769 (6th Cir. 2000) (because “[t]he takings clause itself addresses whether and under what circumstances the government may take an individual’s private property, ... no room is left for ... substantive due process”).

[¶93] Substantive due process claims also require identifying fundamental rights “deeply rooted in ... history and traditions.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted); *see also Abdullah v. State*, 2009 ND 148, ¶27, 771 N.W.2d 246. But Plaintiffs don’t “cite any authority that the right to exclude is a fundamental right for the

purposes of substantive due process[,] [and] [t]he Supreme Court has indicated otherwise.” *301, 712, 2103 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1384-85 (8th Cir. 2022) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84-85 (1980) and *Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994)).

[¶94] And to the extent Plaintiffs *facially* challenge the amalgamation statutes on *procedural* due process grounds, Plaintiffs misunderstand procedural due process. Plaintiffs do not allege the Legislative Assembly failed to follow appropriate procedures when enacting the statutes, nor do they allege any sort of constitutionally inadequate notice. *Cf. State and Local Government Land Use Liability* § 13:5 (Feb. 2025 update) (“Legislative action is generally not subject to the notice and hearing requirements of [procedural] Due Process Clauses.”) (compiling authorities); *Matter of Hehn*, 2021 ND 20, ¶7, 954 N.W.2d 689 (procedural due process is “considered on a case-by-case basis”); *accord Thalheim v. Town of Greenwich*, 775 A.2d 947, 961 (Conn. 2001) (“A claim that a statute fails, on its face, to comport with ... procedural due process reflects a fundamental misunderstanding of the law of due process.”) (citation omitted).

[¶95] In short, Plaintiffs’ repackaging of their Taking claims as due process claims is improper. The claim that they’ve been injured by being denied the ability to exclude others from entering or developing their property interests “must be analyzed under the ... Takings Clause.” *Madison*, 316 F.3d at 870-71. And the Taking claims presented in this case fail for all the reasons discussed *supra*.

V. Plaintiffs’ Non-Delegation Challenge to the Good Cause Exception Statute (N.D.C.C § 38-22-03(7)) Should Be Rejected.

[¶96] The District Court dismissed Plaintiffs’ non-delegation challenge to N.D.C.C. § 38-22-03(7) as barred by either a six- or ten-year statute of limitation, under the same analysis

that was applied to the facial Taking claims. (R248:9:¶33). However, due to the different nature of claim accruals for facial Taking claims and Plaintiffs’ non-delegation claims, the State does not defend the dismissal of Plaintiffs’ non-delegation challenge on that ground (nor did the State argue for dismissal of these claims on that basis below).

[¶97] Nonetheless, dismissal of these claims at the outset remains warranted, and this Court “may affirm the district court on any basis properly before it.” *Otto*, 2013 ND 239, ¶7; *see also Harvey*, 2016 ND 251, ¶14 (Crothers, J., concurring in part).

[¶98] As the State argued below—*see* (R184:19-24:¶¶58-77) (State SJ Br.)—these claims must be dismissed for lack of standing, as Plaintiffs have not established any actual or imminent injury from the good cause exception statute. And in any event, if the merits of these claims are reached, the statute does not violate the non-delegation doctrine.

A. Plaintiffs Have Not Established Standing to Challenge the Good Cause Exception Statute.

[¶99] “A court may decide the merits of a dispute only if plaintiffs demonstrate they have standing to litigate the issues before the court.” *Kjolsrud*, 2003 ND 144, ¶13.

[¶100] Standing must be established for every individual claim asserted. *See In re J.D.F.*, 2010 ND 160, ¶¶14-15, 33, 787 N.W.2d 738 (dismissing some claims for lack of standing while deciding others on their merits); *accord TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (“standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek”).

[¶101] “Standing analysis requires a two-fold inquiry: (1) plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens....”

Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau, 2004 ND 60, ¶11, 676 N.W.2d 752.

[¶102] To confer standing, a plaintiff’s allegations of injury must be concrete and particularized; allegations that rely “on remote possibilities and speculation” are insufficient. *Vickery v. N.D. Workers Comp. Bureau*, 545 N.W.2d 781, 785 (N.D. 1996). A plaintiff alleging that a statute is facially unconstitutional must still establish injury from the challenged statute. *See* 16 Am. Jur. 2d Constitutional Law § 139 (Jan. 2025 update) (“the traditional rule of standing for facial attacks provides that one ... may not attack the statute on grounds that it might be unconstitutional when applied to other people”).

[¶103] Here, Plaintiffs cannot establish standing to challenge N.D.C.C. § 38-22-03(7) as violative of the non-delegation doctrine for the simple reason that the Industrial Commission has not granted, or even considered granting, any exception to Ch. 38-22’s requirements under N.D.C.C. § 38-22-03(7). (R187:¶¶9, 13) (Helms Decl.).

[¶104] Plaintiffs’ unsubstantiated claims that they’ve been affected by (unidentified) exceptions granted under Section 38-22-03(7) are not entitled to any presumption of validity in the face of unrebutted evidence to the contrary. *Ag Acceptance Corp. v. Glinz*, 2004 ND 154, ¶26, 684 N.W.2d 632 (“A party opposing a motion for summary judgment may not rely upon unsupported, conclusory allegations....”); *see also Black v. Abex Corp.*, 1999 ND 236, ¶¶18-19, 603 N.W.2d 182 (“If the record, after discovery, contains no evidence to support an essential element of the plaintiff’s claim, there is no ‘evidence’ the defendant can point to in support of its assertion there is no such evidence.”).

[¶105] Basic principles of standing thus establish that Plaintiffs cannot act as roving commissions scouring the Century Code to identify and challenge laws that they don’t like, but which haven’t caused their members any actual or imminent injury. And here, the good cause exception statute (N.D.C.C. § 38-22-03(7)) is such a statute.

B. The Good Cause Exception Statute Does Not Violate the Non-Delegation Doctrine.

[¶106] If the Court addresses the merits of this claim, N.D.C.C. § 38-22-03(7) does not violate the non-delegation doctrine. That provision is located in the chapter of the Century Code governing the pore space storage of carbon dioxide, and, among a list of other authorities, it authorizes the Industrial Commission “[t]o grant, for good cause, exceptions to this chapter’s requirements and implementing rules.” N.D.C.C. § 38-22-03(7).

[¶107] This provision was included to enable the Industrial Commission to react to potential EPA rulemaking; though, as noted *supra*, the Industrial Commission has never granted any exception under that provision. (R187:¶¶9, 13) (Helms Decl.).

[¶108] “The modern view of the non-delegation doctrine,” adopted by this Court, “recognizes that, in a complex area, it may be necessary and appropriate to delegate in broad and general terms, as long as there are adequate standards and procedural safeguards.” *N.D. Legislative Ass’y v. Burgum*, 2018 ND 189, ¶46, 916 N.W.2d 83 (citation omitted). The doctrine is violated where the law does not “set forth reasonably clear guidelines” to guide agency discretion. *Id.* (citation omitted). But such guidelines need not have dictionary-level precision. *E.g., Cnty. of Stutsman v. State Historical Soc.*, 371 N.W.2d 321, 327 (N.D. 1985) (direction to identify sites with “historical value” sufficient).

[¶109] When it comes to managing the development of natural resources within our State, the Industrial Commission “has extremely broad and comprehensive powers.” *Black Hills Trucking, Inc. v. N.D. Indus. Comm’n*, 2017 ND 284, ¶12, 904 N.W.2d 326.

[¶110] Plaintiffs’ non-delegation challenge rests on the error of reading Section 38-22-03(7) in isolation, rather than as part of Chapter 38-22’s broader statutory scheme. NWLA Br. ¶¶52-56; NDFB Br. ¶25. But “statutes, and particularly subsections, are not construed

or interpreted in isolation.” *Litten v. Fargo*, 294 N.W.2d 628, 633 (N.D. 1980); *U.S. v. Kidd*, 23 F.4th 781, 783 (8th Cir. 2022) (“It is a general principle of statutory interpretation that ‘the meaning of a word cannot be determined in isolation.’”) (citation omitted).

[¶111] Section 38-22-03(7)’s language allowing the Industrial Commission to grant exceptions to that Chapter’s requirements for good cause must be read in context of the wider statute. And elsewhere in Chapter 38-22, the statute identifies the policy bases that would constitute good cause. Just a few provisions prior, the statute provides that the purpose and intent of the Chapter is to promote the public interest by “reducing greenhouse gas emissions,” “help[ing] ensure the viability of the state’s coal and power industries,” and promoting the use of carbon dioxide for “commercial, industrial, or other uses.” N.D.C.C. § 38-22-01. If an exception would further those purposes, there would be “good cause” for granting it. And if there were any doubt as to whether the Chapter’s purpose and intent provide the “good cause” referenced in Section 38-22-03(7), the presumption of constitutionality militates for reading those provisions together. *See Lawrence v. N.D. Workers Comp. Bureau*, 2000 ND 60, ¶19, 608 N.W.2d 254 (“We construe statutes to avoid constitutional infirmities,” and “construe related statutes as a whole.”).

[¶112] Chapter 38-22 thus provides the Industrial Commission with guidelines to evaluate whether an exception would be for “good cause,” and that is all that is required to survive a non-delegation challenge. *E.g., Mistretta v. U.S.*, 488 U.S. 361, 372-73 (1989) (if statute “delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority,” it is “constitutionally sufficient”) (citation omitted).

[¶113] However, in the event the Court reaches the merits of Plaintiffs’ non-delegation challenge and concludes N.D.C.C. § 38-22-03(7) violates that doctrine, any remedy should

be limited to that provision—which is not necessary to the rest of N.D.C.C. ch. 38-22, and indeed has never been utilized. *Cf. NWLA I*, 2022 ND 150, ¶¶36-41 (statutes should not be invalidated entirely when “the remaining provisions can operate independently from the provisions we declare to be unconstitutional”); N.D.C.C. § 1-02-20.

CONCLUSION

¶114] The State asks the Court to affirm the District Court’s judgment of dismissal.

ORAL ARGUMENT REQUEST

¶115] Oral argument may aid the Court in resolution of this appeal by ensuring that counsel are available to address questions the Court may have regarding the variety of different statutes that are facially challenged in this appeal.

Dated: March 7, 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/Cross-Appellees,

and

NORTH DAKOTA FARM BUREAU, INC.,

Intervenor-Plaintiff/Appellants/Cross-Appellees,

-vs-

STATE OF NORTH DAKOTA, NORTH DAKOTA
INDUSTRIAL COMMISSION, 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, DREW WRIGLEY in his
official capacity as Attorney General of North Dakota
and as a member of the North Dakota Industrial
Commission, and DOUG GOEHRING in his official
capacity as Agriculture Commissioner of North Dakota
and as a member of the North Dakota Industrial
Commission,

Defendants/Appellees,

and

SCS CARBON TRANSPORT, LLC, SCS PERMANENT
CARBON STORAGE, LLC, and SUMMIT CARBON
SOLUTIONS, LLC,

Intervenor-Defendants/Appellees/Cross-Appellants,

and

MINNKOTA POWER COOPERATIVE, BASIN ELECTRIC
POWER COOPERATIVE, and DAKOTA GASIFICATION CO.,

Intervenor-Defendants/Appellees.

Supreme Ct. 20240298

**District Ct. 05-2023-CV-
00065**

Northeast Judicial District

CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure,
the undersigned hereby certifies that the following document:

APPELLEE BRIEF OF THE STATE OF NORTH DAKOTA

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Dated: March 07, 2025.

/s/ Zachary E. Pelham
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State Defendant-Appellees*