

No. \_\_\_\_\_

---

In the  
**Supreme Court of the United States**

---

COREY A. KERNS, *et al.*,  
*Petitioners*,  
v.

CHESAPEAKE EXPLORATION, L.L.C., *et al.*,  
*Respondents*.

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit**

---

**PETITION FOR WRIT OF CERTIORARI**

---

PHILLIP J. CAMPANELLA  
*Counsel of Record*  
7059 Gates Road  
Gates Mills, OH 44040  
440-655-1553  
p.campanella@att.net

*Counsel for Petitioners*

April 3, 2019

## **QUESTIONS PRESENTED**

### **STATE REGULATORY POLICE POWER**

1. Whether the Due Process and Takings Clauses are violated when a state official utilizes a state regulatory police power statute to grant a private entity the rights to permanently physically invade the subsurface of private land by horizontal drilling and hydraulic fracturing, and to extract the oil, gas, and natural gas liquids from beneath the land; and

### **STATE ACTION UNDER COLOR OF LAW-- SECTION 1983**

2. Whether a private entity who, pursuant to a state regulatory police power statute, applied for and received from a state official the rights to permanently physically invade the subsurface of private land by horizontal drilling and hydraulic fracturing, and to extract the oil, gas, and natural gas liquids from beneath the land pursuant to a statutory scheme that is defective under the Due Process and Takings Clauses, acted as a state actor under color of law in violation of 42 U.S.C. § 1983.

## **PARTIES TO THE PROCEEDING**

Petitioners are landowners Corey A. Kerns, Keith J. Kerns, Linda Zantene, Mark Zantene, Robert J. Zantene Trust, Mark Zantene and Cathy Skubovius, Trustees, Helen Zantene, and Connie Huhn.

Respondents are Richard J. Simmers, Chief of the Ohio Division of Oil & Gas Resources Management, a division of the Ohio Department of Natural Resources, and Chesapeake Exploration, L.L.C., a private commercial enterprise.

## **CORPORATE DISCLOSURE STATEMENT**

Petitioners and Respondent Richard J. Simmers, Chief of the Ohio Division of Oil & Gas Resources Management do not have any corporate affiliation.

Respondent Chesapeake Exploration, L.L.C. has the following corporate affiliations as disclosed by it to the lower courts:

Chesapeake Exploration, L.L.C. is a subsidiary or affiliate of publicly owned corporations. Chesapeake Exploration, L.L.C., is a limited liability company organized and existing under the laws of the state of Oklahoma, with its principal place of business in Oklahoma City, Oklahoma. Chesapeake Exploration, L.L.C., has three members:

- (a) Chesapeake Operating, L.L.C., is a limited liability company organized and existing under the laws of the state of Oklahoma, with a principal place of business in Oklahoma City, Oklahoma. Chesapeake Operating, L.L.C.'s sole member is Chesapeake Energy Corporation, a

publicly traded company, with its principal place of business in Oklahoma City, Oklahoma.

- (b) Chesapeake E&P Holding, L.L.C., is a limited liability company organized and existing under the laws of the state of Oklahoma, with a principal place of business in Oklahoma City, Oklahoma. Chesapeake E&P Holding, L.L.C.'s sole member is Chesapeake Energy Corporation, a publicly traded company, with a principal place of business in Oklahoma City, Oklahoma.
- (c) Chesapeake Appalachia, L.L.C., is a limited liability company organized and existing under the laws of the state of Oklahoma. Chesapeake Appalachia, L.L.C.'s sole member is Chesapeake Energy Corporation, a publicly traded company, with a principal place of business in Oklahoma City, Oklahoma.

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . .	i
PARTIES TO THE PROCEEDING. . . . .	ii
CORPORATE DISCLOSURE STATEMENT . . . . .	ii
TABLE OF AUTHORITIES. . . . .	viii
PETITION FOR WRIT OF CERTIORARI . . . . .	1
OPINIONS BELOW. . . . .	1
STATEMENT OF JURISDICTION . . . . .	1
CONSTITUTIONAL PROVISIONS INVOLVED. . . . .	1
STATEMENT OF THE CASE. . . . .	3
COMPELLING REASONS FOR GRANTING THE WRIT . . . . .	10
I. The Decisions Of The Lower Courts Conflict With Decisions Of This Court Regarding The Due Process Clause, The Takings Clause, And 42 U.S.C. § 1983 As Follows: . . . . .	10
A. The Lower Courts Erred In Deciding That Petitioners’ Property Rights To The Subsurface, And To The Oil, Gas, And Natural Gas Liquids In The Subsurface, And The Right To Extract Said Minerals Could Be Denied By State Regulatory Police Power. The Lower Courts Failed To Follow This Court’s Decisions That State Regulatory Police Power Which Denies Existing Property Rights Secured By The Fourteenth Amendment Is A Violation Of The Due Process Clause. . . . .	10

-----Petitioners' Rights To The Oil, Gas, And Natural Gas Liquids And The Right To Extract Said Minerals . . . . .	10
-----Petitioners' Rights To The Subsurface . .	12
----Difference Between Unitization And Physical Intrusion . . . . .	14
B. The Lower Courts Failed To Follow This Courts Decisions That State Regulatory Police Power Which Imposes A Permanent Physical Intrusion Of Private Property Rights Is A Per Se Taking In Violation Of The Takings Clause. <i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 432 (1982); <i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528, 538 (2005). See also <i>Kaiser Aetna v. United States</i> , 444 U.S. 164, 179-78 (1979); <i>Horne v. Department of Agriculture</i> , 576 U.S. ___ (2015) . . . . .	17
-----Direct And Immediate Interference . . . .	18
-----Permanent Physical Invasion And The Right To Exclude . . . . .	21
C. The Failure By A State Official To Comply With Ohio's Mandatory Appropriation Statute In The Taking of Private Property Is A Violation of the Due Process Clause. <i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982); <i>Hicks v. Oklahoma</i> , 447 U.S. 343, syl. (1980) . . . . .	25

D. The Lower Courts Failed To Follow This Court's Decisions That The Conveyance By A State Official Of Private Property To A Private Entity For Private Use Is A Violation Of The Due Process Clause. <i>Missouri Pacific Ry v. Nebraska</i> , 164 U.S. 403, syl. (1896); <i>Kelo v. City of New London</i> , 545 U.S. 469, syl. (2005) . . . . .	27
E. The Lower Courts Failed To Apply Decisions Of This Court That A Private Entity Is Acting Under Color Of A State Statute As A State Agent In Violation Of 42 U.S.C. § 1983 Where The Private Entity Applied For And Received From A State Official The Right To Physically Invade Private Property And The Right To Extract Oil, Gas, And Natural Gas Liquids Pursuant To A Statutory Scheme That Is Defective Under The Due Process And Takings Clauses. <i>Lugar v. Edmondson Oil Co., Inc.</i> , 457 U.S. 922, 942 (1982); <i>West v. Atkins</i> , 487 U.S. 42, 49 (1988). . . . .	28
II. The Issues Are Of National Importance and the Lower Courts Are In Need Of This Court's Guidance Particularly In View Of The Court Of Appeals' Decision Misapplying and Diverting from Decisions Of This Court. . . . .	33
-----The Application Of This Court's Decisions To The Permanent Physical Invasion Of The Subsurface Of Private Land To Extract Oil, Gas, And Natural Gas Liquids From Beneath The Land Is A Case Of First Impression . . .	33

-----The Determination Of State Action Under Color Of Law Pursuant To 42 U.S.C. § 1983 Where A State Official Utilizes A State Statute To Grant A Private Entity The Right To Physically Invade Private Property And The Right To Extract Oil, Gas, And Natural Gas Liquids Is A Case Of First Impression . . . . .	33
CONCLUSION . . . . .	35
APPENDIX	
Appendix A	Opinion in the United States Court of Appeals for the Sixth Circuit (February 4, 2019) . . . . . App. 1
Appendix B	Memorandum of Opinion and Order in the United States District Court for the Northern District of Ohio, Eastern Division (June 13, 2018) . . . . . App. 19
Appendix C	Dismissal Entry in the United States District Court for the Northern District of Ohio, Eastern Division (June 13, 2018) . . . . . App. 51
Appendix D	Statutes Ohio Rev. Code § 1509.01(I). .App. 53 Ohio Rev. Code § 1509.28 . . . App. 53



## TABLE OF AUTHORITIES

## CASES

<i>Andrus v. Allard</i> , 444 U.S. 51 (1979).....	23
<i>Buchanan v. Warley</i> , 245 U.S. 60 (1917).....	<i>passim</i>
<i>Chance v. BP Chemicals</i> , 77 Ohio St.3d 17 (1996) .....	19, 20
<i>Chicago, Burlington &amp; Quincy RR Co. v. Chicago</i> , 166 U.S. 226 (1897).....	<i>passim</i>
<i>Cities Service Gas Co. v. Peerless Oil &amp; Gas Co.</i> , 340 U.S. 179 (1950).....	15
<i>City of Norwood v. Horney</i> , 110 Ohio St.3d 353, 2006 Ohio 3799 .....	20
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991).....	30
<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	5
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980).....	5, 25, 27
<i>Horne v. Department of Agriculture</i> , 576 U.S. ____ (2015) .....	<i>passim</i>
<i>Hunter Co., Inc. v. McHugh</i> , 320 U.S. 222 (1943).....	15
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	5, 7, 17, 20, 21

<i>Kansas Natural Gas Co. v. Haskell</i> , 172 F. 545 (Cir. Ct. E.D. Okla. 1909) . . . . .	<i>passim</i>
<i>Kelly v. Ohio Oil Co.</i> , 57 Ohio St. 317, 49 N.E. 399 (1897) . . . . .	11, 26
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005) . . . . .	6, 27, 28
<i>Lake Erie &amp; Western Rd Co. v. Commissioners</i> , 63 Ohio St. 23 (1900) . . . . .	20
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005) . . . . .	5, 15, 17, 21
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) . . . . .	5, 25, 27
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) . . . . .	<i>passim</i>
<i>Lugar v. Edmondson Oil Co., Inc.</i> , 457 U.S. 922 (1982) . . . . .	<i>passim</i>
<i>McCulloch v. Maryland</i> , 4 Wheat. 316 (1819) . . . . .	26
<i>McNamara v. City of Rittman</i> , 107 Ohio St.3d 243 (2005) . . . . .	12
<i>Missouri Pacific Ry v. Nebraska</i> , 164 U.S. 403 (1896) . . . . .	6, 27, 28
<i>Nonamaker v. Amos</i> , 73 Ohio St. 163, 76 N.E. 949 (1905) . . . . .	11
<i>Ohio Oil Co. v. Indiana</i> , 177 U.S. 190 (1900) . . . . .	11, 13, 16, 18, 26

<i>Patterson v. Stanolind Oil &amp; Gas Co.,</i> 305 U.S. 376 (1939).....	15, 16
<i>Pennsylvania Coal Co. v. Mahon,</i> 260 U.S. 393 (1922).....	<i>passim</i>
<i>Pumpelly v. Green Bay Co.,</i> 13 Wall. 166 (1872).....	22
<i>Pure Oil Co. v. Kindall,</i> 116 Ohio St. 188, 156 N.E. 119 (1927).....	11
<i>State ex rel. Royal v. City of Columbus,</i> 3 Ohio St.2d 154 (1965) .....	19
<i>United States v. Causby,</i> 328 U.S. 256 (1946).....	18, 19
<i>United States v. Classic,</i> 313 U.S. 299 (1941).....	30
<i>United States v. General Motors Corp.,</i> 323 U.S. 373 (1945).....	23
<i>Village of Willoughby Hills v. Corrigan,</i> 29 Ohio St.2d 39 (1972) .....	19
<i>West v. Atkins,</i> 487 U.S. 42 (1988).....	6, 28, 29, 30, 32
<i>West v. Kansas Natural Gas Co.,</i> 221 U.S. 229 (1911).....	<i>passim</i>
<i>Winton v. Cornish,</i> 8 Ohio 477 (1832) .....	13

**CONSTITUTION AND STATUTES**

U.S. Const. amend. V . . . . .	<i>passim</i>
U.S. Const. amend. XIV . . . . .	<i>passim</i>
28 U.S.C. § 1254(1) . . . . .	1
28 U.S.C. § 1331 . . . . .	1
28 U.S.C. § 1343 . . . . .	1
42 U.S.C. § 1983 . . . . .	<i>passim</i>
Ohio Rev. Code Chapter 163 . . . . .	25, 26, 27
Ohio Rev. Code § 163.02(A) . . . . .	26
Ohio Rev. Code § 163.09(B) . . . . .	27
Ohio Rev. Code § 1509.01(I) . . . . .	2, 14
Ohio Rev. Code § 1509.02 . . . . .	7
Ohio Rev. Code § 1509.28 . . . . .	<i>passim</i>

## **PETITION FOR WRIT OF CERTIORARI**

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### **OPINIONS BELOW**

The Opinion in the United States Court of Appeals for the Sixth Circuit is attached at App. A.

The Memorandum of Opinion and Order in the United States District Court for the Northern District of Ohio, Eastern Division is attached at App. B.

The Dismissal Entry in the United States District Court for the Northern District of Ohio, Eastern Division is attached at App. C.

### **STATEMENT OF JURISDICTION**

The judgment of the Court of Appeals was entered on February 4, 2019 (App. A).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The federal subject matter jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1343.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the Takings Clause of the Fifth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment.

The Fifth Amendment states in pertinent part:

...nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment, Section 1, states in pertinent part:

“...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ... .”

This case involves Section 1983 of Title 42 of the United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This case involves Ohio Revised Code Sections 1509.01(I) and 1509.28 which are set forth in their entirety in App. D.

## STATEMENT OF THE CASE

At the essence of the dispute herein are the property rights of the Petitioners and the state process for taking those property rights, all of which are secured to the Petitioners by the Due Process and Takings Clauses which impose limitations upon state regulatory police power.

Petitioners have been, and are continuing to be, deprived of their property rights by a permanent **physical intrusion** beneath Petitioners' land and by the forceful extraction of oil, gas, and natural gas liquids as a direct result of the wrongful state action of the Respondents.

The decisions of the lower courts dismissing the Complaint emasculate the protections secured by the Fourteenth Amendment regarding: (1) property rights in the subsurface of land; (2) property rights in the oil, gas, and natural gas liquids beneath the land; and (3) the right to extract the minerals. The decisions of the lower courts also violate the plain language of 42 U.S.C. § 1983, and decisions of this Court.

Petitioners' Complaint avers that the order and permit issued by Respondent Chief Simmers are substantively and procedurally unlawful because the order and permit and the statute pursuant to which they were issued, that is, Ohio Revised Code Section 1509.28 (1509.28), are constitutionally defective and violate Petitioners' constitutional rights as secured by the Due Process and Takings Clauses of Fourteenth Amendment, and violate Section 1983 of Title 42 of the United States Code.

### ---Claims Stated

The Complaint in this case alleges two claims that are at issue herein:

**Count 1** of the Complaint alleges that Respondent Chesapeake, a private commercial enterprise, acted under color of law as a state actor by utilizing an unconstitutional state statute to apply to and receive from Respondent Chief Simmers, a state official, an order and permit granting Respondent Chesapeake the right to permanently physically invade the subsurface of Petitioners' land by horizontal drilling and by the injection of millions of gallons of water, sand, and chemicals, in order to fracture the shale to cause the release of the oil, gas, and natural gas liquids trapped in the shale and to allow them to flow through the borehole to a wellhead on adjacent land, and further granting the continuing right to Respondent Chesapeake to take possession and control of said minerals, all in violation of 42 U.S.C. § 1983. Complaint, RE 1, Page ID # 2-13.

**Count 2** of the Complaint alleges that Respondent Chief Simmers, a state official, acting pursuant to 1509.28, issued a continuing order and permit in violation of the Fourteenth Amendment granting Respondent Chesapeake the right to permanently physically invade the subsurface of Petitioners' land by horizontal drilling and by the injection of millions of gallons of water, sand, and chemicals, in order to fracture the shale to cause the release of the oil, gas, and natural gas liquids trapped in the shale and to allow the minerals to flow through the borehole to a wellhead on adjacent land, and further granting the continuing right to Respondent Chesapeake to take



possession and control of said minerals. The Complaint seeks relief pursuant to *Ex Parte Young*, 209 U.S. 123, syl. (1908) enjoining Respondent Chief Simmers from so doing, and further, seeks a declaration that 1509.28 as applied, and the order and permit, are unconstitutional. Complaint, RE 1, Page ID # 2-13.

Specifically, 1509.28 and Respondent Chief Simmers' order and permit:

1. Constitute the exercise of state regulatory police power to deny property rights in violation of the Due Process Clause. Complaint, RE 1, Page ID # 3-8. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917); *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, syl. 4 (1922); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 571-73 (Cir. Ct. E.D. Okla. 1909), *aff'd sub nom*, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

2. Constitute the exercise of state regulatory police power to permanently and physically invade Petitioners' property rights and are therefore a per se taking in violation of the Takings Clause. Complaint, RE 1, Page ID # 3-10. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-78 (1979); *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015).

3. Fail to comply with Ohio's mandatory appropriation statute in violation of the Due Process Clause. Complaint, RE 1, Page ID # 7-8. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, syl. (1980).

4. Constitute a conveyance by the state of private property to a private entity for private use in violation of the Due Process Clause. Complaint, RE 1, Page ID # 7-8. *Missouri Pacific Ry v. Nebraska*, 164 U.S. 403, syl. (1896); *Kelo v. City of New London*, 545 U.S. 469, syl. (2005).

The Complaint also avers that Respondent Chesapeake's actions:

Violate 42 U.S.C. § 1983 for the reason that Respondent Chesapeake acted under color of a state statute as a state agent by jointly participating with a state official in the taking of private property rights pursuant to a statutory scheme that is defective under the Due Process and Takings Clauses. Complaint, RE 1, Page ID # 2-6. *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922 (1982); *West v. Atkins*, 487 U.S. 42, 49 (1988).

#### **-----Petitioners' Property Rights**

The Petitioners are the owners of 127 acres of land and the oil, gas, and natural gas liquids in the Utica Point Pleasant shale formation beneath the surface of said land located in Harrison County, Ohio. Complaint, RE 1, Page # 3, 10, 12.

Petitioners' property rights in the subsurface, and in the oil, gas, and natural gas liquids beneath their land, and their right to extract the minerals are violated by Respondent Chief Simmers' order and permit granting Respondent Chesapeake the rights to permanently invade the subsurface and to extract and take possession of the oil, gas, and natural gas liquids because the statute authorizing such action violates the Due Process Clause as well as the Takings Clause. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917)(Due

Process Clause); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, syl. 4 (1922)(Due Process Clause); *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897)(Due Process/Takings Clauses); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 571-73 (Cir. Ct. E.D. Okla. 1909)(Due Process Clause), *aff'd sub nom, West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

In addition, Respondent Chief Simmers' order and permit in and of themselves constitute a per se taking of Petitioners' oil, gas, and natural gas liquids. See *Horne v. Department of Agriculture*, 576 U.S. \_\_\_, syl. (2015)(order taking raisins); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)(regulation denying the right to exclude others).

Respondent Simmers is the Chief of the Ohio Division of Oil and Gas Resources Management and as such is an official of the State of Ohio. Respondent Chief Simmers is empowered by Ohio Revised Code Section 1509.02 to issue orders and permits to compel the unitization of land to form oil and gas drilling units and to grant the right to drill oil and gas wells, and the right to extract the minerals, and has exercised that power by granting to Respondent Chesapeake the right to permanently invade the subsurface of Petitioners' land and the right to extract the oil, gas, and natural gas liquids beneath the land. Complaint, RE 1, Page ID # 3-5.

Respondent Chesapeake is a private entity engaged in oil and gas drilling and is acting under color of law as a state actor. Complaint, RE 1, Page ID # 2-6.

On November 10, 2014, Respondent Chesapeake filed an Application with Respondent Chief Simmers pursuant to 1509.28, that is, under color of a state

statute, requesting that Respondent Chief Simmers issue an order and permit to the following effect:

- a. granting the right to Respondent Chesapeake, a private commercial enterprise, to enter beneath Petitioners' land by horizontal drilling into the Utica-Point Pleasant shale formation; and
- b. the right to further invade Petitioners' land by injecting millions of gallons of water, sand, and chemicals to hydraulically fracture said shale and to permanently alter the subsurface;
- c. with the result that most of the water, sand, and chemicals remain beneath Petitioners' land;
- d. to release the oil, gas, and natural gas liquids trapped within the shale allowing them to flow through the borehole to a wellhead on adjacent land;
- e. granting the right to Respondent Chesapeake to extract oil, gas, and natural gas liquids from beneath Petitioners' land; and
- f. granting the right to take possession of said minerals. Complaint, RE 1, Page ID # 4-5.

In response to Respondent Chesapeake's Application, on July 13, 2015, Respondent Chief Simmers issued an administrative order, and on December 16, 2016 Chief Simmers issued a permit, pursuant to 1509.28 taking Petitioners' property by granting the foregoing rights to Respondent Chesapeake. Complaint, RE 1, Page ID # 4-5.

Respondent Chesapeake has drilled a well beneath 120 acres of Petitioners' land, and has injected millions

of gallons of water, chemicals, and sand beneath the land to fracture the shale and release oil, gas, and natural gas liquids trapped in the shale to allow them to flow through the borehole to a wellhead on adjacent land where Respondent Chesapeake has taken possession of and continues to take possession of the minerals for its own use and benefit. Complaint, RE 1, Page ID # 5-7.

The lower courts erroneously concluded that the foregoing action was not a violation of the Due Process and Takings Clauses and did not constitute state action under color of law. App. A 11-16; App. B 42-50.

As noted above, this case does not simply involve the use of a state procedural statute by Respondent Chesapeake, but rather **involves the grant of Petitioners' property rights by Respondent Chief Simmers to Respondent Chesapeake** pursuant to a state regulatory police power statute, and therein lies the state action under color of law in violation of Section 1983, as well as in violation of the Due Process and Takings Clauses.

**COMPELLING REASONS FOR GRANTING  
THE WRIT**

- I. The Decisions Of The Lower Courts Conflict With Decisions Of This Court Regarding The Due Process Clause, The Takings Clause, And 42 U.S.C. § 1983 As Follows:**
  - A. The Lower Courts Erred In Deciding That Petitioners’ Property Rights To The Subsurface, And To The Oil, Gas, And Natural Gas Liquids In The Subsurface, And The Right To Extract Said Minerals Could Be Denied By State Regulatory Police Power. The Lower Courts Failed To Follow This Court’s Decisions That State Regulatory Police Power Which Denies Existing Property Rights Secured By The Fourteenth Amendment Is A Violation Of The Due Process Clause.**

**——Petitioners’ Rights To The Oil, Gas, And Natural Gas Liquids And The Right To Extract Said Minerals**

The Court of Appeals acknowledged that “Under Ohio law, ‘minerals underlying the surface, including oil and gas, are part of the realty,’ though a landowner may sever the mineral estate through a conveyance. ...Thus, under Ohio law each landowner has both a property interest in the subsurface minerals of his lot and an attendant right to recover those minerals without needless waste—as does his neighbor. *Chesapeake Exploration, L.L.C. v. Buell*, [144 Ohio St.3d 490, 2015 Ohio-4551, paragraph 21] 45 N.E.3d 185, 189-90 (Ohio 2015).” App. A 12-13.

In the *Buell* case, 144 Ohio St. 3d 490, para. 21 (2015), the Ohio Supreme Court further stated that: “Ohio has long recognized that minerals underlying the surface, including oil and gas, are part of the realty. *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201-202, 156 N.E. 119 (1927); *Nonamaker v. Amos*, 73 Ohio St. 163, 170-171, 76 N.E. 949 (1905); *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897), paragraph one of the syllabus. While the mineral remains underground, it is ‘in place’ and is ‘the same as any part of the realty.’ *Pure Oil* at 201, 156 N.E. 119; *Kelly* at 328, 49 N.E. 399 (‘Petroleum oil is a mineral, and while in the earth it is part of the realty ...’).” The Ohio Supreme Court’s pronouncement is the same in most jurisdictions. See *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 563 (Cir. Ct. E.D. Okla. 1909), *aff’d sub nom*, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

This Court has stated that the general common law recognizes that the ownership of the surface of the land encompasses the right to the minerals beneath the land, and the right to extract the minerals by operations conducted on the owner’s land, and that all of such rights are secured by the Fourteenth Amendment. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 202, 209 (1900). In 1897, the Ohio Supreme Court in *Kelly v. Ohio Oil*, 57 Ohio St. at 328, set forth the same property rights.

This Court noted in *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 202 that: “No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them.” In the *Ohio Oil* case, this Court dealt with migratory gas in a case that did not

involve the permanent physical invasion of private property and held that the state has regulatory police power to prevent waste of natural gas by requiring that the gas be placed in a pipeline and not be allowed to escape into the ambient air.

In *McNamara v. City of Rittman*, 107 Ohio St.3d 243, 245 (2005), the Ohio Supreme Court ruled that a landowner has appurtenant property rights in water beneath the land. Petitioners submit that the same principle of law applies to Petitioners' rights to the oil, gas, and natural gas liquids beneath the land.

The foregoing property rights dating back to 1897 are secured by the Due Process and Takings Clauses and could not be denied without due process nor could they be taken without compliance with the Takings Clause. In 1868 the Fourteenth Amendment was ratified stating that property rights cannot be denied without due process of law; and in 1897, the Takings Clause of the Fifth Amendment was incorporated into the Fourteenth Amendment. *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897).

### **-----Petitioners' Rights To The Subsurface**

In addition to Petitioners' rights to the minerals beneath their land and the right to extract the minerals, Petitioners have property rights in the subsurface. While modified by subsequent decisions discussed below, Ohio long ago recognized the common law principle that: "The word *land* includes not only the face of the earth, but every-thing under it or over it. He who owns a piece of land, therefore, is the owner of everything underneath in a direct line to the center of the earth and everything above it to the heavens. No person can undermine or overhang another's land



without violating his rights.” *Winton v. Cornish*, 8 Ohio 477, 478 (1832).

The foregoing rights were subsequently secured by the Due Process Clause adopted in 1868 and the Takings Clause of the Fifth Amendment which was incorporated into the Fourteenth Amendment in 1897. *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897).

In 1911, this Court reaffirmed property rights in the subsurface citing *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900), and stating “The case is a valuable one, and clearly announces the right of an owner to the soil beneath it, and the relation of his rights to all other owners of the surface of the soil.” *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 252 (1911).

In the instant case, a state regulatory police power regulation, 1509.28, was used by Respondent Chief Simmers, a state official, to issue an order and permit granting a private entity, Respondent Chesapeake, the rights to permanently and physically invade the subsurface of Petitioners’ land by horizontal drilling and by the injection of millions of gallons of water, sand, and chemicals beneath the surface to fracture the shale and to release the oil, gas, and natural gas liquids trapped in the shale so that they could flow through the borehole to a wellhead on adjacent land where Respondent Chesapeake has taken, and continues to take, possession and control of said minerals for its own use and benefit, all in violation of Petitioners’ property rights secured by the Fourteenth Amendment. Complaint, RE 1, Page ID # 4-6, 12.

The error of the Court of Appeals is in concluding that the Petitioners’ right to exclude invasion of the

subsurface to extract the oil, gas, and natural gas liquids could be denied by the doctrine of correlative rights, Ohio Revised Code Section 1509.01(I), adopted by Ohio in 1965, that is, 68 years after Petitioners' property rights were established by the Ohio Supreme Court and secured by the Fourteenth Amendment. App. A 13-14. The lower courts' conclusion violates this Court's holding that state regulatory police power which takes existing property rights secured by the Fourteenth Amendment is a violation of the Due Process Clause. As this Court stated: "But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution ....The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, syl. 4 (1922); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 571-73 (Cir. Ct. E.D. Okla. 1909), *aff'd sub nom, West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

### **---Difference Between Unitization And Physical Intrusion**

The Court of Appeals in the instant case erroneously concluded that there was a valid exercise of state regulatory police power. App. A 13-16. The Court of Appeals failed to distinguish between the regulation of land unitization to form drilling units and the physical invasion of the subsurface of the land. Indeed, the Court of Appeals misstated the issue when it stated that "In fact, the landowners here cannot point to a single case that holds a unitization or pooling

scheme unconstitutional.” App. A 14. The issue is not unitization or pooling, **it is the physical invasion of private property by horizontal drilling and hydraulic fracturing.** The Court of Appeals misapplied decisions of this Court that validated state police power regulation pertaining to the formation of drilling units, that is, unitization, to state regulatory power granting the right to permanently physically invade private property rights which this Court has held to be a violation of the Due Process and the Takings Clauses. Compare *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, syl. 1 (1939) and *Hunter Co., Inc. v. McHugh*, 320 U.S. 222, syl. 2 (1943) and *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 185 (1950) with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982)(Takings Clause); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, syl. (2005)(Takings Clause); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917)(Due Process); *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897)(Due Process/Takings Clauses); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, syl. 4 (1922)(Due Process Clause); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 571-73 (Cir. Ct. E.D. Okla. 1909)(Due Process Clause), *aff’d sub nom, West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

This Court has stated that “A State has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the **migratory** gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.” *Hunter Co., Inc. v. McHugh*, 320 U.S. 222, syl. 2 (1943) (Emphasis added.). See also, *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, syl.

1 (1939) (referring to a common source of supply); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 252-53 (1911) (referring to oil and gas having the power of self-transmission). In contrast, the instant case does not involve oil and gas that migrates in the absence of physical intrusion beneath the land of a non-consenting landowner. Complaint, RE 1, Page ID # 12.

Contrary to the Court of Appeals decision herein, the foregoing cases did not involve a state police power regulation that granted a private entity: the right to permanently physically invade the subsurface of private property by horizontal drilling and by the injection of millions of gallons of water, sand, and chemicals into the subsurface to fracture shale; and granted the right to extract the oil, gas, and natural gas liquids trapped in the shale by allowing the minerals to flow through the borehole to a wellhead on adjacent land; and granted the right to take possession and control of the minerals to the exclusion of the owner, all of which constitute a violation of the federal constitution.

Furthermore, each of the court decisions relied upon by the Court of Appeals did not involve the physical intrusion of private property. The case of *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 203, 208, 210-11 (1900) cited by the Court of Appeals did not involve the physical invasion of adjacent land by drilling or other means. The case involved the regulation of the well operator to prevent the escape of natural gas into the ambient air. Similarly, the state court cases relied upon by the Court of Appeals did not involve the physical invasion of private property. App. A 14-15.

The decision of the Court of Appeals that Petitioners' property rights were not denied violates the Due Process Clause and this Court's holdings. *Buchanan v. Warley*, 245 U.S. 60, 74, 82 (1917); *Chicago, Burlington & Quincy RR Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, syl. 4 (1922); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 571-73 (Cir. Ct. E.D. Okla. 1909), *aff'd sub nom, West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). See also, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, syl. (2005)(Takings Clause); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420, syl. (b) (1982)(Takings Clause).

**B. The Lower Courts Failed To Follow This Courts Decisions That State Regulatory Police Power Which Imposes A Permanent Physical Intrusion Of Private Property Rights Is A Per Se Taking In Violation Of The Takings Clause.** *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-78 (1979); *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015).

In the instant action, the order and permit issued by Respondent Chief Simmers is a physical taking because it imposes a permanent invasion of Petitioners' property by granting Respondent Chesapeake the right to horizontally drill beneath Petitioners' land and to inject millions of gallons of water into the Utica Point Pleasant shale formation to fracture the shale resulting in most of the water remaining beneath Petitioners' land, and grants Respondent Chesapeake the right to extract the minerals from beneath Petitioners' land.

Complaint, RE 1, Page ID # 4-6. In particular, Respondent Chief Simmer's order and permit violate: Petitioners' right to the exclusive possession, control, custody, use, benefit, and voluntary disposition of their property in violation of the Takings Clause, including a declaration of public use, and Petitioners' right to receive just compensation. In *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 211 (1900), this Court stated that: "there is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without divesting them of their property without adequate compensation, in violation of the Fourteenth Amendment. In *Buchanan v. Warley*, 245 U.S. 60 (1917), this Court recognized that property rights include the incidents of acquisition, use, enjoyment, and disposition, all protected by the constitution.

#### —Direct And Immediate Interference

In 1946, this Court found a violation of the Takings Clause stating that "The landowner owns at least as much of the space above the ground as the [owner] can occupy or use in connection with the land. ... The fact that he does not occupy it in a physical sense – by the erection of buildings and the like – is not material." *United States v. Causby*, 328 U.S. 256, 264 (1946). This Court also held in *Causby*, syl. 1(d) that "Flights of aircraft over private land which are so low and frequent as to be a **direct and immediate interference with the enjoyment and use of the land** are as much an appropriation of the use of the land as a more conventional entry upon it." (Emphasis added.)

This Court also stated in *Causby*, syl. 1(a) that “The common law doctrine that ownership of land extends to the periphery of the universe has no place in the modern world.” While this Court’s statement modified the common law rights of land ownership, it nevertheless held that a “direct and immediate interference with the enjoyment and use of the land” constitute an appropriation of the owner’s rights. The Ohio Supreme Court adopted the foregoing in several appropriation cases. *State ex rel. Royal v. City of Columbus*, 3 Ohio St.2d 154 (1965); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39 (1972).

In *Chance v. BP Chemicals*, 77 Ohio St.3d 17, 26 (1996), a trespass case, not involving the Due Process or Takings Clauses, the Ohio Supreme Court applied the same principle of law to the subsurface stating “we find that the Appellants’ subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually interfere with Appellants’ reasonable and foreseeable use of the subsurface.” In the instant case, Petitioners have a reasonable and foreseeable use of the subsurface because that is where the oil, gas, and natural gas liquids are located and said property rights are secured by the Fourteenth Amendment.

In this case, the Court of Appeals failed to follow this Court’s holding in *Causby*, syl. 1(d) that a “direct and immediate interference with the enjoyment and use of the land” constitute an appropriation of the owner’s rights, and the Ohio Supreme Court’s statement that “property rights include the right to exclude invasions of the subsurface property that actually interfere with Appellants’ reasonable and foreseeable use of the subsurface.” *Chance v. BP*

*Chemicals*, 77 Ohio St.3d 17, 26 (1996). App. A 15-17. The Court of Appeals engrafted an additional element erroneously concluding that “there must be ‘some type of physical damages or interference with use’” ignoring the qualifier that the additional element only applied when there was an “indirect invasion situation.” App. A 16. *Chance*, 77 Ohio St.3d at 27. Even with the additional element, the Complaint in this case does allege physical intrusion and physical damage by horizontal drilling and by the injection of millions of gallons of water, sand, and chemicals to fracture the shale, most of which remains beneath Petitioners’ land, and by the extraction of the oil, gas, and natural gas liquids. Complaint, RE 1, Page ID # 2-13.

Also, the Ohio Supreme Court has held that a state regulation that grants the right to excavate the subsurface of private property violates the Takings Clause. *Lake Erie & Western Rd Co. v. Commissioners*, 63 Ohio St. 23 (1900).

This Court and the Ohio Supreme Court have stated that “The rights related to property, i.e., to acquire, use, enjoy, and dispose property, *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 38 S. Ct. 16, 62 L. Ed. 149, are among the most revered in our law and traditions.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 361-62, 2006-Ohio-3799, para 72. See also, *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-78 (1979).

In the instant case, the lower courts erred in deciding that Petitioners do not have property rights



that are secured by the Fourteenth Amendment. App. A 11-18; App. B 49.

**—Permanent Physical Invasion And The  
Right To Exclude**

This Court has held that a permanent physical invasion is a taking: “The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. ...Regulatory actions generally will be deemed per se takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property... ”*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, syl. (2005).

“In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), dealing with a regulation granting the right to the public to use a private pond. In the instant action, Petitioners’ right to exclude has been taken by the Respondent Chief’s order and permit authorizing Respondent Chesapeake, a private entity, to horizontally drill beneath Petitioners’ land, and to inject millions of gallons of water, sand, and chemicals, causing most of the water, sand, and chemicals to remain beneath the surface, for the purpose of fracturing the shale beneath Petitioners’ land, to cause the oil, gas, and natural gas liquids to migrate through the borehole, and to be extracted by Respondent Chesapeake.

“To the extent that the government permanently occupies physical property, it effectively destroys the

owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a stranger invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the use of the property, since the owner may have no control over the timing, extent, or nature of the invasion." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420, syl. (b) (1982).

"Our cases further establish that, when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking, but also is determinative." *Loretto*, 458 U.S. at 426.

"When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Loretto*, 458 U.S. at 427.

"The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is

perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, *cf. Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435.

"Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435.

"Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. As Part II-A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." *Loretto*, 458 U.S. at 436. In *Loretto*, a municipal regulation granted to a cable company the right to invade an apartment building to install a cable box.

"We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character

of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.” *Loretto*, 458 U.S. at 441.

In the recent decision of *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015), this Court held that a marketing order issued by the Department of Agriculture imposing a reserve requirement on the owners of raisins is a per se taking. This Court stated in subparagraph (a)(2) of its syllabus that: “The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee disposes of those raisins as it wishes, to promote the purposes of the raisin marketing order. The Government’s formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government’s control and use, is ‘of such unique character that it is a taking without regard to other factors that a court might ordinarily examine.’ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432.”

In *Horne*, the raisins were not physically taken by the government because the owners refused to transfer them. Nevertheless, this Court held that the raisin marketing order in and of itself constituted an unlawful per se taking. *Horne* syllabus.

At pages 8-9 of its slip opinion in *Horne*, this Court stated: “Raisin growers subject to the reserve requirement thus lose the entire ‘bundle’ of property rights in the raisins—‘the rights to possess, use and dispose of them. *Loretto*, 458 U.S. at 435 ... .”

As noted above, the Respondent Chief's order and permit herein are in the same category as the raisin reserve requirement at issue in the *Horne* case.

The Court of Appeals is in error in its decision that the regulatory police power of the State of Ohio, including the doctrine of correlative rights as adopted by Ohio and as applied in this case, does not violate this Court's holding that the physical invasion of private property constitutes a per se taking that requires compliance with the Takings Clause. App. A 12-17.

**C. The Failure By A State Official To Comply With Ohio's Mandatory Appropriation Statute In The Taking of Private Property Is A Violation of the Due Process Clause.**  
*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, syl. (1980).

Respondent Chief Simmers failed to abide by Ohio's mandatory appropriation statute in the taking of Petitioners' property rights secured by the Fourteenth Amendment. Complaint, RE 1, Page ID # 7, paragraph 27.

Failure to comply with the state's procedural statute for the deprivation of rights secured by the Fourteenth Amendment is a violation of due process secured by the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, syl. (1980).

Ohio Revised Code Chapter 163 sets forth a mandatory comprehensive procedure, compatible with the Fourteenth Amendment, for the taking of real

property that encompasses the taking by horizontal drilling and hydraulic fracturing, and by the extraction of oil, gas, and natural gas liquids. As discussed above at pages 10-11, since at least 1897, Ohio has recognized that the minerals beneath the surface of land are part of the realty and that ownership of the surface of the land encompasses the right to the minerals beneath the land, and the right to extract the minerals by operations conducted on the owner's land. *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 328 (1897); *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 490, para. 21 (2015). See also, *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 202, 209 (1900); *Kansas Natural Gas Co. v. Haskell*, 172 F. 545, 563, 571-73 (Cir. Ct. E.D. Okla. 1909), *aff'd sub nom*, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

Ohio Revised Code Section 163.02 (A) expressly mandates that "All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code ... ." Complaint, RE 1, Page ID # 7, paragraph 27. This section and the entirety of Ohio Revised Code Chapter 163 is ignored by the Court of Appeals.

The process used in the taking of private property is a critical constitutional protection. As noted by this Court in *Horne v. Department of Agriculture*, 576 U.S. \_\_\_\_ (2015) at page 9 of the slip opinion: "The Constitution, however, is concerned with the means as well as the ends. The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.' *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). As Justice Holmes noted, 'a strong public desire to improve the public condition is not enough to

warrant achieving the desire by a shorter cut than the constitutional way.’ *Pennsylvania Coal*, 260 U.S., at 416.”

Two of the most critical rights set forth in Ohio’s mandatory appropriation statutes are the determination of public use by the court and a determination of just compensation by the jury. Ohio Revised Code Section 163.09(B). In contrast, 1509.28 has no such protections. Section 1509.28 grants to Respondent Chief Simmers the power and authority to take the property and to determine the amount to be paid. Complaint, RE 1, Page ID # 4-5.

Respondent Chief Simmers failed to follow the mandatory process set forth in Chapter 163 and therefore, Respondent Chief Simmers’ order and permit are unconstitutional.

The Court of Appeals failure to acknowledge Ohio’s appropriation statute and the demands of due process of law is erroneous and violates this Court’s decisions in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982) and *Hicks v. Oklahoma*, 447 U.S. 343, syl. (1980).

**D. The Lower Courts Failed To Follow This Court’s Decisions That The Conveyance By A State Official Of Private Property To A Private Entity For Private Use Is A Violation Of The Due Process Clause.** *Missouri Pacific Ry v. Nebraska*, 164 U.S. 403, syl. (1896); *Kelo v. City of New London*, 545 U.S. 469, syl. (2005).

This Court has held that the conveyance of private property for the private use of another is not due

process of law. *Missouri Pacific Ry v. Nebraska*, 164 U.S. 403, syl. (1896). Also, this Court has stated that the government cannot take private property to confer a private benefit on a private entity. *Kelo v. City of New London*, 545 U.S. 469, syl. (2005).

Respondent Chesapeake is a private commercial entity which has been granted Petitioners' private property rights for its private use by Respondent Chief Simmers, a state official, in violation of the Due Process Clause. The Court of Appeals erred in failing to so determine.

**E. The Lower Courts Failed To Apply Decisions Of This Court That A Private Entity Is Acting Under Color Of A State Statute As A State Agent In Violation Of 42 U.S.C. § 1983 Where The Private Entity Applied For And Received From A State Official The Right To Physically Invade Private Property And The Right To Extract Oil, Gas, And Natural Gas Liquids Pursuant To A Statutory Scheme That Is Defective Under The Due Process And Takings Clauses.** *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982); *West v. Atkins*, 487 U.S. 42, 49 (1988).

Title 42 U.S.C. § 1983 states in pertinent part that: "Every person who, under color of any statute ... of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured ... ."

In this case, the person referred to in § 1983 is Respondent Chesapeake which utilized an



unconstitutional state statute, 1509.28, jointly with Respondent Chief Simmers, to cause Petitioners to be deprived of their property rights secured by the Fourteenth Amendment, and therefore Respondent Chesapeake is liable to Petitioners.

The gravamen of the state action under color of law herein is that Petitioners have been deprived of their private property rights in the subsurface of their land, in the oil, gas, and natural gas liquids beneath the land, and in the right to extract said minerals by the joint actions of Respondents Chesapeake and Chief Simmers, a state official, pursuant to an unconstitutional statute.

Respondent Chief Simmers, pursuant to 1509.28, granted Respondent Chesapeake the right to physically invade the subsurface of Petitioners' land by horizontal drilling and hydraulic fracturing and granted Respondent Chesapeake the right to extract the minerals from Petitioner's land. Respondent Chesapeake applied to Respondent Chief Simmers pursuant to 1509.28 for an order and permit to engage in the foregoing invasion of Petitioner's property rights and Respondent Chief Simmers issued the order and permit granting Respondent Chesapeake the right to do so.

The Court of Appeals decision that the foregoing is not state action under color of law is in violation of the plain language of § 1983 and of this Court's decisions in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982), and *West v. Atkins*, 487 U.S. 42, 49 (1988). App. A 9-12. The Court of Appeals conclusion that the state played no role in Respondent Chesapeake's actions and that said actions occurred without overt significant

assistance of state officials disregards the following overt acts: Respondent Chief Simmers used an unconstitutional state statute, 1509.28, to convey Petitioners' private property rights secured by the Fourteenth Amendment, to Respondent Chesapeake, and Respondent Chesapeake used the order and permit issued by Respondent Simmers to physically invade Petitioners' property rights. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991).

Respondents herein engaged in joint activity pursuant to 1509.28 to deprive Petitioners of their property rights secured by the Fourteenth Amendment.

There are two prerequisites for a claim based on 42 U.S.C § 1983. First, Respondent Chesapeake acted under color of law as a state actor. *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922, 942 (1982). Specifically, Respondent Chesapeake acted under color of law and as a state actor in utilizing 1509.28, that is, a statute that is defective under the Due Process and Takings Clauses of the Fourteenth Amendment to deny Petitioners' property rights. As this Court stated: "The traditional definition of acting under color of state law requires that the defendant in a section 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' *United States v. Classic*, 313 U.S. 299, 326 (1941)." *West v. Atkins*, 487 U.S. 42, 49 (1988).

Second, Respondent Chesapeake's wrongful acts under color of law pursuant to 1509.28 not only include its Application for an order and permit for the right to invade Petitioners' land by horizontal drilling and hydraulic fracturing beneath the land, but also

includes the actual drilling, fracturing, and injection of water, sand, and chemicals beneath the land and the continuing extraction of the oil, gas, and natural gas liquids from beneath Petitioners' land, and its plan to drill additional wells.

Respondent Chesapeake's actions are fairly attributable to the state because Respondent Chesapeake applied for and received from Respondent Chief Simmers, a state official, the right to permanently physically invade the subsurface of Petitioners' land and to extract the oil, gas, and natural gas liquids therefrom. As averred in the Complaint, and as discussed above, the statutory scheme violates the Takings Clause and the Due Process Clause of the Fourteenth Amendment. Complaint, RE 1, Page ID # 3-10.

In the *Lugar* case this Court stated: "If the creditor plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under federal statute, section 1983, designed to provide judicial redress for such constitutional violations." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 934 (1982). The facts in *Lugar* are parallel to the instant case: Respondent Chesapeake violated Petitioners' rights secured by the Fourteenth Amendment by seizing their property pursuant to purported rights granted by Respondent Chief Simmers utilizing defective statutory procedures, and therefore Respondent Chesapeake violated Section 1983. Complaint, RE 1, Page ID # 3-10.

"As is clear ... we have consistently held that a private party's joint participation with state officials in

the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. ... 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. ... In summary, petitioner was deprived of his property through state action, respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioners did present a valid cause of action under section 1983 insofar as he challenged the constitutionality of the Virginia statute ... ." *Lugar*, 457 U.S. at 941-42.

Respondent Chief Simmers, acting as an official of the State of Ohio pursuant to 1509.28 issued an order and permit granting the right to Respondent Chesapeake to drill into the subsurface of Petitioners' land and to inject millions of gallons of water, chemicals, and sand into the subsurface, and granted the right to remove the oil, gas, and natural gas liquids, and Respondent Chesapeake invaded the subsurface of Petitioners' land and forcefully removed and continues to remove the oil, gas, and natural gas liquids. Complaint, RE 1, Page ID # 3-10.

The Court of Appeals decision that Respondent Chesapeake did not act under color of law, and that Respondent Chesapeake is not a state actor, (App. 9-12), violate the holdings of this Court in *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922, syl. 3 (1982) and *West v. Atkins*, 487 U.S. 42, 49 (1988).

As noted above, **this case does not simply involve the use of a state procedural statute by Respondent Chesapeake, but rather involves the grant of Petitioners' property rights by Respondent Chief Simmers to Respondent Chesapeake pursuant to an unconstitutional state statute, and therein lies the state action under color of law in violation of Section 1983.**

**II. The Issues Are Of National Importance and the Lower Courts Are In Need Of This Court's Guidance Particularly In View Of The Court Of Appeals' Decision Misapplying and Diverting from Decisions Of This Court**

**—The Application Of This Court's Decisions To The Permanent Physical Invasion Of The Subsurface Of Private Land To Extract Oil, Gas, And Natural Gas Liquids From Beneath The Land Is A Case Of First Impression**

**—The Determination Of State Action Under Color Of Law Pursuant To 42 U.S.C. § 1983 Where A State Official Utilizes A State Statute To Grant A Private Entity The Right To Physically Invade Private Property And The Right To Extract Oil, Gas, And Natural Gas Liquids Is A Case Of First Impression**

This case involves issues encompassing the Takings Clause, the Due Process Clause, and state action under color of law in violation of 42 U.S.C. § 1983, all of which are in need of this Court's guidance.

In particular, this case involves the use of state regulatory police power to deny property rights in violation of the Due Process Clause; and the physical intrusion of property rights in violation of the Takings Clause; and the failure to comply with Ohio's mandatory appropriation statute in the taking of property rights in violation of due process of law; and the conveyance of private property to a private entity for private use in violation of due process of law.

In addition, this case involves the determination of the concept of state action under color of law pursuant to 42 U.S.C. § 1983 in a case of first impression.

The rights of owners of property throughout the State of Ohio and the United States are adversely impacted by the decision of the Court of Appeals permitting a state official to issue an order and permit granting a private entity the right to invade private property by horizontal drilling and hydraulic fracturing and the right to extract oil, gas, and natural gas liquids without the consent of the owner and without a determination of public use and just compensation as required by the Takings Clause, and in violation of the Due Process Clause.

This case involves the application of principles of law established by this Court securing property rights to a state regulatory police power statute denying those property rights. The state statute authorizes a state official to grant the right to oil and gas companies to physically intrude beneath the land of non-consenting owners and further grants the right to extract oil, gas, and natural gas liquids therefrom without compliance with the Due Process and Taking Clauses. While the principles of law established by this Court are clear,

the Court of Appeals herein erroneously failed to apply this Court's holdings. The order and permit issued by Respondent Chief Simmers grant a private entity the right to invade private property by horizontal drilling and hydraulic fracturing and grant the right to remove oil, gas, and natural gas liquids without the consent of the owner and without a determination of public use and just compensation as required by the Takings Clause of the Fifth Amendment as incorporated into the Fourteenth Amendment, and without affording the Petitioners due process of law.

Furthermore, the decision of the Court of Appeals fails to follow this Court's decisions setting forth the criteria for state action under color of law pursuant to Section 1983.

### CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted to protect rights secured by the Fourteenth Amendment, including Petitioners' property rights.

Dated April 3, 2019

Respectfully submitted,

PHILLIP J. CAMPANELLA

*Counsel of Record*

7059 Gates Road

Gates Mills, OH 44040

440-655-1553

p.campanella@att.net

*Counsel for Petitioners*