

No.

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IN THE  
SUPREME COURT of the UNITED STATES

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Rodney Hogen, Susan Hogen and Marby Hogen,

Petitioners,

v.

Steven C. Hogen, Individually and as  
Personal Representative of the Estate  
of Arline H. Hogen, Deceased

Respondent.

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On Petition For Writ of Certiorari  
To The Supreme Court of North Dakota

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Does the decision of the Supreme Court of North Dakota deprive the Petitioners of established property rights in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States?
2. Has the State of North Dakota, acting through its judiciary, deprived the Petitioners of their vested property rights without any real opportunity to protect such rights in violation of the Due Process Clause of the Fourteenth Amendment?
3. Were Petitioners Marby and Susan Hogen denied vested property interests, in violation of the Due Process Clause of the Fourteenth Amendment, when the State of North Dakota's judiciary determined the Petitioners' property interests could be extinguished by a court appointed personal representative although Petitioners Marby and Susan Hogen were never provided notice, nor made parties to the probate proceedings that occurred after their property interests were created?
4. Did the North Dakota judiciary, under claimed inherent powers, violate Petitioner Rodney Hogen's First and Fourteenth Amendment constitutional rights when it imposed a sanction that required him to pay all post-remand attorney fees of the personal representative?

## **LIST OF ALL PARTIES TO THE PROCEEDING**

The caption of this Petition contains all of the parties who have made an appearance in the probate litigation below.

Steven C. Hogen, acting as a court appointed personal representative, had sold Petitioners' real property interests in Barnes County, North Dakota to Barnes County residents John H. Triebold, Alan N. Triebold. Steven C. Hogen sold Petitioners' property interests in Cass County, North Dakota to Tulip Acres, LLLP, a North Dakota limited liability limited partnership, [privately owned] of Fargo, North Dakota. Petitioners, consistent with the Petitioners' service process in the North Dakota probate litigation below, will serve by mail the Petition for Writ of Certiorari on these persons.

For purposes of adding clarity to this Petition for Writ of Certiorari, the Petitioners identify the relationship of the named parties in the caption of this Petition.

Petitioner Rodney Hogen and Susan Hogen, residents of Fargo, North Dakota, are husband and wife. Petitioner Marby Hogen is the daughter of Rodney Hogen.

Respondent Steven C. Hogen is a resident of West Fargo, North Dakota. Steven C. Hogen was a party to the litigation below as an individual, as the personal representative of his mother Arline H.

Hogen's estate. Brothers Rodney Hogen and Steven Hogen were the only devisees under their mother's Will.

**PROCEEDINGS DIRECTLY  
RELATED TO THIS CASE**

Petitioners Marby Hogen and Susan Hogen are also the Petitioners in the Supreme Court of the United States docket number 18-1440. This Petition is directly related to that case. Petitioner Marby Hogen and Susan Hogen continue with their assertion the North Dakota judiciary, in violation of the Fourteenth Amendment to the Constitution of the United States of America, has deprived Susan Hogen of a life estate and deprived Marby Hogen of a remainderman's interest in real property transferred to them by Rodney Hogen in February 20, 2014, quit claim deeds.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioners, Rodney Hogen, Susan Hogen and Marby Hogen, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Dakota that deprives landowners of their property without due process of law; denies landowners equal protection of settled law; and punishes Petitioner Rodney Hogen for activity protected by the First and Fourteenth Amendment to the Constitution of the United States of America.

### **OPINIONS BELOW**

All of the opinions of the North Dakota judiciary that lead to this Petition for Writ of Certiorari trail the Supreme Court of North Dakota's remand from its decision in Estate of Hogen, 2015 ND 125, 863 N.W.2d 876 [Appendix D, pages 43-79], and include the following:

The May 16, 2019, published opinion of the Supreme Court of North Dakota is reported in Matter of Estate of Hogen, 2019 ND 141, 927 N.W.2d 474. The decision is found at Appendix A, pages 1- 10.

The unreported Order on Petition for Complete Settlement and Distribution of Estate of the Cass County District Court dated April 3, 2017, is found at Appendix B, pages 11-21.

The unreported Order Discharging Personal Representative and Denying Rodney's Hogen's Declaration and Petition, dated August 22, 2018, is

found at Appendix C, pages 22-42.

### **BASIS FOR JURISDICTION**

The Court has jurisdiction under 28 U.S.C. § 1257(a). Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the judgment of North Dakota Supreme Court of May 16, 2019. Appendix A, pages 1-10; Appendix J, page 115.

### **CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED IN THIS PETITION**

Article 1 of the Articles of Amendment to the Constitution of the United States of America states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Article 14, § 1, of the Articles of Amendment to the Constitution of the United States of America states:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. 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, nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners assert they have been denied the protection of North Dakota's settled law, including the equal protection of several provisions within North Dakota's version of the Uniform Probate Code. The Petitioners assert they were denied the equal protection of provisions of the North Dakota Century Code that follow. Because of the length of the statutory provisions, the text, of relevant North Dakota Century Code provisions, is found in the Appendix to this Petition. The protection of the following provisions of the North Dakota Century Code provision (hereinafter, abbreviated "N.D.C.C.") have been denied the Petitioners.

N.D.C.C § 30.1-03-01. (1.401). Method and time of giving. See, Appendix K, pages 119-120.

N.D.C.C § 30.1-03-03. (1.403) Pleadings - When parties bound by others - Notice. See, Appendix K, pages 120-123.

N.D.C.C. § 30.1-12-01. (3-101) Devolution of estate at death--Restrictions See, Appendix K, page 123.

Subsection 2 of N.D.C.C. § 30.1-17-10. (3-610). Termination of appointment--Voluntary. See, Appendix K, page 125.

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N.D.C.C. § 30.1-21-08. (3-1008) Subsequent administration - Fee. See, Appendix K, pages 131-132.

## **STATEMENT OF THE CASE**

Petitioners Rodney, Susan and Marby Hogen assert, in violation of rights guaranteed to them under the Fourteenth Amendment, the North Dakota judiciary has deprived them of property that Petitioner Rodney Hogen inherited from his mother and later transferred, in part, to Petitioners Susan and Marby Hogen. Rodney Hogen further asserts, in violation of his right to due process of law, the North Dakota judiciary has punished him for exercising activities that are authorized by North Dakota law, and further, activities protected by the First and Fourteenth Amendments to the Constitution of the United States

of America.

The first two issues presented in this Petition carry on the theme asserted by Petitioners Susan Hogen and Marby Hogen in United States Supreme Court Docket No. 18-1440. The first two (2) issues stem from Justice Kennedy's statements made in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 737, 130 S. Ct. 2592, 2615, 177 L. Ed. 2d 184 (2010) [a decision where a majority of the justices accepted Justice Scalia's proposition that it is appropriate to "set(..) aside judicial decisions that take private property"; *id.*, page 720]:

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. *Lingle*, 544 U.S., at 542, 125 S.Ct. 2074; see *id.*, at 548–549, 125 S.Ct. 2074 (KENNEDY, J., concurring); see also *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) ("'[P]roperty'" interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings' " (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing

“by judicial decree what the Takings Clause forbids it to do by legislative fiat.” *Ante*, at 2601.

The third issue presented by the Petitioners Susan and Marby Hogen, embraces federal rights addressed by this Court in *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S. Ct. 1761, 135 L.Ed.2d 76 (1996), holding that a stranger to a judicial proceeding, whose interests are not adequately represented by a party to the judicial proceeding, cannot be bound by such proceedings. The Supreme Court of North Dakota, in its opinion below, bound Petitioners Susan Hogen and Marby Hogen to Steven C. Hogen’s sales of all of their vested interest in lands without prior notice and without a meaningful opportunity to voice their positions concerning the sale. Despite having received an interest in all the subject real property, the North Dakota judiciary did not recognize Susan and Marby Hogen as interested persons who should have a voice in the sale of their lands by a court appointed personal representative. Appendix A, pages 3-5 (North Dakota Supreme Court); Appendix C, pages 24-26; 37-38 (North Dakota District Court, the trial court).

The first three (3) of Petitioners’ stated issues also stem from Petitioners’ belief that the Fourteenth Amendment has ensured them “...notice reasonably calculated, under all the circumstances, to apprise” the Petitioners that they could be deprived of their income and interest in lands by a court empowered personal representative without providing Petitioners with a meaningful opportunity, in a judicial proceeding, to

present their objections to the deprivation of their property. See, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

Petitioners assert that the North Dakota judiciary violated the Petitioners' due process rights when the North Dakota judiciary empowered Steven C. Hogen, as a personal representative, with arbitrary powers – powers that exceed his statutory granted authority as a personal representative – and sanctioned Steven C. Hogen's acts that deprived the Petitioners of their vested property. When presenting the first three (3) of Petitioners' stated issues, the Petitioners continue with their belief that this Court will protect them from the arbitrary actions of the court empowered personal representative because “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” See, *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935 (1974), citing *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).” The unprecedented empowerment of the personal representative by the North Dakota judiciary, allowing Steven C. Hogen to exercise powers denied by statute, constitutes state action that triggers the protection of the Fourteenth Amendment to the Petitioners. The North Dakota courts have been “... intimately involved throughout, and without that involvement ...” the Petitioners would not had been deprived of their property. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487, 108 S. Ct. 1340, 1346, 99 L. Ed. 2d 565 (1988).

The fourth issue, presented in this Petition, involves the judicial sanction imposed upon Petitioner Rodney Hogen requiring him to pay all of Steven C. Hogen's attorney fees subsequent to the 2015 decision of Estate of Hogen, 2015 ND 125, 863 N.W.2d 876. Appendix D, page 43. Claiming the probate court acted within the scope of its inherent powers when burdening Rodney Hogen with all of Steven's post-remand attorney fees and its act was consistent with N.D.C.C. § 28-26-31 [Appendix K, pages 118], the North Dakota judiciary allowed Rodney Hogen to be punished for doing what North Dakota law clearly allows him to do. The sanction imposed upon Rodney Hogen, under claimed inherent powers of the District Court, punishes Rodney Hogen for activities that are protected by the First and Fourteenth Amendments to Constitution of the United States of America. The sanction violated Rodney Hogen's right of free speech and the right to petition the government for the redress of his grievance. The sanction violated activities protected by the Fourteenth Amendment, including Rodney Hogen's right to alienate his inherited real property. Rodney Hogen asserts the judicially imposed sanction deprives him of Due Process of Law guaranteed to him by the Fourteenth Amendment. As this Court stated, in *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978):

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see *North Carolina v. Pearce*, *supra*, 395 U.S., at 738, 89 S.Ct., at 2082

(opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin v. Stynchcombe, supra*, 412 U.S., at 32–33, n. 20, 93 S.Ct., at 1986. See *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138. . . .

To fully understand why the Petitioners believe the North Dakota courts have deprived them of their property in violation of their constitutional right to due process of law, one needs an understanding of the background concerning the probate of Arline H. Hogen's Last Will and Testament. One also needs understanding of the North Dakota settled probate law denied to Petitioners.

**Pertinent Background leading to  
Supreme Court of North Dakota's  
2015 decision: Estate of Hogen, supra.**

Arline Hogen ("Arline") died testate on March 23, 2007, survived by her two sons, Rodney Hogen ("Rodney") and Steven C. Hogen (Steven"). Under Arline's probated Will, Rodney and Steven are equal devisees. Appendix D, page 45.

At the time of her death Arline had owned an undivided interest in a Cass County, North Dakota farmstead, and an undivided interest in farmlands located in Cass County and Barnes County, North Dakota. At the time of her death, most of Arline's

undivided interest in the farmlands were subject to mortgages of record. During her lifetime, Arline allowed her lands in Barnes County, and one quarter in Cass County, to be mortgaged to benefit Rodney's farming operations.

During her lifetime, Arline's interest in one other quarter of land in Cass County was mortgaged to benefit a business created by both Steven and Rodney. Because of favorable interest rates afforded to Rodney who farmed the lands [Steven did not farm], Rodney was a mortgagor on the mortgage benefitting their common business interest. Steven, though, is obligated to Rodney to pay one-half of this mortgage indebtedness.

Steven was appointed personal representative of his mother's estate in April, 2007. On May 30, 2007, Steven filed his Affidavit of Publication of his Notice to Creditors. No other court activity occurred until March 19, 2010 – almost three (3) years after Arline's death. On March 19, 2010, Steven, as personal representative, filed: (1) a tardy Inventory and Appraisement; (2) a Final Account and Report; and (3) a Petition for Approval of Final Account, Determination of Testacy and for Settlement of Estate.

Steven's inventory and final account showed, that as of March 19, 2010, all creditors and administration costs were paid in full, with money in the estate's account to be distributed. Steven's 2010 inventory and final account also revealed that Steven claimed Rodney owed the probate estate \$97,536.71 for his farming of Arline's lands from 2003 through 2009.

Within his petition seeking approval of his final accounting, Steven prayed for an unequal distribution of land due to his claim the Rodney owed the probate estate said \$97,536.51 through 2009. Within this petition, Steven also plead:

14. This Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.

Rodney, responding to Steven's claims made within said documents, objected on procedural grounds, and generally denied liability to his mother and her probate estate. Rodney further sought: (a) removal of Steven as personal representative and his legal counsel; (2) supervised administration, and (3) either an equal distribution of land, or partition. Appendix B, page 46.

On July 22, 2010, the District Court entertained arguments to establish the proper procedure to determine Steven's claimed "right of retainer", under N.D.C.C. § 30.1-20-03, against Rodney. In that hearing, the District Court announced it would "... hear the evidence and make the determination. And once that's done the Estate will be distributed accordingly and this case will be over." Appendix X, pages 291-292.

On August 5, 2010, the District Court determined Steven pleadings were sufficient to assert a right to retainer against Rodney, and ordered Rodney to submit his defenses and denials to Steven's claims. District Court Docket Entry #73. Obeying the Order, Rodney filed his Answer Arising Out of Order On Procedure as to the claimed retainer on September 1, 2010. District Court Docket Entry #77.

In February, 2011, Rodney sought summary judgment claiming that Steven's pre-death claims were barred, and that Steven did not show an administrative need nor demand for post-death rents. District Court Docket Entry #96. When denying summary judgment concerning post-death crops and farm rentals, the District Court accepted Steven's argument that Rodney had no ownership rights to the farmland until the District Court approves a distribution to him. District Court Docket Entry #129.

On February 15, 2013, Steven, without seeking court permission, filed an amended final accounting, and an amended petition seeking distribution to him of 66.218712% and to Rodney 33.781288% of the interest in the real estate once owned Arline Hogen at the time of her death. Steven had claimed a right to retainer against Rodney in the amount of \$247,261.04 [originally \$97,536.51]. District Court Docket Entry #197 and Entry #198. Steven's amended petition again stated that one of its purposes was "... to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03." Appendix V, page 220.

Trial upon Steven's claimed retainer began in March of 2013 and concluded, after sporadic five days of trial, on June 27, 2013. The District Court issued its Order on Petition for Approval of Final Account, for Determination of Testacy Status, and Settlement of Estate under N.D.C.C. § 30.1-21-01 on October 24, 2013. The District Court issued its Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate on December 11, 2013. Appendix V, page 221. The District Court determined Rodney owed the Estate \$123,387.44 for crop years 2007 through 2013, inclusive. The District Court did not credit Rodney with any payment that Rodney paid directly to Steven [as an individual], nor did it credit Rodney with any payment he made upon the mortgages upon the lands when his mother died, including the mortgage that Steven, too, shared an obligation to pay. Rodney's petition for supervised administration was denied. District Court Docket Entry #436.

On March 6, 2014, the District Court approved Steven's personal representative fees in the amount of \$27,500. The District Court also approved a total of \$333,272.23 in attorney fees and costs, incurred by Steven, to be paid out of the estate. In another March 6, 2014, Order, the probate court approved Steven's "Second Amended Final Report", and determined Rodney and Steven were each 50% distributees of their mother's estate. The probate court determined its March 6, 2014, Order was a "final Judgment" and "ends the action" for matters expressed therein. Appendix V, pages 218-219. Under Steven's petition(s) to settle the estate, under the provisions of N.D.C.C. §

30.1-21-01, the real estate [owned by Arline Hogen at the time of death] and the claimed “right of retainer” against Rodney were listed as assets to be distributed.

In its concluding orders of 2013 and 2014, the District Court did not reserve jurisdiction to sell or partition the lands that devolved upon Rodney and Steven, equally, at the time of their mother’s death through her probated will. Nor did the District Court reserve jurisdiction to lease the farm lands within the concluding orders.

On February 20, 2014, Rodney quit claimed all of his inherited real property to his daughter, Marby Hogen (“Marby”), and reserved a life estate unto himself and his wife, Susan Hogen (“Susan”).

Rodney then appealed the adverse rulings against him, including the amounts awarded for personal representative fees and attorney fees, to the Supreme Court of North Dakota. Rodney’s 2014 appeal resulted in the decision of Estate of Hogen, *supra*., a decision affirming all of the District Court’s orders except as to the amount of “right to retainer” against Rodney.

In ¶1 of its 2015 decision of Estate of Hogen, the Supreme Court of North Dakota said the appeal was “... from an order approving a final accounting and settlement in the probate of the estate of Arline Hogen.” In ¶25 of this decision, the Supreme Court of North Dakota determined, “[t]he personal representative’s power or control over the decedent’s property or estate during administration may be

exercised without notice, hearing, or an order and may continue until termination of the personal representative's appointment, or execution of an instrument or deed of distribution transferring the assets to the distributee." Appendix D, pages 43-44, 65-66.

**Pertinent Background leading to  
Supreme Court of North Dakota's 2019 decision:  
Matter of Estate of Hogen, *supra*.**

A detailed procedural history of most of the pertinent probate proceedings leading to the Supreme of North Dakota's 2019 decision is found in ¶ 6 through ¶44, inclusive, of the Petitioner's Declaration of Interested Persons Voiding the Allocation, Partition, Sale, Encumbrance of Real Property Once Owned by the Decedent. Appendix V, pages 219-241. To establish why the Petitioners assert the North Dakota judiciary has deprived them of property, and/or First Amendment liberty rights, in violation of their constitutional right to due process of law, the Petitioners find it necessary to highlight the underlying factual scenario, and their belief as to what statutory probate rights and process were denied them after the remand of Estate of Hogen, *supra*.

In 2014 and 2015, while Rodney's first appeal was pending, Rodney farmed the Cass County lands but not the Barnes County lands. Since 2010, Steven as personal representative, received all Barnes County rentals for lands once owned by Arline Hogen. In 2014, Rodney's net farm "profit" from lands was \$2,916.00. In 2015, Rodney's net farm "profit" was \$25,442.00.

Rodney's "net farm" profit" stemmed from all lands inherited through both of his parents, not just from his mother – and from his own labor. Appendix S, pages 183-185. Rodney's net profit farming, for pertinent post remand years [2014 through 2016], did not include any portion of Barnes county farm rentals that could be traced through his inheritance from Arline Hogen -- as Steven received these rents as claimed personal representative. For these pertinent years, Steven did not make any principal or interest payment on any of the mortgages on the land. Any payment to the mortgagees were made by Rodney.

On July 14, 2014, after its decision in Estate of Hogen, *supra*., was final, the Supreme Court remanded the case to the District Court for what appeared to be a single issue: "to recalculate the retainer after considering the effect of the Barnes County conservation program on the cash rent for Barnes County land.." See, ¶35 of Estate of Hogen, *supra*. Appendix D, page 70.

Based upon the Supreme Court's determination the appeal was from a "final accounting and settlement", Rodney believed Steven's powers over his inherited lands had terminated as a matter of law. Use of the word "settlement", in reference to decedent's estates, is defined so it "includes the full process of administration, distribution, and closing." N.D.C.C. § 30.1-01-06 (49); Appendix K, page 118-119. Under N.D.C.C. § 30.1-17-10, "[a]n order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal representative." Appendix K, page 125.

The Supreme Court's determination in the appeal, Estate of Hogen, *supra*., was from a "final accounting" also led to Rodney's belief that Steven's powers as personal representative had terminated. Rodney's belief or post appeal position, was consistent with the Supreme Court of North Dakota's decision in Estate of Cashmore, 2010 ND 159, 787 N.W.2d 261, determining in ¶14, thereof, "[o]nce a final judgment or order has been entered approving a final accounting and distribution under N.D.C.C. § 30.1-21-01(1), the estate proceedings are concluded, and the parties are not authorized to file a petition to approve an amended final accounting under the statute."

During the hearing to determine the amount of retainer, as required by the Supreme Court of North Dakota's order for remand, Rodney realized that neither Steven nor the District Court shared his view that personal representative's powers had terminated by Steven's prior, approved final account and the District Court's order of Rodney and Steven were each 50% distributees. On September 15, 2015, due to that realization, Rodney filed his Petition for Order Restraining Personal Representative as authorized under N.D.C.C. § 30.1-17-07. Appendix L, pages 135-146; statute at Appendix K, pages 124-125.

Rodney's September 15, 2015, petition prompted Steven to move for a "Cashmore" bifurcation order on November 12, 2015 [Appendix N, pages 154-157], which was resisted by Rodney. Because of Rodney's response, Steven asked for a delay of the time his motion would be heard. On January 4, 2016 [during the time of this delay], Steven petitioned for supervised

administration of the probate. Appendix O, page 158-161. On January 5, 2016, Steven petitioned for an order for the delivery of possession and control of all estate real property to him as personal representative. Appendix P, pages 162-168.

Steven's petition for supervised administration was granted by the District on January 11, 2016, without affording Rodney an opportunity to be heard. Appendix Q, pages 169-170. Steven did not provide any form of notice to either Marby or Susan of this petition, nor any other petition or motion made by him, until Marby and Susan later appeared in the probate proceedings, as interested persons, on August 2, 2018.

On January 5, 2016, Steven petitioned for an order to establish his possession of the Cass County lands – the first time Steven sought control over the Cass County lands since the District Court's 2013-2014 concluding orders. Appendix P, page 162-168. Again, Steven had been taking the tenant's rents from the Barnes County lands, attributable to the devise of Arline, since 2010. Rodney resisted Steven's petition by repeating his post appeal position that the personal representative's powers terminated upon the entry of the 2013 and 2014 Order(s) issued under N.D.C.C. § 30.1-21-01. Appendix R, pages 171-176.

Following arguments on the various outstanding motions [occurring on February 2, 2016] and Rodney's objection to the order of supervised administration, the District Court issued three (3) orders: (1) Order on Petition for Delivery of Possession and Control of Estate Real Property dated February 2, 2016

[Appendix E, pages 80-94]; (2) Order Denying Petition for Restraining Personal Representative of February 4, 2016 [Appendix F, pages 95-96]; and (3) Order Bifurcating Issues of February 6, 2016 [District Docket Entry #639]. When entering these three (3) orders, the District Court rejected Rodney's positions concerning the termination of the personal representative's powers and the finality of the prior 2013 and 2014 Order(s) that were affirmed by the Supreme Court of North Dakota in Estate of Hogen, *supra*.

To protect Rodney's interest in the lands Rodney had inherited from his mother, Rodney's attorneys [the Garaas Law Firm] filed a Lis Pendens for both Cass County and Barnes County lands in early February, 2016. The Lis Pendens filings were necessary to prevent third parties from claiming they had acted in "good faith" when dealing with Steven, as personal representative, in any transaction concerning the inherited lands. See, N.D.C.C. § 30.1-18-14. Appendix K, pages 127-128. In North Dakota, a lis pendens is authorized in any "civil or criminal action in a court affecting the title to real property". See, N.D.C.C. § 28-05-07. Appendix K, pages 117-118.

The next activity in the District Court involved Steven's November, 2016, motion to consolidate the probate proceedings with the trust proceedings involving the Curtiss A. Hogen testamentary trust. Rodney resisted consolidation and the District Court denied Steven's motion on December 12, 2016.

On January 27, 2017, Steven filed his Petition for Complete Settlement and Distribution of the

Estate. Steven asked the District Court to determine and order, without benefit of a proper pleading or trial in the probate proceedings, that Rodney owed the Estate an additional \$55,379.63, together with interest thereon, for crop years 2014, 2015, and 2016. Steven requested an order directing Rodney to release his two Lis Pendens filed in Cass County and Barnes County. Steven also sought an order authorizing the sale of real property and distribution of the Estate, coupled with an order determining any capital gain taxes to be paid on the land he sells to be paid on his allocated ownership of the sold land; and other relief. District Court Docket Entry #668.

Rodney responded to Steven's petition by repeating his post-appeal position concerning the effect of the District Court's concluding Order(s) of 2013 and 2014. Appendix T, pages 187-192; see also, Appendix V, pages 216-268. Rodney also disputed Steven's contention that his proposed allocation of lands was based upon an Steven and Rodney's agreement as revealed in Rodney's testimony in trust proceedings involving the Curtiss A. Hogen testamentary trust. Rodney submitted portions of the transcript of his testimony clearly showing Rodney had testified the two of them had come close to an agreement but, "It never happened." Appendix V, pages 233-235.

When presenting his defenses to Steven's position, Rodney submitted evidence of his post 2014 and 2015 income from his farming operations, as well as history of his payments on mortgages. Rodney's position was it would be inequitable to impose a rental obligation upon Rodney for years 2014 through 2016

greater than what the land produces in income. Rodney's claimed it would be inequitable to not give him credit, against any imposed rental obligation, for the mortgage payments made by him. Appendix V, pages 243-246.

On April 3, 2017, the District Court issued its Order on Petition for Complete Settlement and Distribution of Estate. Appendix B, pages 11-21. This order authorized Steven to allocate and sell any of the subject lands to pay all mortgages, and previously approved attorney fees and probate court expenses. The Order released Rodney's two (2) Lis Pendens. The Order imposed a rental liability against Rodney for 2014 through 2016 crop years in the principal amount \$55,379.73, together with accruing interest thereon at the rate of six percent (6%) per annum. Appendix B, pages 17-21.

In its April 3, 2017 Order, the District Court awarded to Steven, and against Rodney, all of Steven's "attorney fees and costs following the remand" of Estate of Hogen, supra. The order concerning attorney fees was made by the District Court without any prior motion or hearing afforded to Rodney as to the appropriateness of the order. The District Court required Rodney Hogen to pay all post remand attorney fees incurred by Steven. The District Court reasoned "Rodney Hogen's continued objections to and obstruction of the probate process and actions in convoluting the title to the real property have been unreasonable and unjustified. Of particular note is the recording a lis pendens in a direct violation of this Court's February 2, 2016 Order." Appendix B, pages

19-20.

On July 23, 2018, Steven filed his Petition for Discharge of Personal Representative giving notice to the District Court and Rodney that Steven had sold all of lands Steven had allocated to Rodney. Appendix U, pages 193-215. Steven requested, for post remand attorney fees in the estate proceedings, \$200,000.00 attorney fees to be paid through Rodney's allocated property. Part of these attorney fees were his legal fees and expenses incurred by Steven in Susan and Marby's Barnes County quiet title action. Steven claimed his legal fees of \$61,129.26, incurred in the quiet title action, were "attributable to the unjustifiable conduct of Rodney" without specifying what was Rodney's "unjustifiable conduct" in the action(s) in which he was not a party. Appendix U, page 208. Steven proposed another \$23,000.00 to be withheld from Rodney until final resolution of all appeals in the probate matter and Barnes County quiet title action. Appendix U, page 208.

On August 2, 2018, Petitioners Rodney, Susan, and Marby exercised their statutory right [N.D.C.C. § 30.1-18-13; Appendix K, pages 126-127], as interested persons, to void Steven's allocation, deeds, sale and other transaction relating to the subject lands. Appendix V, pages 216-268. In the same document, Petitioners sought a court order confirming Steven's transaction relating to the lands were void. Additionally, the Petitioners sought a court order to vacate the District Court's April 3, 2017, order claiming the District Court acted in excess of its jurisdiction, or without jurisdiction, when entering the

order. The Petitioners obtained a hearing date of September 6, 2018, and gave notice to Steven and to the purchasers, identified by Steven, of the land.

Upon Steven’s August 8, 2018, motion, the hearing on the Petitioners’ August 2, 2018, petition was consolidated with Steven’s petition for discharge and expedited to August 10, 2018. On the same day – August 8, 2018 – Rodney, Susan and Marby filed their objection to Steven’s discharge, citing his disloyalty to Arline’s Will and his failure to distribute the probate equally at date of distribution values, among other reasons. Appendix W, pages 269-290.

On August 22, 2018, the District Court issued its Order Discharging Personal Representative and Denying Rodney Hogen’s Declaration and Petition. Appendix C, pages 22-42. Within this order, the District Court determined Susan and Marby were “not interested persons in the estate” and had no “standing” to void Steven’s sale or allocation of the land, because “the Estate’s interest in real property referred to in the Barnes County Judgment has been transferred to third parties other than Rodney Hogen.” Despite Rodney’s 2014 conveyances to Marby and Susan that preceded Steven’s transfers to the third parties, the District Court stated, “The Court finds that Susan and Marby have no interest in the Estate property.” Appendix C, page 25.

As to Marby and Susan’s assertion they were denied due process of law in the probate proceedings, the District Court determined, “But even if Susan and Marby were arguably interested persons, they have

received whatever process was due to them by choosing to start a quiet-title action in Barnes County.” Appendix C, page 25.

As to Rodney, the District Court rejected all of Rodney’s post-remand positions, approved Steven’s accounting and distribution, and ordered Rodney to pay Steven his requested “total of \$200,000.00 in attorney fees that were expended following the remand from the supreme court.” Included in the total of \$200,000.00 is Steven’s total attorney fee of \$61,129.726 incurred by Steven [individually or as personal representative or trustee] in the quiet action initiated by Susan and Marby in Barnes County District Court, and \$10,788.59 in two (2) separate actions to evict a tenant. Rodney was not a party to the quieting title action, or the eviction actions. Appendix C, pages 36-42.

To chill Rodney’s appellate rights, the District Court ordered \$23,000 to be withheld from Rodney’s share of the estate to pay Steven’s attorney fees and costs arising out the District Court’s probate orders, or Steven’s attorney fees relating to the appeal in the Barnes County quieting title action. Appendix C, page 42.

Petitioners timely appealed to the Supreme Court of North Dakota, resulting in the May 16, 2019, decision of Matter of Estate of Hogen, supra. Citing Hogen v. Hogen, 2019 ND 17, 921 N.W.2d 672 [holding in ¶16 thereof, “...this record does not reflect an order closing the Estate or discharging Steven...”]; the Supreme Court of North Dakota rejected the

Petitioners' position Steven's powers had terminated with the 2013-2014 concluding orders – orders judicially declared to be a "final accounting and settlement" in ¶1 Estate of Hogen, supra. ¶1, Appendix D, pages 43-44.

Alluding to the Rodney's "litigation strategy on remand", the Supreme Court of North Dakota affirmed the \$200,000.00 attorney fees imposed against Rodney, thereby rejecting Rodney's position the lower court punished him for exercising liberty rights guaranteed to him under the First and Fourteenth Amendments. Appendix A, page 10.

### **Settled Probate Law Denied Petitioners**

As stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1155, 71 L. Ed. 2d 265 (1982), "[t]he hallmark of property, this Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Since the date of Arline Hogen's 2007 death, Steven and Rodney obtained, through devolvement under her probated Will, ownership of real property. See, N.D.C.C. § 30.1-12-01. Appendix K, page 123. What Rodney and Steven inherited was an ownership interest and not an expectancy. Brigham Oil and Gas, L. P. v. Lario Oil & Gas Co., 2011 ND 154, ¶14, 902 N.W.2d 751.

Through 2014 quit claim deeds, Rodney transferred part of his inherited real estate interests to his wife, Susan, and daughter, Marby. As owners of a life estate and a remainder respectively, Susan and

Marby are each an “interested person” in Arline Hogen’s estate because each has “a property right in or claim against a trust estate or the estate of a decedent”. See, N.D.C.C. § 30.1-01-06 (26). Appendix K, page 118-119.

Rodney, Susan and Marby recognize their real estate interests can be removed for “cause”, but respectfully submit the removal must be done under procedures that are consistent with their right to Due Process of Law. A personal representative has broad statutory powers to fulfill his fiduciary “duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will”. See, N.D.C.C. § 30.1-18-03(1). Appendix K, page 126. Although a personal representative has broad powers to fulfill his fiduciary duties, the North Dakota judiciary cannot empower, nor authorize, a personal representative to act in a way that conflicts with the mode of exercising his powers as prescribed by statute. As stated in Syllabus 2 of In re Anderson’s Estate, 34 N.W.2d 413 (N.D. 1948), “[t]he county court must have jurisdiction not only of the parties and the subject matter but must also substantially follow the statute in the exercise of its powers to render validity to its decrees.” The Petitioners respectfully submit when their property has been taken for probate administration purposes, without adherence to protections afforded to them by statute, they have been deprived of property without due process of law.

The Petitioners, in their quest to preserve their vested real property interests, have been denied several statutory protections afforded to them to guard

against the broad powers of a personal representative. For example, North Dakota's non-claim statute [N.D.C.C. § 30.1-19-03; Appendix K, pages 128-129] acts as bar to untimely claims and the protection extends to "heirs and devisees". "Claims", as defined in N.D.C.C. § 30.1-01-06(7) [Appendix K, pages 118-119], include the "expenses of administration" yet the lower courts allowed all of Steven's requested attorney fees be paid out of the Petitioners' land interest without the necessary claim procedure.

The finality of orders that approved "a final account and settlement" made under N.D.C.C. § 30.1-21-01 [Appendix K, pages 130-131], should have resulted in the termination of Steven's powers under N.D.C.C. § 30.1-17-02 [Appendix K, page 124]. Due to shifting sands of judicial thought, a judicially determined "final accounting" and a judicially determined "settlement" became neither "final"; nor a "settlement" [See, N.D.C.C. § 30.1-01-06(49), Appendix K, pages 118-119]. The shifting sands of judicial thought deprived the Petitioners of vested property rights and the statutory protections that places limitations upon subsequent administration. See, N.D.C.C. § 30.1-21-08. Appendix K, pages 131-132.

The District Court acted inconsistently with N.D.C.C. § 30.1-20-11 [Appendix K, pages 129-130] when it allowed Steven to "allocate the estate real property." Appendix B, page 18. Allowing Steven to "allocate" lands is the equivalent of a partition which is a power denied to personal representatives by N.D.C.C. § 30.1-20-11. Because Steven was empowered to allocate, rather than seek a partition

action as required by statute, the Petitioners were denied the protection of statutory substantive rights to protect their ownership interest in the lands. The Petitioners were denied the protection of a Lis Pendens [N.D.C.C. § 32-16-04; Appendix K, page 132]; a contemporaneous valuation and payment of life estates and future interests [N.D.C.C. § 32-16-28 and N.D.C.C. § 32-16-30; Appendix K, pages 133-134]; a public sale in which the Petitioners could participate and apply their determined interests towards the purchase price [N.D.C.C. § 32-16-24 (Appendix K, page 133) and N.D.C.C. § 32-16-35 (Appendix K, page 134)], a trial as to all factual claims [N.D.C.C. § 32-16-23 (Appendix K, page 132)], and other substantive rights enjoyed by parties to a partition action.

The Petitioner were denied the equal protection of N.D.C.C. § 30.1-18-13 [Appendix K, pages 126-127], a statutory provision that empowers any “person interested in the estate” to void “any transaction which is “affected by a substantial conflict of interest” of a personal representative. This statutory right vested with Marby and Susan, in 2014, when they received an ownership interest in lands from Rodney’s quit claim deed(s) to them. This statutory right, stemming from their ownership of lands, cannot be removed without “cause.” Steven’s allocation favoring himself, and sales to others under terms favoring himself, is not “cause” for the removal of the statutory protection that authorizes them to void such acts. Steven’s allocation of lands, or sales, under terms favoring only Steven and his attorneys, are the reasons all interested person(s) are statutorily empowered with voiding powers. It is truly irrational, and a denial of due

process of law, for North Dakota's courts to deny Marby and Susan the protections of the North Dakota statute.

It is also irrational for the District Court [probate court] to conclude that Susan and Marby "have received whatever process was due to them by choosing to start a quiet-title action in Barnes County." Appendix C, page 25. Due process is not a remedy to be chosen, but rather a constitutional right guaranteed to Marby and Susan in every judicial proceeding in which their property rights could be affected. Before the probate court, or its empowered personal representative, could deprive them of their ownership interest in lands, they were entitled to notice and a meaningful opportunity to be heard as to their defenses to the deprivation. See, *Mullane v. Cent. Hanover Bank & Tr. Co., supra.*, and Alward v. Borah, 381 Ill. 13, 44 N.E.2d 865 (1942).

Rodney, too, was denied the equal protection of N.D.C.C. § 30.1-18-13 when the District Court limited the scope of the statute to "sales" and the scope of what was a "substantial conflict of interest" to a sale by Steven "to himself, his spouse, agent, attorney, or any entity in which he has an interest." Steven clearly has a conflict with his assumed fiduciary duties to distribute property according to his mother's Will [50/50 between the two (2) brothers] when he allocates lands to himself over Rodney's objection. Rodney was deprived of property, and due process of law when his voiding powers, clearly granted to him in N.D.C.C. § 30.1-18-13 [Appendix K, pages 126-127], was denied him for Steven's transactions that conflict with

Steven's duties to be loyal to their mother's Will.

**Sanction of attorney fees against Rodney was punishment for exercising First Amendment Rights**

The District Court's "inherent" powers would not justify the punishment imposed upon Rodney when it required him to pay all post-remand attorney fees incurred by Steven. North Dakota generally follows the "American Rule" requiring each litigant to pay his own attorney fee. In re Guardianship and Conservatorship of D.M.Q., 2008 ND 100, 749 N.W.2d 517. In North Dakota, a District Court has inherent powers to award attorney fees to a party as a sanction for a litigant's misconduct, but such sanction must be "reasonably proportionate to the misconduct." Dethloff v. Dethloff, 1998 ND 45, ¶16, 574 N.W.2d 867. In this case, Rodney was required to pay all of Steven's post-remand attorney fees, including fees in cases where Rodney was not a party, without any judicial analysis as to what was proportionate to the claimed misconduct.

In this case, the District Court did not make a factual finding that any of Rodney's post-remand positions were frivolous, untrue, or not made in good faith. Rather, Rodney's claimed "misconduct" was his "continued objections to and obstruction of the probate process and his actions in convoluting the title to the real property" by his "recording a lis pendens". Appendix B, page 19-20.

Rodney submits that which the District Court claims is "misconduct" is constitutionally protected

activity under the First and Fourteenth Amendments to the Constitution of the United States.

Since his mother's death, Rodney enjoyed a vested right to alienate his inherited real property – a right protected by the Fourteenth Amendment to the Constitution of the United States of America. Rodney's transfer of land [apparently "convoluting the title] cannot justify the sanction imposed upon Rodney. A lis pendens is a privileged communication serving to provide constructive notice to subsequent purchasers of the pendency of an action related to real property so that they can be bound upon the final judgment. Boehm v. Long, 172 N.W. 862 (N.D. 1919). It is a *communication* made in a "proceeding authorized by law" and therefore is a [absolutely or conditionally] privileged communication under N.D.C.C. § 14-02-05(2). See also, Havilah Real Property Services, LLC v. VLK, LLC, 108 A.3d 334, 345-346 (D.C. 2015). Rodney's filing of a Lis Pendens involves activity protected by the First Amendment [freedom of speech and right to petition the government].

The lower court's order of February, 2016, restraining Rodney from interfering with the personal representative's control of Rodney's real property is not specific enough to be considered a prior restraint on Rodney's First Amendment rights. See, *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931), and its progeny. A lis pendens, filed in the probate proceedings, was a procedural step to help preserve Rodney and his family's interest in the inherited lands. The filing of a lis pendens was necessary so that no one could claim to be acting in "good faith", and the

protections of N.D.C.C. § 30.1-18-14 [Appendix K, pages 127-128] when dealing with Steven. The Lis Pendens was intended to help preserve Rodney's statutory right to void Steven's actions under N.D.C.C. § 30.1-18-13. Appendix K, pages 126-127. Neither the Lis Pendens, nor the transfer of an interest in Rodney's inherited lands, would justify the lower court's shifting of all post-remand attorney fees to Rodney under any claimed inherent powers.

Rodney knows of no act made by him, or legal position asserted by him in post-remand proceedings, that was not based upon statutory authority or having a factual basis. Rodney was clearly denied basic due process rights when he is punished for what the law clearly allows him to do. *Bordenkircher v. Hayes*, *supra*.

## **REASONS FOR GRANTING THE WRIT**

This Court should grant a Writ of Certiorari to safeguard Rodney Hogen's First and Fourteenth Amendment liberty rights, and to safeguard all of the Petitioners' Fourteenth Amendment right to not be deprived of their property by arbitrary actions of a court empowered personal representative.

Petitioners Susan and Marby Hogen had a legitimate expectation that they had acquired property, in 2014, by appropriate quit claim deeds from their grantor, Rodney Hogen. As owners of land since 2014, Marby and Susan Hogen had a legitimate expectation that North Dakota courts would provide them with prior notice and a meaningful opportunity to be heard

as to their objections before they could be deprived of their ownership interests in the lands – for that is what is constitutionally due them under the Fourteenth Amendment. *Mullane v. Cent. Hanover Bank & Tr. Co.*, *supra*, and *Alward v. Borah*, *supra*. As owners of land since 2014, Marby and Susan had a reasonable expectation that they were vested with the statutory right, under N.D.C.C. § 30.1-18-13, to void any of Steven’s transactions that appropriated their ownership interests to Steven himself, or his attorneys.

In violation of their due process rights, the North Dakota judiciary has not afforded Marby and Susan any meaningful way to voice their objections to Steven’s judicially granted powers over their lands. The District Court of Barnes County refused to honor their ownership claims, without any appropriate pleading from Steven as personal representative, due to Steven’s court granted powers. The District Court of Cass County, who empowers Steven, refuses Marby and Susan Hogen any “standing” in probate proceedings because the Barnes County District Court refused to quiet title due to Steven’s powers. The decision was arbitrary or irrational under the Due Process Clause resulting in a deprivation of property. The North Dakota Supreme Court decision conflicts with the spirit of the decision(s) of this Supreme Court of the United States of America striking down any judicial decisions that deprive litigants of their established property rights – all such aberrant judicial decisions should be set aside. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 720 (2010); as acknowledged by Justice Scalia on page 714, “It would be absurd to allow a State to do

by judicial decree what the Takings Clause forbids it to do by legislative fiat. See *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211–1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari).” All consistent with Justice Scalia’s observation, at page 715: “If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property ...” – making it a decision that should be set aside.

The third issue presented by the Petitioners, embraces federal rights addressed by this Court in *Richards v. Jefferson County, Ala., supra*, holding that a stranger to a judicial proceeding, whose interests are not adequately represented by a party to the judicial proceeding, cannot be bound by such proceedings. The Supreme Court of North Dakota, in its opinion below, bound Susan and Marby to Steven’s sales of all of their interest in lands without affording them prior notice, a meaningful opportunity to be heard, and standing in the probate proceedings. The North Dakota Supreme Court decision conflicts with well-established notions for proper exercise of judicial function under our system, early made known. “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Rodney, too, has been deprived of property without due process of law being afforded to him. Rodney should have been afforded the protection of several North Dakota statutes that limit Steven’s

powers over Rodney's lands, but Rodney was repeatedly denied the protection of statutes. Rodney was punished, through an award of all post-remand attorney fees to Steven, for acts that the law plainly allows him to do. The North Dakota courts punished Rodney for acts protected by the First Amendment – recording a lis pendens and advocating in judicial proceedings – violations of basic due process rights under the Fourteenth Amendment. The lower court's decision, that sustains such sanction under claimed inherent powers, conflicts with this Court's decision in *Bordenkircher v. Hayes, supra*.

The Petitioners seek a decision of the Supreme Court of the United States of America that recognizes what the Fourteenth Amendment has ensured – “...notice reasonably calculated, under all the circumstances, to apprise” the Petitioners that their interest in lands could be sold by a court empowered trustee or court empowered personal representative and a meaningful opportunity provided Petitioners, in a judicial proceeding, to present their objections to the sale. See, *Mullane v. Cent. Hanover Bank & Tr. Co., supra*. The Petitioners seek a decision that they, as owners of lands, are entitled to equal protection of probate statutes that prevent them from losing their inherited lands due to arbitrary actions of a personal representative – actions that promoted his own interests at the expense of the Petitioners, and dishonoring his mother's Will.

The protection of settled laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, should have been afforded to

the Petitioners. This Supreme Court should not allow any state court to deprive litigants of liberty and property by denying any of them basic due process rights.

## CONCLUSION

Without legal basis, the judgment of the Supreme Court of North Dakota deprives Petitioners of their property without due process of law for it eliminates established property rights legitimately expected to exist. It is absurd to allow a judicial decree to deprive landowners of property, or civil rights, without adherence to law. It is equally absurd to allow the judiciary to punish Rodney for doing what the law clearly allows him to do – advocate in a judicial setting.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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