NO. 20-_____

In the Supreme Court of the United States

DEBORAH HOLTER,

Petitioner,

v.

THE CITY OF MANDAN,
a Political Subdivision of the State of North Dakota,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. By paying a nominal portion of the total costs of an improvement for which the remaining costs will be specially assessed against private properties, does a governmental entity properly consider the special benefits accruing to an assessed property, as required by *Village of Norwood v. Baker*.

2. Does a state court of last resort commit an abuse of discretion and/or violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by deciding an appeal on issues or facts which were never raised by the parties and to which neither party was given the opportunity to respond.

PARTIES TO THE PROCEEDINGS

Petitioner

- Deborah Holter, petitioner on review ("Petitioner"), was the petitioner-appellant in the action in the Morton County District Court, State of North Dakota and Supreme Court of North Dakota below.

Respondent

- The City of Mandan, a Political Subdivision of the State of North Dakota, respondent on review ("the City"), was the respondent-appellee in the action in the Morton County District Court, State of North Dakota and Supreme Court of North Dakota below.

LIST OF PROCEEDINGS

Supreme Court of North Dakota

Supreme Court No. 20190277

Deborah Holter, *Petitioner and Appellant v.*
City of Mandan, a political subdivision of the State of North Dakota, *Respondent and Appellee.*

Opinion Date: July 22, 2020

Rehearing Order Date: September 21, 2020

State of North Dakota, County of Morton,
South Central Judicial District

Case No. 30-2017-CV-01003

Deborah Holter, *Appellant v.*
City of Mandan, a political subdivision of the State of North Dakota, *Appellee*

Memorandum Opinion Date: June 28, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deborah Holter, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in this case.

OPINIONS BELOW

The June 28, 2019 Memorandum Opinion on Appeal of the Morton County District Court, State of North Dakota, South Central Judicial District (App. 21a) is unreported. The July 22, 2020 Opinion of the Supreme Court of North Dakota (App.1a), as well as the Dissent on the Order of the Supreme Court of North Dakota Denying Petition for Rehearing filed September 21, 2020 (App.49a), are reported at 948 N.W.2d 858.

JURISDICTION

The opinion of the Supreme Court of North Dakota was entered on July 22, 2020. A petition for rehearing was denied on September 21, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> The Takings Clause of the Fifth Amendment to the U.S. Constitution states: "nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. XIV § 1

> The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution states: "nor shall any State deprive any person of life liberty, or property, without due process of law."

N.D.C.C. § 40-23-07

Section 40-23-07 of the North Dakota Century Code states, in relevant part,

> [t]he commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as is necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment.

City of Mandan Special Assessment Policy, *Benefit Determination and Distributions*, Adopted by the Mandan City Commission on January 19, 2016

The City of Mandan's Special Assessment Policy states the City's formula for assessing properties benefitted by an improvement. The applicable portion of the policy is as follows:

> [3] Streets (local, collector and arterial) and Alleys . . .
>
> [3.1] The district boundaries are drawn to include all properties benefiting from the improvement.
>
> [3.2] Typical benefit allocations on single-family, residential properties can be assessed by determining a unit cost. The allocation is based on a unit cost, if similar in size, by applying an equal cost share to each parcel/lot within the district. A unit cost may be determined by taking the total project costs and dividing by the total lots within the district.
>
> [3.3] If the single-family residential properties vary greatly in size or front footage, the units may be increased or a combination of allowable methods may be used. For calculations purposes, all effective areas and front footages are provided by the City Assessor's office.
>
> [3.4] Multi-family property may be special assessed at a greater number of units proportionate to the properties use of the benefits (apartments, duplexes, condominiums, twin-

homes and/or townhomes, mobile home parks/ manufactured homes).

[3.5] In districts containing strictly commercial and industrial zoning (no residential or multi-family) special assessments are determined by the area of the lot/parcel.

[3.6] Corner lots are assessed at a rate of one-half the unit cost if only one street abutting the lot/parcel is constructed or improved. When the second street is constructed, one-half the unit cost can be assigned to the lot or parcel abutting that street thus allowing equality amongst the surrounding properties.

[3.7] Benefits for agriculturally zone lands within a district may be determined based on the area of the parcel/tract of land.

[3.8] The full cost to pave, resurface, or reconstruct public alleys can be assessed to properties that either abut the alley or have access to their property via the public alley.

STATEMENT OF THE CASE

A. Introduction

This case arises out of a levy of special assessments by the City against Petitioner's privately owned property. North Dakota law, in accordance with *Village of Norwood v. Baker*, 19 U.S. 269, 19 S.Ct. 187, and its progeny, mandates that a local governing body's special assessment commission shall determine the

amount in which a parcel of land will be especially benefited by an improvement project. This determination helps to ensure that the amount assessed to a property will not exceed the benefit to that same property. In this case, however, the City attempts to shirk its statutory responsibility by using the same formula to calculate both the benefit to the affected parcels and the amounts assessed to those parcels.

Petitioner owns three contiguous and vacant lots within the City of Mandan's Street Improvement District No. 199, which was created by the City's Board of City Commissioners (the "Board"). (App.3a) The City's Special Assessment Commission (the "Commission") assessed Petitioner's three lots a total amount of $47,758.20. *Id.* Petitioner objected to these assessments; believing that the amount assessed far exceeded the benefit to her vacant lots. *Id.* Petitioner presented evidence that her lots were worth approximately $50,000.00, regardless of the improvement, as well as evidence showing that she could have engaged the same company to complete the improvements to her lots at a fraction of the cost. (App.9a-10a). Despite this evidence, and Petitioner's contention that the special assessment commission failed to make the required finding of the value of the benefit to her lots, the assessments were approved by the Commission and the Board. (App.3a)

As allowed by North Dakota law, Petitioner appealed her special assessments to the district court for Morton County, State of North Dakota. *Id.* Petitioner's appeal stated that the Board and the Commission failed to find the value of the benefit to her properties and that she had been assessed differently than similarly situated property owners. *Id.* After twice

remanding the case to the Commission for additional factual findings, the district court affirmed the assessments to Petitioner's properties. Petitioner appealed this ruling to the Supreme Court of North Dakota. (App.3a-4a). After oral argument, a 3-2 majority of the Supreme Court of North Dakota affirmed the district court's decision. (App.1a). The dissenting justices noted that the City had failed to use a separate formula to determine the benefits and assessed amounts to the affected parcels. (App.13a) The dissent further noted that the majority's opinion used facts and rationale that were never advanced by the parties to the litigation. (App.19a-20a)

Petitioner filed a petition for rehearing, in part, so she could address the rationale and argument that the majority of the Supreme Court of North Dakota had crafted on behalf of the City. Again, in a 3-2 decision, the Supreme Court of North Dakota denied the petition. (App.47a-48a). The minority filed a dissent stating that the petition for rehearing should have been granted so that Petitioner could have addressed the arguments relied upon by the Supreme Court of North Dakota. (App.49a-50a)

B. Statement of Facts

In accordance with applicable provisions of the North Dakota Century Code, in February 2015, a public hearing was held with regard to repairs to certain streets and alleys within the City of Mandan. (App.2a) In March of 2015, the Board of City Commissioners adopted resolutions creating Street Improvement District No. 199 and declaring the cost of the improvements would be specially assessed against the properties in the district which would be especially benefited by

project. *Id.* The improvement district contemplated construction on streets between 4th Avenue Northeast to Mandan Avenue and between Main Street and 3rd Street Northeast in Mandan. *Id.* The total cost of the project was estimated to be $3,653,297 with approximately five percent of the project being paid by city sales tax. *Id.* The remainder was to be assessed to the benefiting properties. *Id.*

The improvements actually cost $3,316,595.73. *Id.* Of that amount, the City paid $225,000.00, and the remaining cost of $3,091,595.73 was specially assessed to the properties purported to be especially benefited by the improvements. *Id.* In July 2017, the Mandan Special Assessment Commission published a notice of a meeting in August 2017 that contained the items of expense of the improvement, allocation of a portion of the cost to the City, and the net amount to be assessed. *Id.* The notice provided a list of properties alleged to be especially benefited by the construction performed in the project and the amounts to be assessed. The notice stated:

> We the undersigned, constituting the Special Assessment Commission of the City of Mandan do hereby certify that the following is a true and correct list of the particular lots of land which, in the opinion of the Commission, are especially benefited by the construction performed . . . showing the amount against each lot or tract, the same is a true and correct assessment of the property there in described to the best judgement of the members of the Commission.

(App.3a)

In August 2017, the Special Assessment Commission, over Petitioner's objection, approved the proposed assessments against the especially benefited properties and moved the decision to the Board for its consideration. *Id.* The Board approved the special assessments in October 2017. *Id.*

Petitioner owns three undeveloped residential lots in the improvement district. Each lot was assessed $15,928.40, for a total of $47,785.20. *Id.* Petitioner objected to the assessments against her properties, claiming they exceeded the value of the benefits thereto. *Id.*

Pursuant to North Dakota law, Petitioner appealed the Board's decision approving the special assessments to the district court for Morton County, North Dakota. *Id.* The district court twice remanded the case to the City for further findings on the value of the benefits to Holter's properties. *Id.* In issuing its first order of remand, the district court judge specifically found that:

> . . . [t]he record, however, fails to indicate the amount of 'the special benefit accruing to each lot or parcel of land from the improvement.' As a result, this Court is unable to determine whether the city erred in its determination because either the record is incomplete or the City failed to determined [sic] 'the amount in which each of the lots and parcels of land will be especially benefited . . .

(App.45a)

Following the remand, the district court judge again found that the record failed to indicate the value of "'the special benefit accruing to each lot or

parcel of land from the improvement.' The City is once again directed to supplement the record to provide the Court with the method used to decide benefits and apportion costs to individual properties within the assessment district at issue in this case." (App.38a).

In November of 2018, pursuant to the second remand, the City of Mandan's Special Assessment Commission met and determined that under the City's Special Assessment Policy, Holter's properties were benefited by the amounts assessed against them. (App.26a). The only additional findings from the November 2018 meeting stated:

> Winks [commissioner] moved in conformance with the City of Mandan's Special Assessment Policy and the methods prescribed therein, were used to decide the benefits and costs to the Holter properties/parcel number B20-1, B20-2 and B20-3 in the amount of $15,928.40 for each parcel and that the parcels are specially benefitted in that amount by reason of the improvements in Street Improvement District 199.

Id.

The district court affirmed the City's special assessments against Holter's properties. (App.34a). The court concluded the special assessments to Holter's properties under the City's policy were consistent with the amounts assessed to other properties and were not arbitrary, capricious, or unreasonable. *Id.* However, the district judge's Memorandum Opinion on Appeal failed to acknowledge that the formula used by the City to determine the amounts assessed to the affected parcels was the same formula the City used to deter-

mine the value of the special benefit to each affected parcel.

Holter appealed the decision of the district court to the Supreme Court of North Dakota. Holter submitted her Appellant's Brief on October 28, 2019. The City of Mandan submitted its Appellee's Brief on November 25, 2019, and Petitioner submitted her reply brief on December 12, 2019. Oral argument was had on January 21, 2020.

On July 22, 2020, the Supreme Court of North Dakota issued its Opinion affirming the assessments to Petitioner's properties. The Opinion specifically stated that:

> . . . the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work. While the findings by the Special Assessment Commission on the amount of the benefit may be somewhat conclusory, the amount of the benefit was determined to be less than the total cost and was determined to be a just proportion of the total cost based on the City's formula.

(App.11a).

At the oral argument, both Petitioner and the City of Mandan were represented by counsel. Over the course of the argument, both attorneys answered questions from the five Justices of the Supreme Court of North Dakota. At no time did either party

reference the amount of $225,000.00 which was paid by the City of Mandan. Furthermore, no member of the court asked any question, or made any comment, referencing the $225,000.00 which was paid by the City of Mandan.

In a dissenting opinion, joined by Chief Justice Jensen, Justice Tufte noted that:

> . . . the City calculated its determination of the benefit to Holter's property using the same formula by which it calculated the cost it assessed to that property. Under the City's policy, the benefit determination for a lot is defined as the unit cost allocation. The City's reduction of total assessments by 5% does not convert what is a cost allocation into a benefit determination. The City's policy thus subverts the express intent of the statute that costs assessed to a lot be limited to no more than the benefit. The majority acknowledges the City's interchangeable use of assessment and benefit but appears to announce a rule that affirms the City's direct allocation of cost because something less than 100% of the total cost is assessed against the properties in the district.

(App.13a).

The dissent noted that an important statutory safeguard for property owners was being eliminated, and that this was, in essence, a deprivation of due process. *Id.* This deprivation of due process came about because the City's policy makes it "impossible to arrive at a finding that costs exceeded benefits." (App.14a). While a property owner might be able to

lodge a challenge to the City's valuation of the benefit, that challenge will always be futile. *Id.*

Justice Tufte went on to note that the majority opinion went beyond any arguments made by the City. The dissent expressed that "at no point in this Court or in the district court did the City ever articulate [the $225,000.00] deduction as a rationale supporting its determination of benefit in the special assessment process." (App.19a). The City failed to make any reference to the $225,000.00 reduction of cost at any point in the litigation. This was true even though the matter had been remanded twice by the district court. Justice Tufte rightly noted that this was "the first instance where this Court, in the absence of any satisfactory explanation of how a political subdivision determined the amount of benefit to each lot resulting from a special assessment project, engaged in its own search of the record to invent an explanation on behalf of a political subdivision." (App.19a-20a).

Petitioner filed her petition for rehearing on August 6, 2020. Petitioner requested rehearing, in part, to seek an opportunity to respond to the Supreme Court of North Dakota's judicially created argument regarding the $225,000.00 deduction. (App.49a). On September 21, 2020, the Supreme Court of North Dakota entered its Order denying the petition for rehearing. This time, Chief Justice Jensen, joined by Justice Tufte, dissented to the denial for rehearing. The dissent contained the following passage:

> Paragraph 21 of the majority opinion asserts "The Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the cost and

> expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work." What paragraph 21 of the majority opinion omits is recognition that the City never advanced that argument in this Court or in the district court. This Court, not the City, articulated the $225,000 deduction as a rationale supporting the City's determination of benefit in the special assessment process. There is not a single reference to the $225,000 dollar reduction of costs and expenses in the City's brief to this Court. The record does not reflect the City ever advancing the rationale articulated by this Court as a justification or an explanation to the district court — not in the first appeal to the district court, and not after either of the two district court remands to the City demanding an explanation of the benefits. The petition, in part, seeks an opportunity to address the rationale of this Court, an opportunity that Holter has never been given because the rationale was never advanced by the City and was first articulated in the opinion of this Court issued subsequent to the briefing and oral argument.

(App.49a).

Petitioner now seeks a Writ of Certiorari from this honorable Court.

REASONS FOR GRANTING THE PETITION

I. TO AVOID FURTHER VIOLATIONS OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE, THIS COURT SHOULD CLARIFY THAT SPECIAL ASSESSMENTS MUST CONSIDER THE VALUE OF THE SPECIAL BENEFITS TO A PARTICULAR PARCEL OF PROPERTY INDEPENDENTLY OF THE AMOUNTS ASSESSED TO THAT PARCEL OF PROPERTY OR THE COSTS OF THE PROJECT BORNE BY THE ASSESSING AUTHORITY.

This Court should grant this Petition so that it may clarify that determinations of special assessments must take into account the peculiar benefit accruing to the assessed property without regard to the costs of the improvement to be assessed to the property or consideration of the costs borne by the public. This would distill Takings Clause jurisprudence to the core principal that, in the context of public improvements, the Constitution is first concerned with the rights of private property owners. If the Judgment of the Supreme Court of North Dakota is allowed to stand, it may very well provide a road map for other jurisdictions to justify extravagant projects and to assess those costs to individual landowners, regardless of whether they receive an equivalent benefit. This is already the practical effect of the decision in North Dakota.

In its *Village of Norwood v. Baker* decision, this Court stated that:

> . . . the principle underlying special assessments to meet the cost of public improvements

> is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

Village of Norwood v. Baker, 172 U.S. 269, 278-79 (1898).

In theory, the benefits conferred to the property abutting the improvement should be full compensation

for the expense the taxing authority assesses to that property, so that the owner suffers no pecuniary loss. § 38:6. Nature of special assessment or taxation—Benefit conferred theory, 14 McQuillin Mun. Corp. § 38:6 (3d ed.)(internal citations omitted). To levy an assessment against an abutting property in excess of the benefit the improvement provides to that property is shifting the cost of the improvement from the public, who presumably benefits from the improvement, to the owner of the abutting property. It amounts to a confiscation of that owner's property under the guise of taxation.

In the instant case, Petitioner objected to her assessments because the City failed to make any findings as to how much the improvements would benefit her property, if any. (App.3a). Nothing in the record showed that specific findings of benefit values had been made for any properties within the Street Improvement District. The record showed only (a) what the cost of the project was, (b) how much of those costs were paid by the City, and (c) the amounts assessed to each parcel within the Street Improvement District. The district court recognized this and remanded the matter to the City on two separate occasions. *Id.* After each remand, the City failed to offer any evidence that the value of the benefit to Petitioner's property had been determined. The only additional finding made by the Special Assessment Commission was to say that they had acted in accordance with the Special Assessment Policy. (App.4a)

North Dakota precedent notes that, in a case involving an appeal from a decision of a local governing body, a court's review is limited so "that the court does not substitute its judgment for that of the local

governing body which initially made the decision. In an appeal . . . the record is adequate to support the findings and conclusions of the board if it allows us to discern the rationale for the decision." *Dahm v. Stark County Board of County Commissioners*, 841 N.W.2d 416 (N.D. 2013). Despite the fact that the record was devoid of any evidence pertaining to a finding of the value of the special benefit to Petitioner's properties, the district court affirmed the City's decision. Petitioner was given an appeal in name only. The district court failed to address the fact that the City had not made any determination of the special benefits to Petitioner's properties, or that if the City had made such a determination, it did so based on the exact same formula as it used to assess the costs to her properties.

Petitioner's appeal to the Supreme Court of North Dakota was similarly futile but had far broader implications. On appeal, Petitioner continued to argue that the City had failed to determine the value of the benefits to Petitioner's properties and that the City's alleged method of benefit determination was nothing more than an allocation of costs. Petitioner argued that the formulas for benefit valuation and for cost allocation were one-in-the-same. The City argued that its policy was allowed to be based on front footage, and that it was similar to other policies throughout the state. At oral argument, the City conceded that the formula used to determine the value of the benefit to a parcel in the Street Improvement District was the same formula it used to determine the amount to be assessed to a parcel in the Street Improvement District. (App.13a). In the end, none of these arguments swayed the Supreme Court of North Dakota.

The rationale for the majority's affirmance of the City's assessments to Petitioner's properties is found in paragraph 21 of the Supreme Court of North Dakota's opinion, which reads:

> Although the City's determination of benefits and assessments is based on a formula similar to others upheld by this Court, this case does raise some concerns. Under the City's policy, the terms "benefit" and "assessment" appear to be used interchangeably, which may explain why the special assessment commission determined the amount of the benefit to Holter's properties equaled the amounts assessed to them. However, the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work. While the findings by the Special Assessment Commission on the amount of the benefit may be somewhat conclusory, the amount of the benefit was determined to be less than the total cost and was determined to be a just proportion of the total cost based on the City's formula.

(App.11a).

The City did not argue that, because it had deducted $225,000.00 from the total costs of the project, it had determined the benefit to the properties in the Street Improvement District. In fact, the number "$225,000.00" did not appear in any filing or submission

authored by any party to this case. It did not appear in any order from the district court. Paragraph 21 of the majority opinion was the first time this rationale had been set forth in the proceedings.

The dissenting opinion correctly noted that the majority opinion erred in "reasoning that by deducting a modest percentage of the total project cost from the total amount assessed, the City had decoupled cost and benefit" and inferred that the City "determined the benefits for all properties assessed was less than the total cost of the work." (App.16a). The majority and dissent conceded that the City used the terms "benefit" and "assessment" interchangeably.

In the instant case, it is uncontested that the City uses the exact same formula to determine the alleged benefit to an assessed property, as well as the amount which will be assessed to that same property. The City's formula took the total costs of the improvement, subtracted a nominal amount that was paid by the City, and then determined the amount of the remainder to be assessed to each parcel within the Street Improvement District. The dissent properly reasoned that this was an absurdity because if the costs of the project doubled, so too would the alleged benefit. (App.17a-18a). This also necessarily meant that, under the majority opinion, no challenge to a special assessment levied using the City's methods could be challenged. Justice Tufte's dissent deftly addressed this point and its perils; noting that "because N.D.C.C. § 40-23-07 requires the benefit to be compared to allocated cost, the benefit determination may not be calculated by the same formula that allocates cost." (App.17a).

As interpreted and approved by the majority of the Supreme Court of North Dakota, the City's policy, and the assessments on Petitioner's lots, amounts to an absolute rule that the properties abutting the assessment may be assessed by the front foot for a fixed sum without any right for Petitioner to show that the assessed sum is in excess of the benefits received. This is because it is impossible for the City's formula to ever assess an amount greater than the benefit conferred. This is a direct contravention of this Court's *Norwood* precedent. As such, this Petition should be granted.

II. THE SUPREME COURT OF NORTH DAKOTA ABUSED ITS DISCRETION BY ACTING AS AN ADVOCATE FOR THE CITY OF MANDAN AND, IN DOING SO, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FEDERAL PRECEDENT RECENTLY ARTICULATED IN *UNITED STATES V. SINENENG-SMITH.*

A. Due Process Concerns

In deciding Petitioner's appeal on grounds not advanced by either party to the action, and in denying her petition for rehearing so that she could not have an opportunity to address their rationale, the Supreme Court of North Dakota discarded its role as a neutral arbiter and took on the role of an advocate for the City. Petitioner was not given notice that the Supreme Court of North Dakota would entertain arguments or rationales that had not been advanced at any other point in the litigation. This denied her the chance to have a hearing to address that argument and to present a case in opposition to the same. By affirming the special assessments against her properties on grounds

not advanced by the parties, and by refusing to let her be heard with regard to those grounds, Petitioner has been deprived of her property without due process of law.

Where a state law is challenged on due process grounds, this Court reviews whether the state has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 42, 119 S.Ct. 977, (1999). The touchstone of due process under the Fourteenth Amendment is notice and an opportunity to be heard.

Petitioner has a protected property interest in the assessed real estate, and in the funds to be paid to the City pursuant to the special assessments. By denying Petitioner the opportunity to be heard on the merits it raised *sua sponte*, the Supreme Court of North Dakota failed to provide Petitioner due process of law. The majority decision, if allowed to stand, will deprive her of her protected property interest.

B. Public Policy Concerns

In his opinion dissenting on the denial of the petition for rehearing, Supreme Court of North Dakota Chief Justice Jon J. Jensen specified that:

> The petition, in part, requests an opportunity to address the rationale underlying the majority's affirmance of the special assessment. Paragraph 21 of the majority opinion asserts "the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and

> expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work." What paragraph 21 of the majority opinion omits is recognition that the City never advanced that argument in this Court or in the district court. This Court, not the City, articulated the $225,000 deduction as a rationale supporting the City's determination of benefit in the special assessment process. There is not a single reference to the $225,000 reduction of costs and expenses in the City's brief to this Court. The record does not reflect the City ever advancing the rationale articulated by this Court as a justification or an explanation to the district court—not in the first appeal to the district court, and not after either of the two district court remands to the City demanding an explanation of the benefits. The petition, in part, seeks an opportunity to address the rationale of this Court, an opportunity Holter has never been given because the rationale was never advanced by the City and was first articulated in the opinion of this Court issued subsequent to the briefing and oral argument.

(App.49a).

Chief Justice Jensen worried that "a decision founded on rationale never advanced by the taxing authority, without providing a taxpayer an opportunity to respond, makes this Court 'little more than an apologist for the actions of the executive branch of government.'" (App.50a).

This dissent touches on just a few of the numerous considerations of public policy which are strengthened by a stronger and more rigid principle of party presentation. The U.S. Court of Appeals for the District of Columbia Circuit has addressed the roles of the courts and litigants in appellate procedures by noting that:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's brief contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution. Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, "important questions of far-reaching significance" are involved.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (internal citations omitted). The North Dakota Rules of Appellate Procedure closely mirrors the Federal Rules and the *Carducci* Court's discussion is instructive.

At its essence, the principle of party presentation allows parties to have confidence that a court will decide their dispute without favoritism, that the roles of the court and counsel will be consistent, and that a court will not provide assistance to one party at the detriment of another. Further, it preserves judicial and party resources by narrowing the issues, evidence, and arguments before the courts. Deciding cases on the issues and theories advanced by the parties also avoids creating a perception that the courts are engaging in judicial activism. This is as true in federal courts as it is in state courts. As articulated above, the principle also strengthens constitutional due process guarantees by ensuring that parties are given an opportunity to address substantive and dispositive issues which may be raised by a court after briefing.

Justice Tufte's dissent to the majority opinion observed that the Supreme Court of North Dakota had gone looking for facts and arguments to invent a justification for the determination of the political subdivision. (App.19a-20a). This speaks loudly to the notion that such a decision erodes confidence in the impartiality of the judiciary. This is especially true when a case concerns the decisions of another governmental entity.

C. Federal Precedent

In general, courts rely on parties to frame issues for decision and assign courts the role of neutral arbiter of the matters the parties present. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "To the extent courts

have approved departures from the party presentation principle . . . the justification has usually been to protect a *pro se* litigant's rights." *Id.* While this Court has also noted that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," the Supreme Court of North Dakota's decision in this matter fails to clear the bar; as it failed to apply the proper construction of governing law.

This Court has more recently reinforced the importance of the principle of party presentation in its *United States v. Sineneng-Smith* decision. *United States v. Sineneng-Smith*, 140 S.Ct. 1575. In *Sineneng-Smith*, a unanimous Court held that courts "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties. *Id.* (citing *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987).

While the *Sineneng-Smith* and *Greenlaw* decisions arose out of, and were applicable to, federal cases, there is an open question as to whether or not a state court of last resort is beholden to these same principles. The Supreme Court of North Dakota's decision to deny rehearing necessarily means that Petitioner has no other state recourse to address this constitutional issue. While this is absolutely appropriate when the litigants have been able to address the arguments upon which the court decided the dispute, it is far less appropriate when the court has substituted its own argument for the parties' and has not given them an opportunity address the same. The instant case

has been competently and zealously litigated by the parties. Both the Petitioner and the City were represented by counsel at each stage of the litigation. As such, *Greenlaw's* departure for *pro se* litigants is inapplicable.

It is indisputable that the City never mentioned, much less relied upon, the $225,000.00 payment as a means of calculating the benefit to Petitioner's properties. The dissenting opinions of Chief Justice Jensen and Justice Tufte express great concern about the consequences of the Supreme Court of North Dakota's departure from normal appellate procedures. The majority's opinion in this case inappropriately substituted its argument for the City's. In this matter, it sallied forth looking for a right to wrong and, in doing so, denied Petitioner of notice and hearing while wrongly deciding a takings case.

Because this case raises considerable due process and public policy concerns, and because the decision of the Supreme Court of North Dakota contravenes existing federal precedent, this Petition should be granted.

CONCLUSION

For the foregoing reasons, Petitioner Deborah Holter respectfully requests that this Court issue a writ of certiorari to review the judgment of the Supreme Court of North Dakota.

Respectfully submitted,

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DECEMBER 18, 2020