

No. _____

In the Supreme Court of the United States

William S. Wilkinson, et al.,

Petitioners,

v.

The Board of University and School Lands of the
State of North Dakota, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the North Dakota Supreme Court erred in finding the Fifth Amendment to the United States Constitution does not require just compensation when the State of North Dakota claimed title to, and leased private oil and gas interests for over a decade, which the North Dakota Supreme Court ultimately held the State did not own?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners William S. Wilkinson, Ann L. Nevins, Ann L. Nevins, and Amy Perkins as Personal Representatives for the Estate of Dorothy A. Wilkinson; Barbara Caryl Materne, Trustee of the Petty Living Trust; Charlie R. Blaine and Vanessa E. Blaine, as Co-Trustees of the Charlie R. Blaine and Vanessa E. Blaine Revocable Trust; Lois Jean Patch, life tenant; and Lana J. Sundahl, Linda Joy Weigel, Deborah J. Goetz, Marva J. Will, Ronald J. Patch, Michael Larry Patch, and Jon Charles Patch, Remaindermen (collectively, the “Wilkinsons”), were the plaintiffs in the district court and appellants in the North Dakota Supreme Court.

Respondents The Board of University and School Lands of the State of North Dakota,

Brigham Oil & Gas, LLP; Statoil Oil & Gas LP, were defendants and in the district court and appellees in the North Dakota Supreme court. Respondents EOG Resources, Inc.; XTO Energy Inc., Petrogulf Corporation; and all other persons unknown who have or claim an interest in the property described in the Complaint, were defendants in the district court. Respondent North Dakota State Engineer was an intervenor in the district court and an appellee in the North Dakota Supreme Court.

RELATED PROCEEDINGS

Wilkinson v. The Board of University & School Lands of the State of North Dakota, 2022 ND 183, North Dakota Supreme Court. Judgment entered November 10, 2022.

Wilkinson v. The Board of University & School Lands of the State of North Dakota, 2020 ND 179, North Dakota Supreme Court. Judgment entered August 27, 2020.

Wilkinson v. The Board of University & School Lands of the State of North Dakota, Civil No. 53-2012-CV-00038. Judgment entered January 10, 2022.

Wilkinson v. The Board of University & School Lands of the State of North Dakota, Civil No. 53-2012-CV-00038. Judgment entered September 6, 2019.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the North Dakota Supreme Court.

OPINIONS BELOW

The North Dakota Supreme Court's opinion (App. 1a-42a) is reported at 2022 ND 183, 981 N.W.2d 853. The district court's opinion is unpublished but reproduced in the appendix (App. 71a-152a).

JURISDICTION

The North Dakota Supreme Court entered on judgment resolving all claims in the case on November 10, 2022. Jurisdiction in this Court exists under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States

Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The State Ownership of Missouri Riverbed Act, as set forth in Chapter 61-33.1, is reproduced in full in the appendix (App. 174a-184a).

STATEMENT OF THE CASE

A. Legal Background

The Takings Clause of the Fifth Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment to the United States Constitution, requires just compensation when the government takes private property for public use. U.S. Const. amend. V; U.S. Const. amend. XIV. As this Court has repeatedly recognized, “government action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’” *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 314 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The constitutionally required just compensation

“generally consist[s] of the total value of the property when taken, plus interest from that time.”

Knick v. Township of Scott, Pa., 139 S. Ct. 2162, 2170 (2019).

B. Factual Background

Over half a century ago, the Wilkinson family (the Petitioners’ predecessors in interest) acquired title to 286.04 acres of property in Sections 12 and 13, Township 153 North, Range 102 West, in Williams County, North Dakota. (*See* App. 4a, at ¶ 2). In 1958, the Wilkinsons sold the surface of that property to the United States for construction and operation of the Garrison Dam and its reservoir, Lake Sakakawea. *Id.* In the deed, however, the Wilkinsons reserved their interest in the minerals in and under the property (“Wilkinson Property”), which include valuable oil and gas

interests. *See id.* It is undisputed the Wilkinsons have leased the minerals numerous times since they conveyed the surface of the property to the United States. *Id.* at ¶ 3.

In 2010, despite the Wilkinsons' longstanding ownership interests, the State of North Dakota ("State"),¹ a stranger to title, claimed it owned the Wilkinson Property. (*See* App. 5a at ¶ 4).

The State purportedly claimed ownership based studies, commissioned by the State, to measure the current and historic ordinary high water mark ("OHWM") of the Missouri River. (*See*

¹ The Wilkinsons collectively refer to Respondents The Board of University of School Lands of the State of North Dakota and the North Dakota State Engineer as the "State."

App. 28a at ¶ 43).² Upon admission to the Union in 1889, the State of North Dakota acquired title under the equal footing doctrine to the beds of navigable waters within its boundaries up to the OHWM, including the bed of the Missouri River. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 580-81 (2012). Rivers are “variable,” and the Missouri River was known to “shift[] and flood[] often.” *Id.* at 582. Capitalizing on these dynamics, the State claimed “title to the bed of the Missouri River up to the *current*” OHWM to broadly assert ownership over valuable mineral rights reserved by private owners, such as the Wilkinsons. *Wilkinson*

² These studies are known as the Phase I and Phase II studies. Lake Sakakawea, the Reservoir for the Garrison Dam, altered the OHWM, prompting the studies.

v. Board of Univ. & Sch. Lands, 2017 ND 231, ¶ 7, 903 N.W.2d 51 (“*Wilkinson I*”) (emphasis added).

In addition to claiming ownership of the minerals, the State entered into leases for the Wilkinson Property. (App. 5a, at ¶ 4). As a result of these leases, the State received royalties for oil production from the Wilkinsons Property in Section 12 and bonus payments for Section 13. *Id.*

As a result of the State’s competing claim to ownership of the Wilkinson Property, royalty payments to the Wilkinsons were suspended, and Statoil escrowed the royalty payments to the State at the State-owned Bank of North Dakota. (*See* App. 6a, at ¶ 5).

C. Procedural Background

In 2012, the Wilkinsons brought this lawsuit. (*See* App. 6a, at ¶ 5). As relevant here, the

Wilkinsons sued the State seeking to quiet title to the minerals at issue and just compensation pursuant to the Takings Clause of the Fifth Amendment.³ *See id.*; *see also* U.S. Const. amend. V; 42 U.S.C. § 1983.

On May 18, 2016, the state district court granted summary judgment in favor of the State, finding the State owned the Wilkinson Property. (App. 7a, at ¶ 6). The Wilkinsons appealed. *Id.* During the pendency of the appeal, the North Dakota Legislature enacted Chapter 61-33.1 of the North Dakota Century Code, limiting the State’s ownership claim “only to the *historical* Missouri riverbed channel up to the” OHWM before

³ The Wilkinsons brought other claims against the State and other defendants, but the federal takings claim is the only claim at issue for purposes of this Petition.

construction of the Garrison Dam. N.D. Cent. Code § 61-33.1-02 (emphasis added). Accordingly, the North Dakota reversed the district court's grant of summary judgment and remanded for consideration of N.D.C.C. ch. 61-33.1. (*See* App. 7a, at ¶ 6); *see also Wilkinson I*, 2017 ND 231, ¶ 29, 903 N.W.2d 51 (reversing and remanding).

On remand, the district court granted summary judgment in favor of the Wilkinsons, confirming that the Wilkinsons – and not the State – own the Wilkinson Property. (*See* App. 7a, at ¶ 7). The State appealed before a final judgment disposing of all claims, and the North Dakota Supreme Court affirmed that the Wilkinsons own the Wilkinson Property. *See id.*; *see also Wilkinson v. Board of Univ.*, 2020 ND 179, ¶ 32, 2020 ND 179 (“*Wilkinson II*”) (affirming ownership) (republished

at appendix 43a-69a). The North Dakota Supreme Court then remanded for the district court to resolve the Wilkinsons' remaining claims, including their federal takings claim, and to determine damages. (*See* App. 7a-8a, at ¶ 7). Following that decision in November 2020, the Wilkinsons finally received royalties owed to them since November 2010. (*See* App. 8a, at ¶ 8).

In July 2022, on remand, the district court held a bench trial on the remaining claims and damages. *See id.* at ¶ 9. Contrary to the law, the district court dismissed the Wilkinsons' takings claim and denied damages, interest, costs, and attorney's fees. (App. 151a-152a).

The Wilkinsons appealed, and the North Dakota Supreme Court affirmed. (App. 1a-42a). The North Dakota Supreme Court confirmed that

the Wilkinsons – and not the State – own the Wilkinson Property; that the State claimed ownership to and entered into leases to the Wilkinson Property; and that, because of the State’s actions, the Wilkinsons did not receive royalties for production on the Wilkinson Property for a decade. *See id.* However, the North Dakota Supreme Court wrongly concluded that the State’s actions did not constitute a taking under the Fifth Amendment. *See id.* From that decision, the Wilkinsons petition for review.

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the Takings Clause of the Fifth Amendment requires just compensation when the State claims ownership to, and leases, valuable, private oil and gas interests, depriving the private

owner of royalty payments for a decade. The Wilkinsons respectfully submit that the Takings Clause requires just compensation under these circumstances. The North Dakota Supreme Court, however, found that no just compensation was due, because the State's conduct was the product of a title dispute and did not amount to a taking under federal law. (App. 17a-29a).

The Court should hear this case because it involves a decision by a state court of last resort, the North Dakota Supreme Court, on an important question of federal law that conflicts with opinions of the Federal Circuit and is inconsistent with the existing guidance from this Court on the Takings Clause. *See* Sup. Ct. R. 10(c). Beyond that, this case involves a specific question of federal law on which this Court has not directly opined. *Id.*

Further, this case is a good vehicle to address that important federal question because the underlying facts, and the Wilkinsons' ownership of the Wilkinson Property, are not in dispute. Accordingly, this Petition should be granted so that this Court can correct the North Dakota Supreme Court's decision on federal constitutional law.

A. The Decision Below Conflicts with the Decisions of this Court and the Federal Circuit

The district court characterized this matter as a mere "title dispute" rather than an unconstitutional taking. (App. 104a-105a). That characterization was contrary to federal law. The North Dakota Supreme did correctly find that "[r]eframing the action as merely an action for quiet title does not preclude a determination of the takings claim on the merits." (App. 16a at ¶ 23).

However, the North Dakota Supreme Court erroneously deviated from federal law in finding the State's conduct here nevertheless did not amount to a taking. More specifically, the North Dakota Supreme Court erred in finding that the government conduct at issue did not amount to a taking under federal law when the State claimed title to, leased, the minerals, causing royalty payments to be withheld for over a decade.

Review of this case is warranted because the decision below conflicts with decisions from the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims.

Courts in the Federal Circuit have found that the mere assertion of title by the government, standing alone, does not amount to an actionable

taking. However, those cases also recognize that a taking *does* occur when such an assertion of title is coupled with other government conduct that interferes with a private property interest. *See generally Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983); *Central Pines Land Co. v. United States*, 107 Fed. Cl. 310 (Fed. Cl. 2010) (“*Central Pines II*”); *Central Pines Land Co. v. United States*, No. 98-314L, 2008 WL 8958319 (Fed. Cl. Sept. 30, 2008) (“*Central Pines I*”) *Pettro v. United States*, 47 Fed. Cl. 136 (Fed. Cl. 2000); *see also Petro-Hunt, LLC v. United States*, 90 Fed. Cl. 51 (Fed. Cl. 2009). In other words, the government’s “assertion of title plus something more” is an unconstitutional taking. *Central Pines II*, 107 Fed. Cl. at 325.

Numerous cases have found the issuance of mineral leases is “‘something more’ than the mere assertion of title,” constituting a taking. *Central Pines II*, 107 Fed. Cl. at 325. For example, like in this case, in *Central Pines*, a property owner sold the surface of the land to the United States but reserved ownership of the minerals. *Central Pines I*, 2008 WL 8958319, at *1. Sixty years after the conveyance, the federal government circulated an internal memorandum determining the government actually owned the minerals. *Id.* at *3. The government subsequently leased the minerals. *Id.* The mineral owner filed a quiet title action along with a takings claim under federal law. *Id.* at *4. The government argued that a mere incorrect assertion of ownership, or a title dispute, is not a taking. *Id.* at *4-5. The Court of Federal Claims

rejected the government's argument, explaining that any good-faith belief by the government that it owned the minerals did not change the fact that the government issued leases for minerals it did not own. *Id.* at *11-12.

Other cases from the Federal Circuit have reached the same conclusion in similar contexts. *See, e.g., Yuba*, 723 F.2d 884 (reversing summary judgment to the government where the government asserted a good-faith claim to title but nonetheless interfered with private mineral rights); *Pettro*, 47 Fed. Cl. 136 (finding the government's assertion of title cannot excuse interference with private mineral rights).

Despite the guidance from these cases in the Federal Circuit, the North Dakota Supreme Court found that the State claiming ownership to,

entering into mineral leases for, the Wilkinson Property was not “something more” than a mere government assertion of title. (App. 37a at ¶ 60). The North Dakota Supreme Court reached that conclusion despite the fact that the State interfered with the Wilkinsons receiving royalties on its minerals for over a decade. (App. 41a at ¶ 67).

Inconsistent with the opinions of the courts from the Federal Circuit, the North Dakota Supreme Court found no temporary physical taking, because “the leases neither invaded the property nor legally authorized a physical invasion or occupation of the [Wilkinson] property.” (App. 21a, at ¶ 31); *cf. Central Pines II*, 107 Fed. Cl. at 325, 238 (assessing mineral leases as a temporary physical taking); *Pettro*, 47 Fed. Cl. at 138, 145-49 (same for preventing plaintiff to mine minerals);

Petro-Hunt, 90 Fed. Cl. at 64, 67 (same for mineral leases). The North Dakota Supreme Court otherwise rejected that a regulatory taking occurred because the Wilkinsons were also able to enter into leases for their minerals, ignoring the total deprivation of the royalties from the production under the leases with the State. (App. 29a-30a, ¶ 45).

In all the North Dakota Supreme Court’s decision cannot be reconciled with the cases from the Federal Circuit. Rather, those cases stand for the proposition that the State is not excused from its constitutional duty to pay just compensation simply because it commits a taking under the guise of a title dispute. Instead, once the government asserts title and then does “something more”—such as entering into leases and causing the suspension

of royalty payments—the government has worked a taking, and just compensation is due.

The cases from the Federal Circuit are the most analogous. However, the North Dakota Supreme Court's decision is also inconsistent with the guidance from this Court regarding takings. Review of this case is further warranted on this basis.

The North Dakota Supreme Court erroneously determined that the State's conduct in this case did not interfere with the Wilkinsons' property rights because the Wilkinsons were able to enter into mineral leases on the Wilkinson Property as well. However, that determination wholly that the Wilkinsons were nevertheless deprived of royalty payments for a decade because of the State's interference with their property.

The Wilkinsons' receipt of the royalty payments a decade later does not change the fact that the State worked a taking when it leased the Wilkinson Property, resulting in the suspension of those payments. Rather, this Court has instructed that the Takings Clause of the Fifth Amendment is "self-executing." *First English*, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)). In other words, "a property owner has a constitutional claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2171. Indeed, no government conduct after the taking can "nullify the property owner's existing Fifth Amendment right [to compensation]: '[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to

provide compensation.” *Id.* (quoting *First English*, 482 U.S. at 321). That constitutionally requested compensation includes interest from the time of the taking. *Id.* at 2170.

As applied to this case, these principles provide that the Wilkinsons were entitled to just compensation from the time that the State worked a taking on the Wilkinson Property by claiming ownership to and leasing it, resulting in the deprivation of royalties to the Wilkinsons. At a minimum, the Wilkinsons were entitled to just compensation “at the time” the State interfered with their right to royalties from their oil and gas interests. *Knick*, 139 S. Ct. at 2171. Although the North Dakota Legislature intervened, forcing the State to concede that the Wilkinsons – and not the State – owned the Wilkinson Property, that

“subsequent action by the government” does not relieve the State “of the duty to provide compensation.” *Id.* As a result, the decision below directly conflicts with the guidance of this Court that the Wilkinsons were due just compensation, “plus interest from that time,” for the decade they were deprived the royalty payments. *Id.* at 2170.

In sum, this Court should review the decision below because its conclusions on the federal Takings Clause cannot be reconciled with the opinions from the Federal Circuit or the guidance from this Court.

B. The Decision Below Presents an Important Federal Constitutional Question on which this Court Has Not Directly Opined.

As noted above, the cases from the Federal Circuit are the most analogous in that they directly consider whether the Takings Clause is invoked

when the government frames its conduct as a title dispute as opposed to a taking. This Court’s guidance in seminal cases such as *First English* and *Knick* are consistent with the conclusions reached by those courts in the Federal Circuit—that the government’s assertion of title constitutes a taking when coupled with interference with the private owners property rights. However, this Court has not directly considered the “title dispute” defense that the State asserted to the federal takings claims in this case. Accordingly, the Court should review the decision below in order to directly rule on this important federal constitutional question.

Indeed, guidance is needed on this question. The cases from the Federal Circuit, cited above, demonstrated the government has repeatedly attempted to evade its constitutional duty to pay

just compensation by reframing a taking as a mere title dispute. In addition to the cases from the Federal Circuit, other courts have similarly wrestled with this question, in a variety of contexts. (App. 105a-108a (cases cited therein)). Thus, this is not an isolated incident or question; it is a recurring attack on the Takings Clause that this Court should address.

C. This Case is a Good Vehicle to Decide the Federal Constitutional Question Presented Herein.

The Court should grant review of this case because the decision below is a good vehicle to decide the federal constitutional question presented—whether just compensation is due when the State claims ownership to and leases private mineral interests, depriving the lawful owner of royalty payments for a decade. This case is the

appropriate vehicle for resolving the question of whether the State's position, that it was merely acting as a landowner in disputing title, is a valid defense to a federal takings claim.

This case is a good vehicle because the underlying facts are entirely undisputed. Importantly, it is undisputed that the Wilkinsons own the Wilkinson Property, and that they have owned that property (through their predecessors in interest) for over half a century. It is further undisputed that the State does not now own, nor has it ever owned, the Wilkinson Property. That is, it is undisputed that the State was a stranger to title when it claimed ownership to, and entered leases for, the Wilkinson Property.

Under these circumstances, the Court need not concern itself with the ultimate merits of the

State’s supposed “title dispute,” but can instead focus on the important federal constitution presented: whether just compensation is nevertheless due.

CONCLUSION

The North Dakota Supreme Court erroneously denied the Wilkinsons relief on their federal takings claim, depriving them of the just compensation required under the Fifth Amendment to the United States Constitution. The decision below is inconsistent with federal case law and the guidance from this Court on the Takings Clause. This case is an appropriate vehicle for resolving the important federal constitutional question presented—whether just compensation is due when a government claims ownership to and leases private property, resulting in deprivation of

payment due to the property owner for over a decade. For these reasons, the Wilkinsons' Petition for Certiorari should be granted.

DATED: February 7, 2023.

Respectfully submitted,

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