No. 24A-____

IN THE

SUPREME COURT OF THE UNITED STATES

LIBERTY PETROLEUM CORPORATION,

Applicant,

v.

NORTH DAKOTA INDUSTRIAL COMMISSION, ET AL.,

Respondents

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

Under this Court's Rule 13.5, Applicant Liberty Petroleum Corporation respectfully requests a 60-day extension of time, to and including March 17, 2025, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of North Dakota.[1] That court entered its judgment on September 26, 2024, App., *infra*, at 1a, and denied Applicant's timely petition for rehearing on October 16, 2024, *id.,* at 15a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on January 14, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question concerning whether a State effects a taking requiring just compensation within the meaning of the Fifth Amendment's Takings Clause (U.S. Const. Amend. V) when, by approving an administrative order, that State's highest court puts its imprimatur on a transfer without compensation of ownership of mineral rights, and of actual oil and gas that would otherwise be owned by Applicant, to private parties.

2. Applicant is a small company that, by a state regulatory regime administered by Respondent North Dakota Industrial Commission, had its property taken and given to large oil companies with no compensation. Its property was taken under a regulatory regime called "forced pooling," through which landowners and mineral rightsholders can be forced to participate in oil wells against their wishes. Under forced pooling, a rightsholder will have its mineral rights involuntarily pooled with those of neighboring interests for the purposes of

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[1] Under this Court's Rule 29.6, Applicant states that it is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

developing and operating oil wells. N.D.C.C. § 38-08-08. If someone like Applicant doesn't consent to participate in an oil well stemming from forced pooling, his share of production—that is, the oil—will be withheld until expenses allocated to his share plus a "risk penalty" payable to the owners who advanced his share of costs get paid down. N.D.C.C. § 38-08-08(2)-(3). In North Dakota, the relevant risk penalty is 200%, N.D.C.C. § 38-08-08(3)(a), which means the nonconsenting owner has its oil taken until it covers treble his share of expenses.

3. Until the North Dakota Supreme Court's ruling, this withholding of oil well production was done on a well-by-well basis. *See* North Dakota Industrial Commission Order No. 32353 in Case No. 29746 ("Twin City Technical Case") (2023). So, for example, if a person didn't consent to Well Number 1, and then he did choose to participate in a nearby Well Number 2, his share of production from Well Number 2 wouldn't be withheld to pay down expenses and risk penalty allocated to him for Well Number 1. Similarly, if someone opted to participate in Well Number 1 and was receiving his share of production from that well but then refused consent to Well Number 2, his share of production from Well Number 1 would be safe from being withheld to pay down expenses and risk penalty allocated to him for Well Number 2.

4. The North Dakota Supreme Court's ruling throws that out the window. It approved an administrative order taking all the oil and gas Applicant would own from a much larger unit of land for oil well drilling, which was established at the request of Respondent Burlington Resources Oil & Gas Co. LP, and giving it to the party that paid Applicant's share of costs in the earlier wells to which Applicant didn't consent. North Dakota Industrial Commission Order No. 31792 in Case No. 29224 at para. 19 (2022).

5. Applicant challenged this as a taking, but the court erroneously reasoned that Applicant did not "suffer a permanent physical invasion of [its] property" because it "continues to own" its interests and is "credited with its share of production while that production pays down" the "balance" of expenses and risk penalty from a prior well Applicant didn't consent to. App., *infra*, at 9a. The court called this taking of property to pay back the costs and risk penalty associated with the non-consent well an "economic benefit." *Id*.

6. This reasoning makes no sense. Applicant receives no economic benefit—its mineral rights and oil were forcibly taken. The only economic benefit here is to the beneficiary of the taking. That beneficiary is entitled only to Applicant's share of production from the previous non-consent wells, not Applicant's share of production from other wells on acreage in which Applicant has been force pooled.

7. The North Dakota Supreme Court's holding directly contravenes United States Supreme Court precedent holding that "prohibit[ing] the owner of mineral rights" from extracting them "depriv[es] the mineral rights of practically all economic value." *Sheetz v. County of El Dorado*, 601 U.S. 267, 279 (2024) (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922)). North Dakota law has long-established that working interests under oil and gas leases are interests in real property. *Kittleson v. Grynberg Petroleum Co*., 2016 ND 44, para. 34, 876 N.W. 2d 443 (citing *Corbett v. La Bere*, 68 N.W. 2d 211 (N.D. 1955)). *Slawson Expl. Co. v. Nine Point Energy, LLC* held that "[o]il and gas leases are interests in real property. As such, the working interest – the interest conveyed to the lessee under an oil and gas lease – and the royalty interest – the interest retained by the lessor – are both interests in real property." 966 F. 3d 775, 780 (8th

Cir. 2020). What makes Applicant's working interests valuable – in fact their only value – comes from the right to extract and sell oil and gas for profit.

8. The North Dakota Supreme Court's explicit reliance on Respondent Burlington Resources Oil & Gas Co. LP's assertion that "Liberty continues to own its working interests" (App., *infra,* 9a) is erroneous, and inexplicably so given the court's own quotation (*Id*., 6a) of the unitized area's governing document that clearly states: "The consenting owners who are carrying the Non-Consenting Interest in the Tract **shall be deemed to be owners** of the Non-Consenting Interest in the Tract ("Carrying Owner") until the payout balance has been reduced to zero." (emphasis added).

9. This transfer of ownership of Applicant's working interests to the carrying owners, and their participation in unit activities to the exclusion of Applicant, is a *per se* physical taking of Applicant's real property interests under *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021) as a violation of Applicant's right to exclude others from its property.

10. Furthermore, North Dakota is effecting a physical taking of Applicant's personal property without compensation, because each month Applicant's share of oil and gas from the large new unit is given to the carrying owner. *Horne v. Dep't of Agric.,* 576 U.S. 350, 361 (2015) ("The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government.") Worse still, Applicant's property is hardly taken for a public purpose within the meaning of the Constitution – this is a "bare transfer from A to B for B's benefit." *Kelo v. New London,* 545 U.S. 469 (2005) (O'Connor, J. dissenting, joined by the Chief Justice and Scalia and Thomas, J.J.)

11. The North Dakota Supreme Court's ruling also splits from the constitutional reasoning of a sister state's high court. Under a similar statute, the Utah Supreme Court upheld the "risk penalty" portion of the force pooling regime by noting the constitutional problem that would arise if a state ever did what's now been done to Applicant. Specifically, it noted that an appellant "had the right to participate – or not participate – in [a] second oil well" because the statutory regime respected his "rights" to his share of the oil that came out of the well, and it went on to note that a "serious constitutional problem…would arise if the state simply compelled participation in a speculative venture" without at least giving a person a choice to participate or not. *Bennion v. ANR Prod. Co.,* 819 P. 2d 343, 348 & n.8 (Utah 1991).

12. Good cause exists for a 60-day extension of time to file a petition for a writ of certiorari. Additional time is necessary here, particularly in light of the upcoming holidays, to allow counsel to address fully these important questions of federal constitutional law, especially in the context of a complex state regulatory regime. Undersigned counsel currently faces a press of other matters, and Respondents will suffer no prejudice from a 60-day extension. The only harm here is to Applicant, a small company whose share of oil and gas each month is unconstitutionally taken and gifted to a large oil company.

Accordingly, Applicant respectfully requests that the time to file any petition for a writ of certiorari be extended by 60 days, to and including March 17, 2025.

December 23rd, 2024

Respectfully submitted,

*/s/ Monte L. Rogneby**

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