NO. 23-_____

In the Supreme Court of the United States

MICHAEL L. KISER,
ROBIN S. KISER AND SUNSET KEYS, LLC,

Petitioners,

v.

DUKE ENERGY CAROLINAS, LLC, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state supreme court able to "side-step" the just compensation requirement of the Fifth and Fourteenth Amendments by simply removing pre-existing property rights of owners to real property?

2. Is the North Carolina Supreme Court's decision in holding that an established right of private property no longer exists a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the North Carolina Supreme Court's grant of title and ouster of property rights without payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners and Defendants-Appellees/ Counterclaim Plaintiffs below

Michael L. Kiser; Robin S. Kiser; and Sunset Keys, LLC

Respondents and Plaintiffs-Appellants/ Counterclaim Defendants below

Duke Energy Carolinas, LLC; Thomas E. Schmitt and Karen A. Schmitt; Linda Gail Combs Revocable Trust and Robert Donald Shepherd as Trustee; Donald Reid Hankins; Rebecca Lee Shell; Terry Attinger and Kara Attinger; Daniel Gonzales and Tracy Gonzales; Dennis Fritzler and Tracy Fritzler; Garry R. Wilkinson Revocable Trust and Garry R. Wilkinson and Sandra S. Wilkinson as Trustees; Sandra S. Wilkinson Revocable Trust and Sandra. S. Wilkinson and Garry R. Wilkinson as Trustees; Jason Albert Walser and Adam Carter Walser; William Claypoole and Val Rhae Claypoole; Island Property Owners Association, Inc.; Laurence W. Carstensen Living Trust and Patricia H. Carstensen Living Trust; Jeremy Falls and Michelle Falls; W. W. Sapp; Tommy L. Wallace; Brent Aaron Curtis and Kathryn Rosene Curtis; M. Neil Finger; Jeffrey Lynn Bryant and Barabara Tucker Bryant; Sunset Pointe, LLC; J. Frederick Littlejohn and Cathy D. Littlejohn; David J. Suich and Sherry R. Suich; Jerry Lee Hooper and Barbara N. Hooper; Tracy Lee Hooper and Jerry Bryan Hooper; Walter A. Trott and Kelley B. Trott; Robert S. Weller and Elizabeth A. Weller; Brown D. Overcash Jr. and Ketti W. OVercash; James S. Pope and Betty Jo Poep; Samuel A. Young; Jr and Kimberly A. Young; Warren

Lee Jones Trust and Stuart Barry Jones; Miles Clark Belvin; William L. Bullard and Ann K. Bullard; Terrence E. Gilbert and Donna Gilbert; Jeffrey H. Carlisle; Wayne F. Cherry and Connie G. Cherry; Jeanne Hawver; Joseph B. Grady and Thomas M. Grady; Jeannen H. Allen and Jean B. Hughes; Joseph H. Glenn, IV and Kimberly Daub Glenn; Ann Gardner Glenn and Robert Michael Whitnell; Clarence Michael Underwood and Janna H. Underwood; Joseph Paul Ducey and Diane Elizabeth Ducey; Scott Somerville and Renee Somerville; Theodore H. Corriher; Pamela Robinson McGuire and Johnny Reginald McGuire; John Martin McCoy and Susan Knight McCoy; James Thomas Carroll and Elizabeth L. Carroll; Eric C. Haynes and Tonya M. Haynes; David W. Gerard Trust and Barbara A. Gerard Trust; Scott M. Hopkins and Nancy A. Hopkins; Lester Franklin Eaker; Jr and Dyra R. Eaker; Garland Hughes; David W. Milkins and Patricia M. Milkins; and Robert S. Weller and Elizabeth A. Weller.

CORPORATE DISCLOSURE STATEMENT

Sunset Keys, LLC has no parent company and no public company owns 10% or more of its stock.

LIST OF PROCEEDINGS

North Carolina Supreme Court

No. 398PA21, published as 384 N.C. 275, 283, 886 S.E.2d 99, 105, reh'g denied, 887 S.E.2d 887 (N.C. 2023)

Duke Energy Carolinas, LLC, v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, v. Thomas E. Schmitt and Karen A. Schmitt, Et Al.

Final Opinion Date: April 28, 2023

North Carolina Court of Appeals (Interlocutory)

No. 2021-NCCOA-558, published as 867 S.E.2d 1, 7, review allowed, 867 S.E.2d 666 (N.C. 2022), and review allowed, writ allowed, 867 S.E.2d 668 (N.C. 2022), and review allowed, 867 S.E.2d 670 (N.C. 2022), and rev'd, 384 N.C. 275, 886 S.E.2d 99 (2023), reh'g denied, 887 S.E.2d 887 (N.C. 2023)

Duke Energy Carolinas, LLC, *Plaintiff,* v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, *Defendants/Third-Party Plaintiffs,* v. Thomas E. Schmitt and Karen A. Schmitt, Et Al., *Third-Party Defendants.*

Final Opinion Date: October 19, 2021

State of North Carolina, County of Catawba,
General Court of Justice Superior Division

No. 17 CVS 194

Duke Energy Carolinas, LLC, *Plaintiff,* v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, *Defendants/Counterclaim Plaintiffs.*

Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, *Third-Party Plaintiffs,* v. Thomas E. Schmitt and Karen a. Schmitt, Et Al., *Third-Party Defendants/Counter Claimants.*

Judgment Date: January 2, 2020

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NOW COME PETITIONERS, Sunset Keys, LLC, Michael L. Kiser and Robin S. Kiser, Petitioners/ Appellees, by and through their appellate attorneys, respectfully petitioning this Court for a writ of certiorari to review the judgment of the North Carolina Supreme Court.

OPINIONS BELOW

The North Carolina Supreme Court's Opinion (App.1a) reversing without remand the unanimous North Carolina Court of Appeals Opinion in *Duke Energy Carolinas, LLC v. Michael L. Kiser et al.*, 384 N.C. 275, 283, 886 S.E.2d 99, 105, reh'g denied, 887 S.E.2d 887 (N.C. 2023). The unanimous North Carolina Court of Appeals decision (App.17a) in 2021-NCCOA-558, ¶ 13, 280 N.C. App. 1, 6, 867 S.E.2d 1, 7, review allowed, 867 S.E.2d 666 (N.C. 2022), and review allowed, writ allowed, 867 S.E.2d 668 (N.C. 2022), and review allowed, 867 S.E.2d 670 (N.C. 2022), and rev'd, 384 N.C. 275, 886 S.E.2d 99 (2023), reh'g denied, 887 S.E.2d 887 (N.C. 2023). The Trial Court Order in the Catawba County, North Carolina Superior Court (App.41a) transferring title.

JURISDICTION

The North Carolina Supreme Court reversed the unanimous North Carolina Court of Appeals Opinion on April 28, 2023. App.2a. Petitioners timely filed a Petition for Rehearing on June 2, 2023. The Petition for Rehearing was denied by the North Carolina Supreme Court on June 20, 2023. App.70a. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) and file within the time required within ninety (90) days from the North Carolina Supreme Court's denial of a timely filed Petition for Rehearing which was denied on June 20, 2023.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

> 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 offense 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. XIV, § 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.

STATEMENT OF THE CASE

A. Summary of Law

This Court reviews a state court of last resort when property is taken "without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 707, 130 S. Ct. 2592, 2597, 177 L. Ed. 2d 184 (2010) (*quoting Dolan v. City of Tigard*, 512 U.S. 374, 383-384, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994)). State actors cannot bypass the Fifth Amendment by declaring what was once an "established right of private property no longer exists". *Smith v. United States*, 709 F.3d 111, 1116-17 (Fed. Cir. 2013) (citing Barton H. Thompson, Jr.*, Judicial Takings*, 76 VA. L. REV. 1449 (1990)). *See Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013), aff'd in part, vacated in part, remanded, 782 F.3d 1345 (Fed. Cir. 2015).

The most obvious form of a taking is when property is literally conveyed (as it was here) from one party to another forcibly, but also consists of where the use of a property is curtailed in such a way that it destroys private property. (*See United States v. Causby*, 328 U.S. 256, 261-262, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178, 20 L.E.d. 557 (1872)). The Takings Clause simply and succinctly states "nor shall private property be taken for public use, without just compensation," U.S. Const., amend. V. The Takings Clause is solely focused on the act of taking and not the actor committing the taking. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713-15, 130 S. St. 2592, 2601-02, 177 L. Ed. 2d 184 (2010).

Thus, the injury lies in the act of taking and not who did the taking. *Stop the Beach* at 2592. The Federal Government " . . . retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies . . . ." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 182, 20 L. Ed. 557 (1871). This Court's takings jurisprudence reflects the "settled principle of universal law that the right to compensation is an incident to the exercise of [the power to take] that the one is so inseparable connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 178.

B. Background of the Case

This case arose from a dispute between Duke Energy Carolinas, LLC ("Duke") and Michael L. Kiser and Robin Kiser regarding a retaining wall (the

"Wall") installed by Mr. Kiser in the lakebed of Lake Norman (the "Lake") upon land owned by Mr. Kiser and his brothers in fee simple. The Kiser lake parcel in question in this litigation (the "Kiser Lake Parcel") is encumbered by a flood easement (the "Flood Easement") granted to Duke as the Lake was originally impounded.

Duke commenced this action against Michael L. Kiser ("Mr. Kiser") and Robin Kiser ("Ms. Kiser") by the filing of a complaint and issuance of summons on January 27, 2017 seeking the removal of a retaining wall the Kisers had constructed on their own land. The Kisers answered and counterclaimed, and were subsequently required by the court to add third-parties (the "Third-Parties") on February 13, 2017. Ultimately the entity Sunset Keys, LLC ("Sunset Keys") was added as a third-party plaintiff. Sunset Keys is owned by Mr. Kiser and his two brothers. The Kisers and Mr. Kiser's brothers are referred to collectively together with their entity Sunset Keys, as the "Kisers".

The property at issue in this case was owned by Mr. Kiser's grandparents, B. L. Kiser and Zula C. Kiser (the "Kiser Grandparents"). Prior to the construction of the dam and the impoundment of Lake, the Kiser Grandparents owned a large parcel (the "Original Parcel") of land covering portions of what is now the Lake and "Kiser Island". The Kiser Grandparents are now deceased. The ownership of the Kiser Lake Parcel predates the construction of the Cowan's Ford Dam (the "Dam"), which impounds the water that forms the Lake.

Sometime prior to the construction of the Dam, Duke purchased the majority of the land that would eventually form the bed of Lake (the "Lake Bed").

Unlike the majority of owners who held property in what would become the Lake Bed, the Kiser Grandparents declined to sell their land to Duke in fee simple. Ultimately, they would only agree to grant Duke the limited Flood Easement across the Kiser Lake Parcel.

The Flood Easement sets the boundary (the "Flood Boundary") at which Duke's Easement terminates at the dry property, and specifies each of Duke's particular rights to enter upon the Kiser Property. After the death of Mr. Kiser's father in March of 2016, he and his two brothers became the owners of the Kiser Lake Parcel. The Kiser Lake Parcel was then conveyed to Sunset Keys.

Over the years, the Third Parties have installed docks, ramps and other structures (collectively the "Structures") that are located on, over and/or are affixed to the Kiser Lake Parcel. On August 13, 2018, The Honorable Judge Nathaniel Poovey, Catawba County Superior Court Judge presiding, heard argument on Duke's Motion for Partial Summary Judgment, and issued a judgment that was entered on August 22, 2018, which required the Kisers to remove the retaining wall.

Subsequently, Duke and the Third-Party defendants filed for summary judgment as to the Kisers' counterclaims for trespass and declaratory judgment and a judgment and order granting summary judgment was entered on January 2, 2020. The last paragraph of the Trial Court's January 2, 2020 Order, granting in part Plaintiffs/Appellees' and the Third Parties' motions for summary judgment, set forth the following declaration:

> Accordingly, while this Order and Declaratory Judgment does not dispose of all the claims in this action, it is nevertheless the Court's final judgment with respect to the claims addressed and disposed of herein, and the Court finds pursuant to Rule 54(b) of the North Carolina Rule of Civil Procedure that there is no just reason for delay in the entry of final judgment with respect to those claims.

App.48a.

The North Carolina Court of Appeals reversed the Trial Court Order and remanded for trial consistent with its holding in part that federal regulations "do not abolish private proprietary rights" and "to hold otherwise would in effect authorize the taking of property without just compensation" quoting this Court and a prior North Carolina Court of Appeals decision on the same grounds. *Zagaroli v. Pollock*, 94 N.C. App. 46, 54, 379 S.E.2d 653, 657 (1989) *quoting Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-51, 74 S.Ct. 487, 494, 98 L.Ed. 666, 676 (1954). After the unanimous decision by the North Carolina Court of Appeals remanding this interlocutory appeal for trial, Duke and the Third Parties petitioned the North Carolina Supreme Court for discretionary review on February 11, 2022.

The North Carolina Supreme Court reversed the entire North Carolina Court of Appeals decision, thereby reverting in full to the Trial Court Order and the conveyance of title and ouster of Sunset Keys.

REASONS FOR GRANTING THE PETITION

I. IT IS TIME TO RECOGNIZE THE JUDICIAL TAKINGS DOCTRINE WHEN STATE ACTORS UNPREDICTABLY DESTROY LONG-HELD PRIVATE PROPERTY RIGHTS.

In a plurality opinion, this Court in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 734-35, 130 S. Ct. 2592, 2614, 177 L.Ed. 2d (2010) ("*Stop the Beach*") fell one vote short to fully recognize the doctrine of judicial takings. Although six justices agreed in *Stop the Beach* that the Constitution offers protection for property owners against judicial decisions, the question remains whether a case, as here where all property rights were extinguished, a party aggrieved by a surprising decision of a state's highest court has recourse in the federal court system for a compensation claim.

This Court has already found it necessary enough to grant review in a judicial takings context and the time is ripe to revisit this important issue of Constitutional protection. *See Stop the Beach* generally. It remains unclear whether this Court is the final/only stop for review of a judicial taking or whether a lower federal court obtains jurisdiction upon the final pronouncement of a state supreme court denying constitutional safeguards. As Justice Stewart stated in his concurrence speaking of takings jurisprudence, "[b]ecause the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when

it is deliberate, I join in reversing the judgment." *Hughes* at 443. The facts of this case make it perfect to finally recognize the judicial takings doctrine as the law of the land. This Court would be hard-pressed to find another case where private property rights were unexpectedly obliterated by a judicial opinion. Where the facts fell short in *Stop the Beach*, this case takes the baton in full sprint as the land at issue in this petition was completely taken from the Petitioner. App.48a. At this moment, Petitioner does not have a stick left in its previous bundle. *Id.*

Because of the plurality decision in *Stop the Beach* many courts have been cautious to recognize the judicial takings doctrine. Even though the doctrine extends back to the Constitution, a curious phenomenon has occurred recently as the decision has recently become a problem for the federal circuits.

The Seventh Circuit in *Pavlock v. Holcomb*, 35 F.4th 581 (2022) stated that judicial takings "does not necessarily mean that it applies to the states' judiciaries." *Id.* at 586. The Tenth Circuit is on the fence. *See Grove v. Groome*, 817 Fed.Appx. 551 (2020) (giving lip service to *Stop the Beach* but falling short of applying its reasoning fully). The Eighth Circuit seems the most hostile to a judicial takings case. *See PPW Royalty Tr. by & through Petrie v. Barton*, 841 F.3d 746, 756 (8th Cir. 2016), as amended (Oct. 28, 2016) (refusing to allow a malpractice claim based on attorney failing to bring a judicial taking claim).

The Sixth Circuit has recently embraced the doctrine of judicial takings. *Knight v. Metropolitan Government of Nashville & Davidson County, Tennessee*, 67 F.4th 816 (2023) (*Quoting Stop the Beach* without qualification and remanding to District Court

for appropriate remedy). The Fourth and Fifth Circuit seem ready to apply *Stop the Beach*'s reasoning in light of this Court's decision in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019). *See Archbold-Garrett v. New Orleans City*, 893 F.3d 318 (2018); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533 (2013).

Aside from the obvious circuit split between the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Federal Circuits, the one that is the most entertaining is the Federal Circuit. There seems to be a split within a split. In *Straw v. United States*, 4 F.4th 1358 (2021) and *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370 (2017) the Federal Circuit is clear that it will not step in to scrutinize the lower court's property analysis. *Petro-Hunt* at 1377; *Straw* at 1362 (both exercising restraint about opining on the lower court opinions); *but see McCutchen v. United States*, 14 F.4th 1355 (2021) (*quoting Stop the Beach* in its reasoning but holding a property right did not exist in the "machineguns"). If this Court refuses to weigh in promptly, the judicial takings doctrine is bound to continue to cause problems within the circuits and is at risk of becoming obsolete. Since the doctrine arises from the Constitution itself, embracing it only brings the state of the Country closer to the Constitutional Republic that it is supposed to be.

II. BY UPHOLDING THE TRIAL COURT ORDER IN ITS ENTIRETY THE NORTH CAROLINA SUPREME COURT FINALIZED THE TAKING OF 280.4 ACRES OF REAL PROPERTY WITHOUT ANY POTENTIAL FOR JUST COMPENSATION.

Only through the proper use of eminent domain can a governmental or quasi-governmental entity seize private property, and only then with just compensation. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 458-59, 9 L. Ed. 773 (1837) (holding just compensation is a fundamental part of eminent domain law). Under a Fifth Amendment analysis, any " . . . taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.E.2d 376 (2003).

A. The North Carolina Supreme Court Committed a Judicial Taking When It Reversed the North Carolina Court of Appeals.

In *Lucas v. South Carolina Coastal Council*, this Court reiterated that a "practical ouster of [the owner's] possession" would amount to a "direct appropriation" of property. 505 U.S. 1003, 1013 (1992) *quoting Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1879). The *Lucas* Court went on to state "[b]ecause it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid

the owner." *Lucas* at 1004. When an owner "has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas* at 1019.

This Court went on to define two clear actions that act as a taking without an *ad hoc* case specific inquiry. "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasion), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas* at 1015. "The Second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas* at 1015; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171 (1982).

In order to understand where the North Carolina Supreme Court went astray, a close examination of the Trial Court Order is necessary. The Trial Court Order ousted the Kisers from 280.4 acres of property without their consent and without compensation. App.48a. The Trial Court Order also conveyed land to the Third Parties without compensation. App.42a. This transfer was wholly improper as the "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 452, 66 L.Ed.2d 358 (1980).

In the instant case we have both types of *per se* takings mentioned in *Lucas* above. *Lucas* at 1015. First, there are permanent invasions of property through the transfer of title to the Third Parties without compensation. Second, there is the removal of all economical uses of the Kiser Lake Parcel via the Trial Court Order and ouster therein. *Id.* There is no doubt that a taking occurred when the North Carolina Supreme Court rendered its Opinion reversing the entire Court of Appeals opinion and denied rehearing.

Here there was no "practical" ouster, but an actual ouster. App.48a. Sunset Keys has no property interest left in the Kiser Lake Parcel. Regardless of how the Trial Court Order is interpreted concerning the ouster, it is abundantly clear that all economic value has been destroyed by the Opinion as to the entire 280.4 acres.

North Carolina law is in lockstep with this Court on this issue as well. If anything, North Carolina law construes eminent domain under the public trust doctrine *more* strictly than federal law. In *Zagaroli v. Pollock*, 94 N.C. App. 46, 379 S.E.2d 653 (1989), the North Carolina Court of Appeals squarely addressed the limits of Duke's authority to grant usage rights on the surface of impounded lakes where a flood easement is involved.[1] *Zagaroli* at 658. Pursuant to a

[1] The *Zagaroli* case also had a similar easement that read "all riparian rights". Here, the Easement refers to "absolute water rights". "Rights" being the same word, "all" and "absolute" being synonyms and "riparian" simply meaning water, the grant of authority under the *Zagaroli* easement and the Easement here are essentially the same. Moreover, the *Zagaroli* easement provided Duke with the "exclusive right to determine use", while the Flood Easement states, "treat in any manner". If anything, the *Zagaroli* easement is broader in scope than the Easement at issue here.

permit granted by Duke, the *Zagaroli* defendants operated a marina on and above a portion of lakebed property owned by the *Zagaroli* plaintiff. *Id.* at 654.

The defendants claimed (as Duke and the Third Parties claim here) that the Federal Power Act gave Duke the "exclusive right to determine the use of the lake's surface waters." *Zagaroli* at 657. The Court of Appeals disagreed, finding that "while the Federal Power Act vests substantial authority in the power companies who obtain licenses from the Federal Energy Commission (FERC) . . . *the Federal Power act did not abolish private proprietary rights*." *Zagaroli* at 658 (emphasis added).

Thus, the *Zagaroli* Court stated in quoting this Court, "the Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff." *Zagaroli* at 54 *quoting Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-51, 74 S.Ct. 487, 494, 98 L.Ed. 666, 676 (1954). Any contrary holding would amount to a taking of property without just compensation. *Id.* Unfortunately, the North Carolina Supreme Court came to a completely different conclusion in violation of the takings clause. The complete deprivation of any economical benefit coupled with the ouster of Sunset Keys is a clear-cut taking.

B. In Addition to the Improper Taking, the North Carolina Supreme Court Finalized the Constitutional Harm When It Foreclosed All Opportunity to Provide for a Means to Obtain Compensation for the Transfer and Ouster of 280.4 Acres of Land.

It is axiomatic that a taking can only happen in connection with just compensation. *See Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 337, 13 S. Ct. 622, 37 L. Ed. 463 (1893). "It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation." *Monongahela* at 339. When it comes to the just compensation requirement it eases the burden and "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

Even if the judicial taking that occurred here was somehow justified, without a contemporaneous chance for compensation, Sunset Keys has been denied a Constitutional remedy for due process. Regardless of who actually owns the Kiser Lake Parcel now, due to the ouster, the Kisers have lost their rights to the land and should be compensated for that loss. In this case any post-deprivation remedy was foreclosed. The North Carolina Supreme Court merely overturned the entire North Carolina Court of Appeals decision and upheld the Trial Court Order transferring property without just compensation. In fact the taking was done without any compensation or method to determine the compensation due.

With regard to the federal regulations mentioned in the Opinion, under North Carolina law a person is not bound by other contracts of which they are not a party. *Grimes v. Virginia Electric & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957). Thus, "[a]ny additional burden beyond the grant entitles the landowner to just compensation." *Id.* at 714 *citing to Carolina Power & Light Co. v. Clark*, 243 N.C. 577, 91 S.E.2d 569; *Hildebrand v. Southern Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252; *Crisp v. Nantahala Power & Light Co.*, 201 N.C. 46, 158 S.E. 845; *Rouse v. City of Kinston*, 188 N.C. 1, 123 S.E. 482, 35 A.L.R. 1203; *Teeter v. Postal Telegraph-Cable Co.*, 172 N.C. 783, 90 S.E. 941 and *Hodges v. Western Union Telegraph Co.*, 133 N.C. 225, 45 S.E. 572. In this case, compensation was completely and improperly foreclosed by the Opinion.

III. THE NORTH CAROLINA SUPREME COURT INTENTIONALLY ATTEMPTED TO SIDE-STEP THE JUST COMPENSATION REQUIREMENT BY CREATING NON-EXISTENT, SUDDEN AND UNPREDICTABLE STATE LAW IN DEROGATION OF THE U.S. CONSTITUTION.

Aside from the Constitutional Violations the North Carolina Supreme Court turned North Carolina real property law on its head and allowed a transfer of fee simple title (1) from an easement holder and (2) to parties who were never conveyed title. The North Carolina Supreme Court merely reversed the North Carolina Court of Appeals opinion and did nothing to address the actual conveyance and ouster of real property rights.

A. In Addition to Purposefully Attempting to Avoid the Jurisdiction of This Court, the North Carolina Supreme Court Changed Long-Established Real Property Rights and Ignored Its Own Law and Precedent to Piece Together Its Holding.

Regarding State Court decisions, to the "extent that [they] constitute[ ] a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." *Hughes v. State of Washington*, 389 U.S. 290 (1967). The Opinion was certainly a sudden change in state law in that it purports to find a matter of first impression despite established law holding otherwise. Taking a close look at North Carolina law shows the Opinion is also unpredictable in light of its previous precedent.

This principle applies because States "cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes* at 297. Where an "unpredictable change in state law" arises it "inevitably presents a federal question for the determination of this Court." *Hughes* at 297 *citing Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43, 64 S.Ct. 384, 388-389 (1944).

Much akin to previous courts on the same issue, the North Carolina Supreme Court undoubtedly feels as though its action was not a taking. How could it take property if it only "clarified" the terms of an easement in the 1960's? However, how a state court rules is not dispositive, instead the focus is on what it does as this Court in *Hughes* laid out regarding the state of Washington:

> [O]f course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it does.

*Hughe*s at 443.

Here, what the Trial Court Order did was transfer real estate to Third-Parties and destroy all economic benefit of the underlying fee. App.48a. Even if this Court feels as though the North Carolina Supreme Court applied its past precedent perfectly (which it did not), the elephant in the room is the scope of the Trial Court Order's ouster and conveyance of property. By reversing the North Carolina Court of Appeals, the Opinion reverted to the Trial Court Order. This issue was brought before the North Carolina Supreme Court via a petition for rehearing, but it was denied. App.70a.

Under the Trial Court Order, property went not from A to B, but from A to C without compensation and foreclosed any economic benefit in the Kiser Lake Parcel. App.48a. This is a taking on every conceivable level. Sunset Keys cannot build on the Kiser Lake Parcel, it cannot collect rents and it cannot exclude others. The entire bundle of sticks that represents property interests were removed by the Trial Court Order.

The North Carolina Supreme Court piecemealed a sudden and unexpected ruling regarding easements divesting Sunset Keys of its real property interest. The longstanding rule in North Carolina is that "[a]bsent explicit language to the contrary, the owner of land subject to an easement has *the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement." Michael* at 435 *quoting Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d (1944) (emphasis added). "An easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement." *Michael* at 435. "If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such use will constitute an excessive use . . . ." *Michael* at 435 *quoting Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 90 S.E. 11 (1916).

Unlike transfers of fee simple title, easements do not require any set formulation or particular words. *Borders v. Yarbrough*, 237 N.C. 540 (1953). "In determining what uses the servient tenement may make of the land within the easement the court should look to the words of the deed or instrument creating the easement." *Hundley v. Michael*, 105 N.C. App. 432 (N.C. Ct. App. 1992) *quoting Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954). "One must look at the language of the deed or instrument rationally and construe the language consistent with reason and common sense. If there is any doubt as to the parties' intentions, an interpretation should be adopted which conforms more to the presumed meaning, one that does not produce an unusual or unjust result." *Id.*

Writing language into an agreement that is not present in fact or implication based upon the intention of the parties is error. *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946). Further, resorting to extrinsic evidence makes the interpretation one for trial, not summary judgment. *See Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (discussing that when a written contract is unambiguous, free from extrinsic evidence and does not have disputed facts, then the intention is a question of law for a court to decide its meaning).

Had the parties intended the language "necessary or desirable" to be fee-simple words of conveyance as the Trial Court Order operates, the Flood Easement would have simply been titled "General Warranty Deed" or merely recite only that Duke can " . . . treat the property in any manner deemed necessary or desirable" by Duke's predecessor. A simple half or quarter page document would suffice where the Flood Easement is a lengthy document typed on a manual typewriter in the 1960s. App.100a.

The parties' intention "is to be gathered from the entire instrument and not from detached portions." *Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409-10 (1978). "Easement holders only have the right to use their property within the easement consistent with the purpose for which the easement was created. Consequently, the owner of the land subject to an easement has the right to use his land in any manner, for any purpose which is not inconsistent with the reasonable use and enjoyment of the existing easement." *Adams v. Kalmar*, 226 N.C.App. 583, 741 S.E.2d 513 (N.C. Ct. App. 2013).

Excerpts from a contract must be " . . . interpreted in context with the rest of the agreement." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962), quoting *Westinghouse Elec. Supply Co. v. Burgess*, 223 N.C. 97, 100, 25 S.E.2d 390 (1943). "If one part of the clause is within the primary objective of the grant and supported by the recited consideration, so is the remainder of the clause." *Weyerhaeuser* at 720, 127 S.E.2d at 542. The meaning of the contract in question cannot include implications that are inconsistent to the expressed wording. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 625 (1973).

The Trial Court's Summary Judgment Order (the "Trial Order") is more than just an order for summary judgment regarding what Duke can do or cannot do as the Opinion sets forth, it is a conveyance of real property without consideration. It is also an improper ouster from the Kisers to the Third Parties in fee simple. Further, the Trial Order does not specify metes and bounds and is not sufficient to pass title on its own. The Opinion leaves more questions than it answers.

The Opinion correctly cites to *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E.2d 541 (1953); *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962); *State v. Philip Morris USA Inc.*, 359 N.C. 763, 618 S.E.2d 219 (2005); *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973); *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198 (1946), and *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987), but fails to apply their reasoning in the Opinion.

Unlike the Opinion, the Court in *Weyerhaeuser* reviewed the easement right to clear and keep clear property as " . . . entire and indivisible." *Weyerhaeuser* at 720, 127 S.E.2d at 542. The Opinion hyper focuses on one isolated part of a sentence of a detached portion and ignores the rest of the instrument, which is prohibited by *Weyerhaeuser*. *Id.* In the Opinion, the context of the Flood Easement was analyzed without due regard for the context of the remaining portions of the Flood Easement or the intentions of the Kisers at the time water was about to pool onto their land before signing the Flood Easement.

This Opinion also misapprehends the sentence structure of the "necessary or desirable" language and also how those words are used in another portion of the Flood Easement: " . . . in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant." *Duke Energy Carolinas, LLC v. Kiser*, 384 N.C. 275, 886 S.E.2d 99, 101 (N.C. 2023). Placing this language right at the very end of the Flowage Easement shows that the intent of the parties was to give Duke the right to clear and keep clear in connection with the maintenance and operation of the dam. " . . . [I]n any way deemed necessary or desirable" is a modifier of the words "[T]o grade and to treat . . . " and must be read conjunctively and in context with the rest of the sentence and instrument as Justice Barringer pointed out during oral argument at the North Carolina Supreme Court. *See Weyerhaeuser* at 719, 127 S.E.2d at 541.

In *Michael*, the plaintiff granted defendants an exclusive easement to use a roadway. *Michael* at 434. The *Michael* defendants contended that an "exclusive"

easement empowered it to exclude the underlying fee holder from the easement. *Michael* at 434. The *Michael* court held that an easement holder can neither exclude the underlying fee holder nor increase its use of the easement outside of its terms. *Id.* The Opinion does the exact opposite and destroys the underlying fee.

The meaning of "flowage" in the Easement is far more limited than Duke contends. Flowage simply means to flood over. The dictionary defines "flowage" as "an overflowing onto adjacent land", "a body of water formed by overflowing or damming" and "floodwater especially of a stream." Under this long-held understanding of the word, Duke has the right under the Easement to flood the Kiser Lake Property up to 770 feet above sea level in any manner it deems necessary or desirable in connection with its right to profit from hydroelectric power.

The plain language of the Easement is very specific in only allowing Duke to "treat said land up to said 770 at elevation in any manner deemed necessary or desirable by the Power Company *in connection with the construction, reconstruction, maintenance and operation of the dam and power plant*" (emphasis added). The Flood Easement's clear purpose is to facilitate Duke's generation of power, it is not a fee simple conveyance allowing Duke unlimited rights in the Kiser Lake Parcel.

IV. NO ADEQUATE OR INDEPENDENT STATE GROUNDS EXIST TO JUSTIFY THE CONSTITUTIONAL VIOLATIONS IN THIS CASE.

In addition to the declaratory claims brought by the parties, Duke and the Third Parties also claimed

public trust rights and adverse possession of the various portions of the Kiser Lake Parcel. The North Carolina Supreme Court did not address these claims; however they are briefly discussed herein out of caution to show that there are no adequate or independent state law grounds to justify the broad and excessive transfer of property without compensation.

A. For Purposes of the Public Trust Doctrine, Under North Carolina Law the Navigability Analysis for Artificial Watercourses Focuses on the State of the Stream Before Impoundment.

In *Gwathmey v. State Through Dep't of Env't, Health, & Nat. Res. Through Cobey*, 342 N.C. 287, 300, 464 S.E.2d 674, 682 (1995) the North Carolina Supreme Court reviewed a land dispute with the State of North Carolina as a party regarding the estuarine marshlands on the North Carolina coast and held that if the marshland in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law. The navigability of a watercourse is largely a question of fact for a jury. *State v. Baum*, 128 N.C. 600, 38 S.E.2d. 900, 901 (1901).

Historically, riparian rights attached only to natural (*i.e.*, "by nature") as opposed to artificial watercourses. *Dunlap v. CP&L*, 212 N.C. 814, 195 S.E. 43, 45-46 (1938) (riparian owner had right to use a stream "as it comes upon his land in its natural state" and to use water flowing by his premises "in a natural stream"); *Coastal Plains Utilities, Inc. v. New Hanover County*, 166 N.C. App. 333, 601 S.E.2d 915 (2004) ("[A] riparian proprietor is entitled to the natural flow

of a stream running through or along his land in its accustomed channel").

The first step in the establishment of riparian rights is to "show that [one] is a riparian proprietor or that in some way [one] has acquired riparian rights in the [waterbody]." *Coastal Plains*, *supra*, at 351, 601 S.E.2d at 927; *Young v. City of Asheville*, 241 N.C. 618, 622, 86 S.E.2d 408, 411-12 (1955) (a party claiming riparian rights must show "natural" riparian rights by contact with a natural stream or rights acquired by grant or prescription).

The North Carolina Supreme Court in *Gwathmey* stated "the public ha[s] the right to [ ] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682 (*quoting and relying on State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901 (1901) (emphasis added)).

The *Gwathmey* decision was important in that it reiterated and upheld the navigable in fact test for North Carolina. However, the issues before the North Carolina Supreme Court in *Gwathmey* are inapposite for many reasons which could be why the North Carolina Supreme Court did not address the public trust doctrine. *Gwathmey* involved a coastal land dispute dealing with specific Coastal Statutes, whereas the current case is concerned with an artificially created body of water on a non-navigable stream. *Gwathmey* at 291. The waterway at issue was near the beach and was already considered a navigable waterway. *Id.* at 307. The State of North Carolina was a party to the action and the waterway was not

an artificially created body of water deep inland. *Id.* at 300-01, 310-11.

In *State v. Baum* the North Carolina Supreme Court analyzed a stream in its natural condition under a criminal statute where the defendant put up a gate blocking access to a watercourse. The analysis in *Baum* focused on the natural condition of the watercourse. *Baum* at 60, 38 S.E.2d at 901. Further, *Baum* required some element of obstruction of a public highway as it stated "[a]nd yet it would seem that there must be some element of a public highway, and that its navigation must be in some degree required by the necessity or convenience of the public." *State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901 (1901). Here, the Kiser Lake Parcel does not cut off the public from navigating Lake Norman and it involves an analysis of an artificially created reservoir.

Duke and the third-parties relied heavily on *Fish House, Inc. v. Clarke*, 204 N.C.App. 130 (2010) in the appellate division. However, *Fish House* is distinguishable on several fronts as (1) it involves an artificial canal attached to a large navigable waterway near the ocean and not an artificial reservoir hours from the beach; (2) the body of water was coastal and already labeled as a navigable waterway; (3) it dealt with obstruction of a narrow canal; (4) it analyzed commercial use of the canal in the navigability analysis; and (5) it only applied to boating trespass and not permanent structures. *See* generally *Fish House*.

The most analogous case to the Opinion is *Bauman v. Woodlake Partners, LLC*, 199 N.C.App. 441, 681 S.E.2d 819 (N.C. Ct. App 2009). In *Bauman* the issue before the lower court was whether Black

Creek was navigable in fact before Black's Pond was created. *Bauman* at 454. The *Bauman* Court reviewed navigability under a declaratory action involving an artificial body of water and found that the waters were not navigable based on the condition of Black Creek before Black's Pond was created. *Id.* The pre-impoundment analysis is essential because holding otherwise could subject every private reservoir or body of water in the entire State to public trust rights.

For its part, neither Duke nor the Third Parties provided the trial court with any evidence that the Catawba River was navigable north or south of the Dam before or after the impoundment of the Lake. In fact, prior cases have held that the Catawba River in North Carolina was not navigable. This lack of evidence was one reason the North Carolina Court of Appeals remanded the case back for trial consistent with its decision.

One of the only cases that took a factual look at the state of the Catawba north of Cowan's Ford Dam relating to navigability was *Petition of Howser*, 227 F.Supp. 81 (1964). In *Howser*, the court laid out the futility of claiming navigability of the area in question by stating " . . . to contend that the waters of the Catawba River in North Carolina are navigable is to state a supposed fact which has little if any merit." *Id.* at 87.

It cannot be disputed that Lake Norman is an artificial, man-made reservoir created from a non-navigable watercourse. Lake Norman is not a natural lake and is bounded on both sides by dams. No evidence was produced at summary judgment to show that a navigable waterway existed prior to the impoundment of the Dam. Since navigability is key to the public trust

defense proffered by Duke to prevent Sunset Key's boating/recreational trespass claim, at a minimum, there is an issue of fact as to the navigability of Lake Norman before the impoundment of the Dam. *Bauman* at 449, 453-54.

B. The Public Trust Analysis Focuses Only on Whether the Kiser Lake Parcel Can Be Navigated by the Public at Large and Has No Application to the Dock Trespass Claims.

Only the State of North Carolina through the Attorney General has standing to take property rights from landowners. *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66 (2012). If a stream is not navigable before impoundment, only eminent domain properly raised can entitle a governmental/quasi-governmental entity the right to take private property. *Fabrikant v. Currituck County*, 174 N.C.App. 30 (2005); *Cherry* at 74-75; *See also Zagaroli* at 54.

Under no scenario does the public trust doctrine operate as a sword under North Carolina law to take away property rights from the fee-holder. *Id.* at 72. Further, it appears that the trial court did not fully understand the nature of the relief sought in the Boating Trespass Claims. Sunset Keys was not trying to prevent travel over the Kiser Lake Parcel. Instead, Sunset Keys only wants to be compensated at whatever amount the jury determines is fair for the traffic over the Kiser Lake Parcel.

As to the property owners next to the Kiser Lake Parcel, Sunset Keys is only requesting to be compensated fairly for its use. Sunset Keys is not trying to prevent the Third Parties from recreational boating

use of the Kiser Lake Parcel, only to be compensated for the Structures and recreational use by individuals/ companies other than the Third Parties that do not own land next to the Kiser Lake Parcel.

C. The Scope of This Appeal Concerns Only the Declaratory Judgment Granting Title to Third-Parties Through Duke's Authority as a Federal License Holder.

The positions taken in this litigation are fatal to the Third Parties' claims and defenses as they rely entirely upon Duke's authority to justify their trespass upon the Kiser Lake Parcel. In fact, the Third Parties maintain in their claims for adverse possession that Sunset Keys never had the right to give consent to others in order to use their own land. Thus, both the exclusive and hostility requirements cannot be met for adverse possession. *See Keener v. Arnold*, 161 N.C. App. 634, 639, 589 S.E.2d 731 (2003).

The trial court also did not grant title through an easement by implication. Easements through implication are extremely fact intensive and are the province for juries. *See Barwick v. Rouse*, 245 N.C. 391, 393-394, 95 S.E.2d 869, 871 (1957) (appeal after jury trial requiring long and continued use of an easement pre-separation of title). Here the Flood Easement was conveyed well before any docks were placed on the Kiser Lake Parcel, thus defeating the required long and continued use pre-separation. The trial court did not grant title through adverse possession, implication or any other method other than Duke's purported authority and those issues should not support any adequate or independent state grounds.

CONCLUSION

This Petition covers a vast swath of case law from the various positions of the Federal Circuits to North Carolina State law. In sum, the only three documents truly necessary to understand the scope of this Petition are Amendments V and XIV of the U.S. Constitution and the Trial Court Order which currently governs this case. A side-by-side comparison of these documents screams for a constitutional reconciliation, and for recognition of the judicial takings doctrine.

Respectfully submitted,

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