IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

In the Matter of the Administrative Appeal of
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER,
RICHARD RALL, AMY RALL and LARETTA KRANZ,
Appellants,

v.

SOUTH DAKOTA PUUBLIC UTILITIES COMMISSION and
CROWNED RIDGE WIND II, LLC,
Appellees.

 # 29610
19CIV20-000021

Appeal from Circuit Court, Third Judicial Circuit, Deuel County, South Dakota
The Honorable Dawn Elshere, Presiding

APPELLANTS' BRIEF

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INTRODUCTORY STATEMENT

Appellants, Garry Ehlebracht, Steve Greber, Mary Greber, Richard Rall, Amy Rall and Laretta Kranz, will be referenced by their full names or generally as Appellants. South Dakota Public Utilities Commission, Appellee, will be referenced as PUC or Agency. Agency issued a Facility Siting Permit ("Permit") for a large-scale wind farm project ("Project") to Appellee Crowned Ridge Wind II, LLC, generally referenced as Applicant or Crowned Ridge II.

The Agency's accumulated record is massive (about 15,000 pages). References to that record employ the prefix "R" followed by page(s). When referring to a specific document, numbered-lettered as an exhibit, the reference is underscored, as in "Ex. A12-1," followed by citation to the Agency's record. The transcript of argument to the PUC on claims of "confidentiality" (September 17, 2019) is referenced as "TR-A" followed by page and line. Testimony during the Agency's evidentiary hearing (February 4-6, 2020) is cited "TR-H" followed by page and line. The circuit court heard argument on November 23, 2020; that transcript is referenced as "TR-C," with page and line. Citations to the Clerk's Record appear as "CR"- followed by page in the Clerk's index.

Reference herein to "Effects" potentially includes many undesirable consequences when humans are asked (or required, without their consent) to live in the immediate vicinity of a Project. The term is especially used for two chief among them, "Noise" and "Shadow Flicker." As commonly used in the record, "Participant" is a landowner who has given a wind turbine lease to Applicant, an instrument that also includes a litany of easements, including an "Effects Easement." The Participant may also happen to live in the vicinity of wind turbines, but not necessarily. "Non-Participant," on the other hand, references a landowner not granting leases or easements to Applicant. This term is used

in a more narrow sense, with Applicant's experts focusing not upon the open lands but only the "occupied dwellings" (the homes) of the Non-Participants.[1] The Non-Participant *always* lives in close proximity to the Project, while having *never* executed an instrument accepting the Effects upon the Non-Participant's residence.

JURISDICTIONAL STATEMENT

The circuit court's order of March 12, 2021 (see Appendix B, CR-1566), incorporates the court's previously issued memorandum opinion ("Mem. Op.," CR-1528, see Appendix A), affirming the Agency's decision and order of April 6, 2020. R014230. Notice of entry of the order was served March 15, 2021. CR-1586. Notice of Appeal was filed April 6, 2021. CR-1609. This Court has jurisdiction under SDCL 15-26A-3. This appeal is pursued by the same Appellants as in # 29352, submitted on briefs in November 2020, challenging Deuel County's use of the Zoning Power to accommodate this Project.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Appellants' docketing statement, filed April 6, 2021, identifies the issues presented to the circuit court, and for further consideration, as follows:

> ***Issue 1:***
> **Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effects,"[2] may proceed on a case-by-case or *ad hoc* basis to permit a burden of "Effects" upon both citizens and their properties under variable**

[1] Quantifying the Effects is reserved for "occupied dwellings," and *never* at the property line of Non-Participants. Under the applicable zoning ordinances, Participants – *if they happen to live there* – are eligible to receive somewhat greater doses of Noise, as an Effect. The casting of "Effects" upon agricultural lands matters not to the PUC - only occupied dwellings are considered.

[2] ARSD 20:10:21:12, citing to the Legislative findings in SDCL 49-41B-1, speaks in terms of "efforts of the utility to . . . minimize or avoid adverse environmental, social, economic, health, public safety, and historic or aesthetic preservation effects."

regulatory limits developed by others, including those interested in the promotion of wind development[?]

Agency's Decision on Issue 1: As per the Agency's customary practice in several prior cases, Permit Condition 26, as to Noise and measurement [R014252] a sound level of 45 dBA for Non-Participants, and Permit Condition 35, as to Shadow Flicker [R014255] an annual limit of 30 hours, have been imposed based on testimony of Applicant's experts, and experts hired and called by Staff.[3]

Trial Court's Decision on Issue 1: The trial court concluded the Agency is permitted – *but not required* - to adopt rules concerning the statutory standard of "minimal adverse effects." (Mem. Op., 14-16, CR-1542).

Issue 1 is restated as follows:

Issue 1-A: Whether the Agency, charged with ensuring "minimal adverse effects" are received by neighbors, has discretion to impose, on an ad hoc basis, variable limits for intensity and duration of the Effects (noise and shadow flicker)?

Issue 1-B: Whether the Agency's practice of a case-by-case approach to regulation, while failing to adopt a statewide standard for adverse effects emitted by a Project onto the public, violates Appellants' rights otherwise assured by state and federal constitutions?

Issue 2:

Whether SDCL 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of Appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner[?]

Agency's Decision on Issue 2: While the PUC's Decision notes the names of Appellants [R014233], the Agency failed to make *any* pertinent findings or conclusions as to their particular land-based interests as nearby Non-Participants, including their claimed right as landowners to avoid burdens and servitudes of the Effects to be thrown off by the Project, other than to find, Finding of Fact 34, "Applicant has all land rights needed to construct and operate the Project." Appellants challenge that accuracy of finding, as the Project, without benefit of easement, will cast the Effects on their homes and lands.

[3] Each condition being *more* favorable to Applicant, and *less* so to Appellants, than the Agency's *ad hoc* determinations in *Prevailing Wind Park*, if such had been imposed here.

Trial Court's Decision on Issue 2: Taking note, at 16, of Staff's argument the PUC "is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines," the trial court concluded the statute that Appellants rely on (SDCL 43-13-2(8), suggesting that the "right to discharge light upon and over land is an affirmative easement") is a matter beyond the jurisdiction of the Agency. With the PUC making no relevant determinations concerning easements,[4] the trial court concluded it need "not weigh into the question of easements" (Mem. Op., at 17, CR-1545).[5]

Issue 2 is restated to this Court as follows (Issue 2-C, as stated in Appellants' Docketing Statement, is merged into Issue 2-A):

Issue 2-A: Whether the Applicant, holding Effects Easements from Participants, is entitled or privileged by law, or the Agency's Permit, to cast or emit the "effects" (both noise and shadow flicker) on nearby Non-Participants, without benefit of similar easements?

Issue 2-B: Whether Applicant's casting of shadow flicker on Non-Participants, having granted no easements to Applicant, conflicts with the rights and privileges of such landowners under SDCL 43-13-2(8)?

Issue 3:

Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and also without the provisions of SDCL 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Agency's Decision on Issue 3: The PUC decision, beyond noting the names of Appellants [R014233], made no findings or conclusions

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[4] And indeed, the Agency did not, since it never inquired whether the casting of "Effects" upon Non-Participants also entails the need for an "Effects Easement," as Applicant obtained from *each* Participant. The issue was not addressed by the Agency, but the trial court could have done so given the scope of inquiry permitted by SDCL 1-26-36. The Agency's decision is a *de facto* easement, though lacking Appellants' signatures and unrecorded in the land records office of Deuel County. The PUC decision embodies Applicant's entitlement claims, just as if it *were* the dominant estate owner in relation to the homes and lands of Appellants.

[5] SDCL 1-26-36 permits inquiry, *inter alia*, as to whether the substantial rights of appellant are prejudiced because the agency "inferences" or decisions are "in violation of constitutional or statutory provisions." Appellants, as landowners, homeowners and citizens of the United States, have consistently made that assertion below, to no avail.

regarding the property rights of Appellants, as Non-Participants, other than expressly approving the flow of Effects thereon in accordance with Permit Conditions 26 and 35 [R014251, 014255].

Trial Court's Decision on Issue 3: Citing *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006), the trial court concluded (Mem. Op., 17) Appellants failed under each of the four theories of "taking" available under South Dakota case law.[6] The trial court further concluded the question of whether the Project is a nuisance *per se* is not ripe.[7]

Issue 3 is now restated thusly:

Issue 3-A: Whether the Agency decision, expressly approving the intensity and duration for the casting or emission of "Effects" (noise and shadow flicker) upon Non-Participants (including Appellants) represents a *per se* taking of interests (an easement) in the lands and property interests of Non-Participants?

Issue 3-B: Whether the Agency decision, expressly approving certain levels or durations of the Project's adverse effects upon the homes and lands of Non-Participants (including Appellants) vitiates the nuisance laws as a potential remedy available to Non-Participants, thus representing a taking of property rights otherwise secured by law?

STATEMENT OF FACTS

Appellants are neighbors, all living within several miles of Goodwin, a small village in Deuel County. Ehlebracht and Kranz are to the south, very near Bemis, while

[6] Namely, a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards. This Court's decision in *Benson* is cited by the briefs of both Petitioner and Respondent as argued to the U.S. Supreme Court on March 22, 2021, No. 20-107, *Cedar Point Nursery v. Shiroma*, on writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit (prior decision reported at 956 F.3d 1162). *Cedar Point* involves a state access regulation that has the effect of an easement, a taking of private property without just compensation. The PUC order here is comparable to an "Effects Easement," even though *not* conferred under a volitional instrument uttered by the fee owner (Appellant Kranz). The decision operates *just as if* an easement had been taken.

[7] Reference to a potential nuisance claim challenged the PUC decision, the Project being expressly approved to cast "Effects" (the maximum dosage being specified by the Agency). *That* particular ceiling of intensity or duration of Effects becomes the legal standard for this permanent land use. When otherwise observing that specified allotment, the Project is seemingly beyond challenge under the nuisance law, given the language of SDCL 21-10-1 and -2, in particular.

the Grebers and Ralls are to the northeast. The four homes and associated lands are nonconsensually embraced by Applicant behind the Project's rendered boundary line, represented by four "red dots." Ex. A14-2, R011280.

Appellants' individual sites are smaller parcels, with the exception of Mrs. Kranz' farm at Bemis. Applicant's affiliate sought - in or about 2013, without success - to obtain a wind turbine site lease with myriad easements from Appellant Kranz, a document commonly referenced as the "Kranz Easement." Ex I-2, R013272. Applicant sought to exclude the Kranz Easement (R001499-001525) from the record based on a claim of confidentiality, with the "application for party status (corrected)" [R001197] being partially expunged from the record for a time at Applicant's behest. R001215.

Applicant's attempt to retain secrecy for the Kranz Easement – first, as to Section 5.2 (the "Effects Easement") but in particular, Section 11.10 ("Remediation of Glare and Shadow Flicker") – remains relevant to this case.[8] Applicant argued these two sections deserved confidential treatment, as potential "competitors [might] use [that information] to develop more attractive offers to landowners, which . . . directly impacts the competitiveness of Crowned Ridge Wind II's affiliates . . . ." TR-A 5:4, R001988.

Given this assertion, Commissioner Nelson observed:

> [Counsel's] reasoning for keeping this confidential - - and I'm going to quote this. He said today "to prevent more attractive offers to landowners." Well, when we get all of these developers coming to South Dakota, one of the things that they are contending is, by golly, you should approve our Application because we are benefitting landowners. And now he's saying, well, by golly, we wouldn't want to do anything to further improve the offer to landowners. I just find that offensive as it relates to South Dakota landowners. TR-A 15:16-16:4, R001998.

[8] Sections 5.2 and 11.10 of the Kranz Easement are replicated in Appendix C.

The Commissioner is concerned for the interests of South Dakota landowners in privity with Applicant. And what of Non-Participants? As to their homes and lands, the Agency has done nothing to blunt the competitive aims of Applicant or those promoting like projects.[9] As such, Applicant is allowed to make use of the lands and homes of Non-Participants, *and permanently*, a gift of sorts now fully confirmed by the Agency's order.[10]

The Agency ruled the challenged provisions were not entitled to confidential treatment (R003224). The comments of counsel - and Commissioner Nelson's response - demonstrate also the shift in wind farm development strategies from the era of the Kranz Easement (2013) to the recent submission of this Project to the Agency.[11]

Both Applicant and Staff called expert witnesses to provide opinions and literature about the likely impact and risks of the "Effects" on the lives of Non-Participants, as neither statute nor regulations establish intensity or duration parameters. From this array of witnesses, and the recommendations of Staff, the Agency imposed limits for both Noise and Shadow Flicker, measured at or near the occupied dwellings of Non-Participants. (See Permit Conditions 26 and 35, R014252, 014255.)

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[9] The PUC's own expert, Hessler, opined the Project was "aggressively devised" (Ex. S2, R012746; TR-H 497-8); this remarkable statement is *never* referenced in the Agency's deliberations or decision. When a Project is readily permitted notwithstanding such a design, is the PUC effectively protecting both the property interests *and* persons of Non-Participants?

[10] Not one Commissioner expressed concern over this fact.

[11] Applicant still obtains "Effects Easement" (much like Section 5.2, *see* Appendix C), while assuming no contractual obligation to Participants, as with Section 11.10, to subsequently address glare and Shadow Flicker concerns. As to Non-Participants, no such obligation was ever assumed by Applicant, and the Agency's decision fails to impose one.

Witness Chris Ollson, an environmental consultant, adduced copious volumes of wind farm literature, "Effects" ranging from annoyance, distress, sleep disorders, Noise, and Shadow Flicker.[12] Ollson's Ex. A12-16 (R006006) in both German and English, is the origin of the premise[13] that humans will withstand certain doses of Shadow Flicker without ill effect. A cursory review of the German study ("Information on How to Identify and Assess Optical Immissions Wind Turbines," dated 2002) establishes that Shadow Flicker is not "significantly harassing" if not exceeding 30 hours per calendar year and "beyond no more than 30 minutes per calendar day." R006011. The German study also provides for a limit of "8 hours per calendar year." R006012. Ollson's Ex. A12-15 (at R005988, with a slightly different summary at R005952) explains the German study recommendations:

> "German guidance (2002) adopts two maximum limits:
> - An astronomic worst case scenario limits of 30 hours per year or 30 minutes on the worst affect day; and
> - A realistic scenario taking account of meteorological parameters limited to 8 hours per year."

Hence, the Agency applies merely *one-half of one* of the *two* maximum limits devised by German officials. As recounted by Staff witness Kearney (Ex. S1, R011799), the PUC has *always* used the 30 hour per year limit for Shadow Flicker – except in the case of *Prevailing Wind Park* (EL-18-026), with limits set at 15 hours per year, along with a daily limit of 30 minutes (unless the residence owner had signed a waiver).

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[12] Ollson's prepared testimony, (Ex. A12, R005696) is followed by fifteen articles, some being Ollson's own work, Ex. A12-2 to Ex. A12-16, as referenced and identified further in Appendix D, *infra*.

[13] In Germany, now said to be commonly accepted everywhere. R002023. In reality, only a *one-half of one element* of the *two-part* German standard is deployed by the PUC.

R011810.[14] Witness Kearney further explained that Staff recommended "30 hours per year" (TR-H 573:10-13) for the *Prevailing Wind Park* matter. The applicant agreed, but the Commission, on its own motion, "changed it to 15 hours per year." (*Id.*) Kearney understands the usual annual limit of 30 hours has come into being because of a "determined court case, and it's kind of slowly filtered through the U.S. in a lot of zoning ordinances and state ordinances." TR-H 570:11-15.[15]

Witness Kearney testified that Staff relies on expert witness Hessler for sound guidance, being aware of the distinction between the expert's "ideal design goal of 40 [dBA] and the regulatory permit limit of 45 dBA." TR-H 575:14-17.[16] In *Prevailing Wind Park,* the noise limit for Non-Participants was set at 40 dBA (R011808), which happens to be Hessler's "ideal design goal." Kearney recommended – and the PUC adopted - 45 dBA as the Agency's so-called regulatory limit. R014251, Permit Condition 26. This limit is supported neither by statute nor regulation. Witness Hessler's "ideal design goal" (40 dBA), along with his observation *this* Project is "aggressively devised" (thus necessitating Kearney's recommendation of 45 dBA for Non-Participants, including Appellants), are never mentioned by the Agency. The fallacy of a case-by-case approach, to fix duration and intensity of Effects for the homes of Non-Participants for *this*

[14] A wind farm in Bon Homme, Charles Mix, and Hutchinson Counties, permitted in late 2018. *Prevailing Wind Park* is unique in having both annual *and* daily limits imposed.

[15] Appellants continue to search for that "determined court case." An Agency regulation limiting "Effects" on Non-Participants would provide clear guidance. Presently, Kearney explained, the Agency looks "to the record that's presented in each docket" – "[i]t's a case-by-case basis." TR-H 569:19-20, 24-25. The German standard is neither consistently nor fully applied. Using just part of this foreign test on an *ad hoc* basis here seems rather thin, with a permanent right conferred for Effects upon the homes of Non-Participants.

[16] See note 9, *supra*, for Hessler's view this Project is "aggressively devised."

particular case, seems obvious.[17] The Agency's determinations may be flexible to accommodate aggressive Project designs, but run counter to the "ideal design goals" for those forced to live permanently[18] within the shadows and din. The PUC's statutory role would greatly benefit from regulations limiting Effects that Non-Participants must experience, as well as declaring *the* proper place for measuring those Effects.

STANDARD OF REVIEW

This appeal is governed by SDCL 1-26-36. The Agency's factual findings are reviewed under the clearly erroneous standard, and questions of law and statutory interpretation are reviewed de novo. *Midwest Railcar Repair, Inc. v. South Dakota Department of Revenue*, 2015 S.D. 92, 872 N.W.2d 79. The court may reverse if appellant's substantial rights have been prejudiced because the agency's findings, inferences, conclusions or decision are, *inter alia*, in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure or affected by other error of law, clearly erroneous, or characterized by an abuse of discretion. Appellants submit this *is* a case in which their substantial rights have been prejudiced – their rights as property owners being fully ignored by the PUC - and the Agency's resulting decision is thus legally defective.

ARGUMENT

Issue 1-A: Whether the Agency charged with ensuring "minimal adverse effects" are received by neighbors has discretion to impose, on an

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[17] Appellants suspect the design of their auditory and other senses, as residents of Deuel County, is not materially different than those living in close proximity to *Prevailing Winds Park* in Bon Homme County. Applicant's wind farm design trumps all at Agency.

[18] The Kranz Easement, if executed and the option exercised, would endure for 50 years (R013273). Applicant expects the Project's life to extend for 25 years (R014234), but if repowered, the Project might extend "for many more years." R004511. The Permit itself has no explicit term. As such, the "Effects" from this Project are *permanent* in nature.

ad hoc basis, variable limits for intensity and duration of the Effects (noise and shadow flicker)?

Permits are required as the legislature ensures the "location, construction, and operation of facilities will produce minimal adverse effects . . . upon the citizens of this state." SDCL 49-41B-1. The Agency is directed to adopt rules to implement the chapter. SDCL 49-41B-35. No Agency rules plumb the meaning of "minimal adverse effects."[19] The trial court, Mem. Op. 15, adopts the arguments of Staff and Applicant to the effect the Agency has the discretion, but not the legal obligation, to adopt rules, concluding also that the PUC must defer to whatever "Effects" standard is in place under the zoning ordinance in each county. As such, the Agency's action in one case (the establishment of more stringent Permit Conditions for a wind farm in Bon Homme County, for example) causes no offense or harm to the Appellants residing in Deuel County.

Allowing this Agency to establish variable standards – one set of "Effects" for a wind farm in Bon Homme County and another for this Project in Deuel County – leads to the Hessler opinion: this Project is "aggressively devised." *See* Ex. S2, R012746, TR-H 497:24-498:25.[20] Under the straightjacket imposed upon the Agency, as to elements of

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[19] If PUC wishes suggestions for rules, consider these: (1) prohibit the non-consensual embrace of property within the Project's boundary (as implicated here); (2) prohibit the casting of "Effects" onto homes and lands not consensually accepted by easement (likewise at issue). Otherwise, with knowledge of Agency's prior decisions, to quote expert Hessler, those with "aggressively devised" Projects may probe the depths of the ephemeral "regulatory limits" as to Non-Participants. One can assume Applicant favors this approach, with Effects allowed to invade Non-Participants – up to and into their homes - without need of an Effects Easement, so long as the "annual limit" of 30 hours for Shadow Flicker (merely one part of the German standard) is not exceeded.

[20] This expert's apt description conflicts with legislative findings that citizens never receive more than "minimal adverse effects." This opinion of Staff's own expert is never repeated or quoted, other than by Appellants.

time to issue the Permit and the design presented,[21] some rule making activity as to what comprises "minimal adverse effects" would maintain the onus for devising a proper design on each applicant. Thus, the Agency's failure to adopt substantive rules enhances the risk of failing to comply with the letter and the spirit of the legislative findings. Applicant is likely to simply *take* as much as possible of whatever it does not own,[22] so long as the Agency's regulatory limits *de jour* (porous, existing neither in statute nor regulation) are not penetrated.

As noted in *Matter of Sales and Use Tax Refund Request of Media One, Inc.*, 1997 S.D. 17, 559 N.W.2d 875, at ¶ 11, and in SDCL 1-26-1(8), a "rule" is an agency statement of *general applicability* to implement, interpret, or prescribe law, policy, procedure or practice requirements of an agency. Whether an agency has correctly applied its own rules presents a question of law, and as such, no deference is accorded to the conclusions reached by the agency or the circuit court below. *Id*.

For now, there are *no* substantive rules addressing the legislative policy a facility is to cause merely "minimal adverse effects." As the Agency attempts to keep this standard in mind, while relying on the *ad hoc* opinions of Staff's own experts – along with the testimony of whatever experts Applicant has presented[23] - it may seem logical that the citizens residing near a Project in Bon Homme County can be assured of a lesser intensity and duration of "Effects" (with both an annual and daily limit being applied for

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[21] SDCL 49-41B-25 (9 months) and SDCL 49-41B-36 (no jurisdiction to mandate location).

[22] The land and homes of Non-Participants, for example. Ex. I-3, R013293, at 013294, summarizes the "Effects" anticipated from this Project.

[23] None of the experts directly address the concept of "minimal adverse effects."

shadow flicker), even while those residing near this Project, in Deuel County, must accept greater measures. Such distinctions are warranted, the Agency concludes, given the Project's conservative design (in Bon Homme County, not Deuel). Agency's proceedings for large-scale wind are like the tail wagging the dog. If an Applicant's design is "aggressive," Staff recommends a duration or an intensity of Effects beyond the "ideal" (as Hessler puts it). Just how did this fractional part of a German "safety" rule become the honored, *ad hoc* polestar for this Agency, such that South Dakota Non-Participants must likewise accept it also? Property rights and health issues are conflated.

Thus, no rules of general applicability are applied here (such as those suggested by Appellants - see note 19, *supra*). Rather than applying a permanent rule, the Agency's short history in permitting large wind farms is marked by an iteration of "Permit Conditions," largely recycled from one Project to another, case-by-case. The exception is made *if* the design submitted to the Agency just happens to be sufficiently prudent or conservative to allow stricter constraints on the Applicant's emissions of Effects.[24] But this can't be whenever a Project is "aggressively devised" (in the words of Hessler, the expert willing to ignore, *for this case*, his own pronounced ideal model).[25]

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[24] In *Application of Prevailing Wind Park LLC*, EL18-026, the Agency employed both an annual *and* a daily standard for shadow flicker; *that* annual standard is exactly 50% of that used here. R011810. Since neither Staff nor Applicant suggest a daily limit, one wonders how the Agency there came to know of this part of the German rule. This also suggests the key factor for these cases is not that of "minimal adverse effects," but whether the Project is conservatively designed to allow for such benefits upon being shoehorned into the neighborhood. The Project here (obviously) does *not* have such a conservative design, according to Hessler.

[25] Hessler further observed, TR-H 507:4-12 - "It's how many turbines are around a particular house or a point of interest. . . . [T]he density of turbines is such that there's lots of nonparticipating houses with predicted levels above 40 [dbA]. At my last count I think it was approaching 100 [homes]. It was a lot. . . . And I would like to see a lot lower

This isn't the first time this Agency, in pursuit of public safety, was selected to accomplish "uniformity of regulation" (even if the concepts employed by the several counties in their zoning ordinances have their differences).[26] See *Northwestern Bell Telephone v. Chicago & North Western Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976). Employing one standard of "effects" for those in Bon Homme County, living in the shadows of a wind farm there, while applying quite another standard for those in Deuel County (Appellants), is unjust, an abuse of process flowing from the policy of SDCL 49-41B-1.

> ***Issue 1-B:*** Whether the Agency's practice of a case-by-case approach to regulation, while failing to adopt a statewide standard for adverse effects emitted by a Project onto the public, violates Appellants' rights otherwise assured by state and federal constitutions?

Because of the PUC's *ad hoc* approach in the permitting of large wind projects, persons who are Non-Participants are treated differently. The legislature's findings in SDCL 49-41B-1 pertain statewide, rather than merely a particular area or territory of South Dakota. *State v. Smith*, 88 S.D. 76, 80, 216 N.W.2d 149, 151 (1974). Yet, varying intensities and durations of "Effects" are approved and applied by the Agency, case-by-case, neighbors in Bon Homme County being afforded greater favor than those in Deuel County. Nothing suggests the physical characteristics or capacities of the residents of Deuel are better designed by their Maker to handle higher intensities or durations of

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number there." Hessler's stated concerns remain unaddressed by the Agency, ostensibly in pursuit of the legislature's findings.

[26] Trial court concluded, at Mem. Op. 15, the PUC must "[defer] to local county ordinances." This conclusion seems to rest on SDCL 49-41B-22, as amended in 2019. County's CUP authorizes "Effects" of specific duration or intensity, but does *not* obviate Agency's duty to govern "Effects." Further, use of the Zoning Power for *this* purpose by the several counties is likewise a taking of property interests, at issue in Appeal # 29352, submitted on briefs November 15, 2020.

Effects, or that their inherent property rights are less worthy of protection. The standards regularly deployed by the PUC since 2017 (with one exception) have not been adopted as safe or suitable limits in any formal sense, whether from the standpoint of human health and safety or as burdens to be imposed on the property interests of those humans, now appearing here as Appellants.

City of Aberdeen v. Meidinger, 29 S.D. 412, 233 N.W.2d 331 (1975) involved criminal prosecution of a defendant charged with operating a junkyard without a permit. After being sentenced on a conviction in municipal court, defendant appealed, claiming that the statutes under which he was charged violated Article VI, s 18 of the South Dakota Constitution and the Equal Protection clause of the Fourteenth Amendment, U.S. Constitution. After reviewing potential different outcomes for violating municipal ordinances in Sioux Falls, Rapid City, Aberdeen, Mitchell, Clark and Garretson, this Court concluded the statutes were based on an "arbitrary classification resulting in unequal punishment for like offenses where one city qualifies population wise for a municipal court . . . and another in the same locality does not." *Id.*, at 416, 333. This inequality, the Court concluded, was "completely arbitrary and capricious." *Id.*

The arbitrary and capricious nature of the "rules" enforced by the PUC is even more stark. It depends on just how conservative – or perhaps how "aggressively devised" (in the opinion of Hessler) – the Project happens to be. The PUC – proving to be ever flexible in carrying out the legislature's policy – is willing to quantify and sculpt the Effects, for sanctioning as a Permit Condition, to fit the particular circumstances of the Project's design. In such circumstances, *Applicant* is in charge, having fostered the design, while the PUC is merely on stage, playing an assigned role and overseeing small

details of the Effects. In such manner, PUC readily tightens the permissible emission of Effects (as was done in *Application of Prevailing Wind Park*), yet without ever infringing upon the design of that Project. But, if design requires a more liberal approach (as Hessler famously observed), then *more* Effects are permitted, becoming an *added burden* upon the property rights and interests of Non-Participants.

As applied by the Agency, the *ad hoc* classifications purportedly devised to protect the property (and health) interests of Non-Participants are entirely arbitrary, lacking a rational basis, as observed in the concurring opinion of Justice Sabers in *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 773 (S.D. 1989). If a more conservative design were presented (or, one not so "aggressively devised" in Hessler's view), this Project could be made subject to the very same two-fold criteria applied in the *Prevailing Wind Park* matter. The regulations suggested (*see* note 21, above) would end the pseudo role-playing by both Applicant and Agency, thus benefiting the "citizens of this state."[27]

> ***Issue 2-A:*** Whether the Applicant, holding Effects Easements from Participants, is entitled or privileged by law, or the Agency's Permit, to cast or emit the "effects" (both noise and shadow flicker) on nearby Non-Participants, without benefit of similar easements?

Applicant has obtained wind leases from Participants for purposes of siting the Project's turbines. The leases include "Effects Easements," accepting both Noise and Shadow Flicker from turbines on the Participant's own land, or "attributable to the Wind Farm . . . on adjacent properties over and across the Owner's Property." R011898.[28] Neither Applicant nor Agency's Staff expressed views on the record as to whether similar Effects Easements are appropriate (or perhaps even required) for the lands and homes of

[27] As referenced in SDCL 49-41B-1.

[28] Matching the language of the Kranz Easement, Section 5.2, in Appendix C.

Non-Participants. With the exception of one "Participation Agreement" disclosed after the Agency's hearing[29], Applicant has in place no Effects Easements with Appellants or other Non-Participants.

While Participants have granted Applicant a substantial amount of control over their property, thus inviting the Agency's ruling on the level of the Effects that may be cast upon them by the Project, Non-Participants uttered no such instruments in favor of Applicant, conceded no such role to the PUC. If an "Effects Easement" is warranted for the lands of Participants, then when Applicant seeks the same legal footing and the right to afflict with Effects as a servitude upon the lands and homes of Non-Participants, it must likewise hold an Effects Easement.[30] Thus, without benefit of an interest created under the provisions of SDCL Chapter 43-13, any claim of *lawfully burdening* the homes and lands of Appellants (and of all other Non-Participants) hangs entirely upon the Permit issued by the PUC.

The doctrine of judicial estoppel has been outlined in many cases, including *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, ¶ 18, 865 N.W.2d 466 (2015). In essence, if an earlier position is judicially accepted, the party later claiming an inconsistent legal position may be estopped, in order to avoid inconsistent legal determinations. Applicant's use of an "Effects Easement" with Participants – *and those*

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[29] Marked as Ex. I-8 (R013802). Why this landowner, with a small parcel that does not also include a wind turbine, afforded Applicant a form of "Effects Easement" is not clear. Appellants assume that owner may receive "Effects" beyond the specific intensity or duration level otherwise approved by the Agency. When or by what means have those levels of Effects become *the* fulcrum point in South Dakota, such that when exceeded, an easement is required - otherwise the Effects may be freely cast without recourse?

[30] Neither the PUC nor the trial court accepted this logical conclusion.

landowners only – is inconsistent with the position that, *for all others*, the Agency's Permit fully suffices in casting Effects within the Permit Conditions.[31] This view, again, conflates the legislature's focus on *health* (as the Agency resorts to some part of a German standard) with rights conferred by instrument upon a servient estate.

Aside from the statutory assignment under SDCL 49-41B-1[32], and the elements for Applicant's burden of proof listed in SDCL 49-41B-22, the PUC has *no* authority to determine, grant, award or compel easements. That much is clear, but without retreating from the position the PUC Permit under SDCL Chapter 49-41B, does have the *effect* of ostensibly authorizing burdens or servitudes on adjoining lands and homes, albeit without the formal hallmarks of an easement.[33]

That burden is particularly evident as to these Appellants and their homes.[34] The homes are from 2,000-2,749 feet from the nearest turbine, must endure between 3:04 and 15:04 hours of Shadow Flicker annually, while Noise is predicted from 42.0 to 43.6 dBA. While Shadow Flicker for each home is less than 30 hours annually, no one knows (on this record) whether the German standard's daily limit of 30 minutes is also offended by Applicant's predictions, or if the additional 8-hour per year limit (as referenced in Ex.

[31] The PUC's own actions in *Prevailing Wind Park* – imposing a daily time limit for Shadow Flicker, being part of the German standard – is compelling also on the issue of judicial estoppel. No evidence was adduced here as to daily time limits.

[32] That task is to ensure "minimal adverse effects" are "upon the citizens of this state."

[33] In pleadings before the PUC, Appellants have referenced the Agency's action as the taking of a *de facto* easement. Appellants also persistently criticized the PUC's actions that erase Non-Participant's property lines and, without benefit of Agency rule making, encourage deployment of some fractional part of the so-called German "safety" standard, which reads or tallies the Effects at the occupied dwellings of Non-Participants.

[34] Ex. I-3, R013293, at 013294, includes a summary of Applicant's predicted Effects.

A12-15, at R005988) is also transcended. Notably, two of the four homes exceed 8 hours annually.

If merely one portion of the German safety standard is to be enforced in South Dakota, that should entail an appropriate rule-making proceeding. Appellants also can't help but notice that both Staff and Applicant are avid promoters of that *part* of the German rule selected by the PUC (30 hours per year for Shadow Flicker). No evidence was adduced on unapplied aspects of the German "safety" rule, even as the PUC's own expert (Hessler) was pushed beyond *his* ideal design goal (40 dBA) to some illusory "regulatory limit" of 45 dBA.

These Effects, cumulatively, burden the lands of those living nearby.[35] When given by the owner of lands, an "Effects Easement" is certainly in order. The PUC's Permit is a rather poor (and wholly inadequate) substitute where such an easement was neither sought by Applicant nor given by Non-Participants.

> ***Issue 2-B:*** Whether Applicant's casting of Shadow Flicker on Non-Participants, having granted no Effects Easement to Applicant, conflicts with the rights and privileges of landowners under SDCL 43-13-2(8)?

From the outset of Appellants' intervention in August 2019 (R001197), the Agency's unilateral imposition of servitudes on the lands and homes of Non-Participants has been challenged, citing SDCL 43-13-4 and 43-13-2, including the latter's subsection (8): "[t]he right of receiving air, light or heat from or over, or discharging the same upon

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[35] Shadow Flicker does not extend to infinity. According to Applicant's expert Haley, the Effect is "indistinguishable" beyond 1,700 meters (about 5,577 feet). The homes of Appellants are in the range of 2000-2800 feet (about 850 meters, at most). Haley testified the "flickering effect is most noticeable within approximately 1,000 meters of the turbine." Ex. A14-2, at R011270. The rule suggested in note 19 would prevent this. In the absence of any such rule, this appeal seeks to establish whether Applicant's right to cast Effects and burden property can be conferred under the terms of the Agency's Permit.

or over land."[36] The pulsating or flickering effect, when the turbines are turning, is a "discharging [of light]" – *in objectionable form* – over Non-Participants.

Neither Appellee responded to this assertion until the time of argument before the circuit court, when Applicant's counsel countered with these comments:

> With regard to the Ehlebracht appellant's arguments, Mr. Swanson can't even make his argument without a dramatic mischaracterization of shadow flicker as a discharge. As he explains in great detail in his initial brief, the source of the light is the sun. The shadow flicker just means the blade passes between the sun and the receptor. There's no capturing reflection, discharge, light source, or anything of that nature from these wind turbines and his argument relies on there being some kind of discharge of light originating from the turbines. That doesn't happen. TR-C 25:7-16.

Counsel concluded with the claim that "[e]asements and property rights are not within the purview of the PUC in this process and are not an appropriate subject matter for this appeal." TR-C 26:17-19.

While it is agreed the PUC has no actual authority to issue easements, *or to adversely affect property rights*, the question fairly remains: does the Permit nevertheless constitute a *de facto* easement upon and over the homes and lands of Non-Participants? Further, while the original source of the light being discharged *is* the sun, the actual source of the resulting, adulterated light is *actually* the wind turbine. Applicant's own Section 5.2 (*see* Appendix C), depicting the Effects Easement, lays down this string of words: "light, flicker, noise, shadow."

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[36] This statute, copied by the territorial legislature in 1877 from California's Civil Code of 1872 (presently § 801), was discussed in Appellants' opening brief to the circuit court, at 18-27. CR 1399. This Court does not seem to have addressed the issue, but the list of easements in California's statute is not an exclusive list. *Blackmore v. Powell*, 150 Cal.App 4th 1593, 59 Cal.Rptr. 3d 527, 534 (2007); *Wright v. Best*, 19 Cal.2d 368, 381, 121 P.2d 702 (1942).

Stated differently, a light source, shining through spinning turbines, will yield Shadow Flicker. The wind turbine is the discharge point. The record holds hundreds if not thousands of pages of professional literature claiming this essential point: *Shadow Flicker and Noise each may be an annoyance, as is the case elsewhere, but they will not kill you*. That point relates entirely to the *health* of humans. Whether these Effects are a burden on *property* was never resolved by either the Agency or the trial court.

The old statute (SDCL 43-13-2(8)) does not seem to have been cited in *any* decision of this Court, much less one focused on wind turbine permitting or whether Shadow Flicker comprises a servitude, a burden to be created only by the vested owner of the estate rather than at the direction of some state agency. Applicant's own experts clearly state that Shadow Flicker becomes "indistinguishable"[37] if the turbine is about one mile or so from the Non-Participating property. Rather than either observe that separation distance or negotiate an easement from Non-Participants, Applicant has acted to burden the lands and homes of Non-Participants, trusting the PUC's Permit will suffice to close the legal gap.

Do the Effects comprise a burden or servitude? In extracting wind leases from Participants, Applicant *itself* selected a mechanism for protection should the burden of Effects eventually outweigh the benefit of mere monetary consideration paid to present or future owners of leased turbine sites. That Non-Participants would regard these Effects as a burden on *their* nearby lands and homes should not be surprising. What is surprising is that the PUC, willing to accommodate even an "aggressively devised" Project (as opined by Staff's expert Hessler), shifts the burden of Effects onto the homes of Non-

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[37] See testimony of Haley, as referenced in note 35, *supra*.

Participants, while yet professing *ad hoc* allegiance to some favored part of the purported German safety standard for Shadow Flicker and the imaginary case-by-case line (otherwise known as a "regulatory limit") for the burden of Noise. Ironically, what the Agency concedes it has no jurisdiction to grant (Effects Easement), it has, in fact, given.

> ***Issue 3-A:*** Whether the Agency decision, expressly approving the intensity and duration for the casting or emission of "Effects" (noise and shadow flicker) upon Non-Participants (including Appellants) represents a *per se* taking of interests (an easement) in the lands and property interests of Non-Participants?

Convinced that no one will be maimed or killed by the Effects, the Agency's Permit effectively licenses Applicant for permanently casting those Effects - in some predicted level of intensity or duration – onto the homes and lands of Non-Participants. Applicant didn't supply an applicable easement for such neighbors, and the Agency also never considered whether the sought Permit is effectively a taking of property interests.

The trial court cites *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131, 149 to support the conclusion that the Permit is not a taking of property rights, citing also *Boever v. South Dakota Board of Accountancy*, 526 N.W.2d 747 (S.D. 1995), for the proposition that, as argued by Staff, any claim of *per se* nuisance is unripe.[38] Applicant's own evidence is extensive in predicting the Effects now coming upon Appellants' homes.

In *Benson*, at ¶ 60, this Court cites *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005). *Harms* is a city zoning case, where the adjoining property owners claimed the city's rezoning approval for a cement plant (with resulting noise, dust, traffic problems, and lights) caused the harm to the nearby home, seeking damages for inverse

[38] Appellants did not argue that this or any wind farm comprised a nuisance *per se*. With the Permit in hand, the point of Issue 3-B, *infra*, is that relief is even more unlikely because of SDCL 21-10-2 and cases determined by this Court. The PUC's taking of Non-Participant's property interests, as to such Effects, seems to be complete.

condemnation as if the City had appropriated an interest in property. While deciding the city did not "[work] a taking of private property within the meaning of the Fifth Amendment," *Harms* remains instructive as to the "consequential damages rule," or the "natural, probable consequence test," as referenced in *Benson*, ¶ 60. The Iowa Supreme Court reviewed a range of federal cases,[39] distinguishing between burdens placed on private landowners because of the government taking an easement over the land, versus government action on the government's own property, resulting in a burden. The consequential damages rule generally precludes the finding of a taking in the former case, but not the latter. *Harms*, 702 N.W.2d at 101. The court then further noted:

> The Harms do not challenge the district court's finding that the rezoning ordinance was valid. Joe's Ready Mix and Sandbulte, as the county in *Griggs*, were the promoter and owner of the ready mix plant and decided, subject to the ordinance, where the plant was to be built and how it would be operated. The City in enacting the rezoning ordinance has taken no action in determining these matters.
>
> Unlike *Causby* and *Portsmouth Harbor*, it was not the operation and maintenance of government property that produced the nuisance which caused the Harms' injury and damages. Under these circumstances, the City's action in rezoning the property did not result in a taking of an easement created by the nuisance as the Harms contend. Rather it was the action of Joe's Ready Mix and Sanbulte that produced the nuisance and they – rather than the City – should pay for the easement. *Id.*

The conclusion in *Harms* must be contrasted with what is clearly presented here: the PUC has expressly licensed the casting of Effects (as minutely and exhaustively

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[39] Including *Lingle v. Chevron U.S.A. Inc.*, 544 US 528 (2005), *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), and *United States v. Causby*, 328 U.S. 256 (1946). *Lingle*, reverses the holding of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), to the effect that a zoning ordinance "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." The state *has* legitimate interests as expressed in SDCL 49-41B-1, including the health of citizens; Appellants, however, submit that ensuring Non-Participants (such as Mrs. Kranz) will be nonetheless subjected to wind farm "Effects" by means of a PUC Permit is *not* among those expressed interests. *Lingle*, at 548, clarifies the grounds for challenging government regulations as a taking.

predicted by computer modeling) upon all homes and properties within the Project area, both Participants and Non-Participants, according to some *ad hoc* regulatory limit. In the case of Participants – whether entailing bare land or occupied dwellings (or both) – they are compensated to accept this burden, having conferred an Effects Easement. In the latter case, the issued Permit, *standing alone*, is Applicant's sole source of right and privilege with regard to the occupied dwellings of Non-Participants – no concern whatsoever being shown for licensing the dumping of either Noise or Shadow Flicker also upon the bare land of Non-Participants, and in all cases, permanently, and without compensation.[40]

While finding the rezoning action of city did not comprise a taking, *Harms* took note of its prior decision in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998). In *Bormann*, the Iowa court had held the nuisance immunity created an easement in property affected by a nuisance in favor of land belonging to those seeking the agricultural designation; easements are property interests subject to the just compensation requirements of the Federal Takings Clause. *Id.*, at 316. The "right-to-farm" (RTF) statute was held unconstitutional in *Bormann* because of authorizing the use of property in ways that infringed on the rights of others, by "allowing the creation of a nuisance-easement without the payment of just compensation." *Harms*, at 101-2.[41]

Appellants recognize this is not yet an inverse condemnation case. Presently, this is an administrative appeal, moving to this Court from the circuit court; Appellants intend to present a challenge to the jurisdictional power of the PUC to actually license what the

[40] That Applicant's permanent use of open land for such purposes reduces or eliminates the owner's right to develop other homes or uses now permitted by the zoning ordinance is mentioned only in passing – this, too, is an infringement of property rights.

[41] The doctrine of *Bormann* pertains to Issue 3-B, *infra*.

Permit purports to confer upon Applicant, *as a matter of right*, over the lands and homes of Non-Participants.[42] As argued in Issue 3-B, *infra*, that very license, furthermore, becomes also a means of insulating Applicant's operations from further challenge as a nuisance.

> ***Issue 3-B:*** Whether the Agency decision, expressly approving certain levels or durations of the Project's adverse effects upon the homes and lands of Non-Participants (including Appellants) vitiates the nuisance laws as a potential remedy available to Non-Participants, thus representing a taking of property rights otherwise secured by law?

The history of other large-scale wind energy facility permits issued by the Agency confirms that these endeavors are fairly recent, beginning in 2017. R011799, 011808, Ex. S1, Staff Witness Kearney.[43] For their part, Appellants are less than enthused about being *permanently* consigned to now live and own property in or near the boundary of an industrial-scale electrical energy generation facility. Appellants are concerned the Agency's Permit serves as a *de facto* easement for the permanent casting of the Effects upon their homes and lands. So long as Applicant remains within whatever dose of Effects has been prescribed for Appellants by terms of the Permit Conditions, Appellants are further concerned this uncompensated taking is further harmful to their property interests by serving also as an effective roadblock to a nuisance action.

Legal literature suggests that wind energy development has always felt vulnerable to attack on the basis of nuisance law. In West Virginia, a wind farm project with the

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[42] That said, if the Permit endures as a veritable, permanent Effects Easement, the taking of Appellants' property rights may be further considered in a suitable forum under the ruling of *Knick v. Township of Scott*, 588 U.S. ____ (2019).

[43] PUC docket number reflects the year – thus, *Crocker Wind Farm* application, EL17-055; *Prevailing Wind Park*, EL18-026, transpired in 2018.

name of NedPower Mount Storm, obtained a certificate from the State's Public Service Commission, and proceeded with construction of 200 turbines. Several neighbors – living between a half-mile and two miles from the proposed site – brought legal action to enjoin the work based on nuisance, citing noise, and "flicker" or "strobe" effect, among other concerns. Following the trial court's dismissal on the pleadings, the case reached the West Virginia Supreme Court, which reversed and remainded the case for trial. *Burch v. NedPower Mount Storm*, LLC, 647 S.E.2d 879 (W.Va. 2007).

That remand gave rise to a number of law review articles arguing the developing wind industry needed protection from nuisance and other suits. In "Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States,"[44] the author provided several suggestions, including adopting the view that a state siting permit for a wind farm should be preclusive and final. The article asserts also that wind development would be economically beneficial, outweighing any harm it caused.[45]

Although the PUC did not start hearing large wind farm cases until 2017 (as outlined in Ex. S1, R011806), the legislature made the assignment to this Agency many years before. The PUC's expert witness, David Hessler, is a well known "noise expert." In the words of Staff's witness Kearney (Ex.S1, at 9, R011808), Hessler "consistently maintain[s] that wind projects should work to achieve an ideal design goal of 40 dBA if possible." Kearny continues: "At the same time, Mr. Hessler acknowledges that in most

[44] Stephen Harland Butler, 97 Calif. L. Rev. 1337 (October 2009). *See also*, Joseph Haupt, "A Right to Wind? Promoting Wind Energy by Limiting the Possibility of Nuisance Litigation," Journal of Energy & Environ. Law, 256, Summer 2012. Haupt, at 256, suggests using the Right-to-Farm acts as a model to pave the way for wind farm development, thus placing *Bormann* in context; see 30, *infra*.

[45] By the time of this article (2009), *Lingle* had overturned *Agins*, as cited in note 43 – otherwise, the author surely would have cited the 1980 case, with the "legitimate state interests" test as an exception to "takings."

circumstances it is difficult for wind projects to meet the ideal design goal and for regulatory purposes a permit limit of 45 dBA for non-participants is reasonable." Ex. S2, R012746; TR-H-497:24-498:25.[46]

The Agency's decision reflects the adoption of "permit standards" that, as to noise, do not meet Hessler's ideal design goal, while yet being below the "regulatory limit," in Kearney's words.[47] Meanwhile, notwithstanding opinions as to what might be "reasonable" for Non-Participants, the record before the Agency is replete with Applicant-provided articles and journals. These writings are to the effect that, while Non-Participants are relegated to living on the edge of a wind farm (an environment not necessarily pleasant for everyone because of the potential for sleep disruption and various health complaints), the writers seem unanimous in the view that no serious health risk exists, nor is anyone likely to be killed.[48] The striking conclusion of nearly all of the studies adduced by Applicant is this: *more studies are required* to plumb the depths of the relationship between wind farm proximity, the "Effects," and the reported sleep disturbances and other health concerns.

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[46] Non-Participants, such as Appellants, often enclosed by the Project's boundary line, volitionally accepted *none* of the Project's Effects burdens, now imposed without consent by force and effect of the Permit.

[47] This so-called "regulatory limit" is found neither in statutes nor regulations, but arise – *this time, at least* – from the *ad hoc* expert opinions (Hessler and others), along with the recommendations of Kearney to the Commissioners.

[48] Appendix C, *infra*, lists fifteen (15) studies or articles in the Agency's record, regarding noise (sound) or shadow flicker and claims of annoyance or health effects. The list reflects the "effects" of the Effects is not settled science. Under SDCL 49-41B-22(3), Applicant has the burden of proof that "[t]he facility will not substantially impair the health, safety or welfare of the inhabitants." This suggests *some* impairment in the health of inhabitants *is* an acceptable price to pay, under the State's scheme. This appeal concerns Agency's award to Applicant of a free use of Appellants' property rights, in accord with PUC's *ad hoc* "regulatory limits."

For now, the expert opinions are given, mixed together with Staff recommendations and computer-generated modeling performed by other experts at the behest of Applicant to create the Permit Conditions. As of this writing, Applicant's Project is *fully built* – and *fully permitted* by the Agency (as envisioned by SDCL 49-41B-2), with Permit Conditions *written and imposed* as a result of the computer modeling, opinions and projections. What Hessler opined as being "reasonable" (noise is still an intrusion on neighbors, even if below the *ad hoc* "regulatory limits" proclaimed from the witness stand by Kearney) could yet prove to be, in actual experience, a living nightmare for Appellants and other Non-Participants. What then? What remedy remains for Appellants as neighbors locked within the Project boundary?

Appellants fear that the computer modeling, studies, and prognostications have become the Agency's Permit Conditions and are now immutable. Further, these are imposed on Applicant's wind farm "under the express authority of a statute" (as referenced in SDCL 21-10-2) marking the permissible limits of invasive uses. As such, "Effects" emitted from this Project in full conformity with the applicable Permit Conditions (if conforming also to the Agency's *ad hoc* regulatory limits – that is to say, the limits for this particular Project and these Non-Participants) are then protected from further question or challenge as a public or private nuisance, without regard to the *actual* consequences on the lives and well-being of Appellants.[49]

The point made by statute ("express authority of a statute," SDCL 21-10-2) is discussed in several decisions of this Court. In *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, 557 N.W.2d 748, the majority opinion, at ¶ 46, concludes that based on the

[49] As noted in Appendix D, *infra*, many of the papers presented by witness Ollson suggest further studies are warranted.

statute, no action based on nuisance could lie against a public utility. *Kuper,* at ¶ 47, cites *Armory Park v. Episcopal Community Services*, 148 Ariz. 1, 712 P.2d 914, 921 (1985): "We would hesitate to find a public nuisance, if, for example, the legislature enacted comprehensive and specific laws concerning the manner in which a particular activity was to be carried out." The South Dakota permitting process is an example of comprehensive, specific direction.

In *Krsnak v. Brandt Lake Sanitary District*, 2018 S.D. 85, 921 N.W.2d 698, the doctrine of *Kuper* was followed, as "[s]anitary districts are specifically authorized by statute." Plaintiffs "must present evidence that the District engaged in some act or omission that violated its statutory authority." *Id.*, ¶ 32.

Likewise, the PUC's *ad hoc* regulatory limits for the Effects [50] – applicable to this specific wind farm – have become *the* statutory authority of the intensity and duration of those Effects, *permanently*, while the literature adduced by Applicant often observes that *more study* of the potential adverse consequences to humans is warranted. The resulting regulatory limits become the officially licensed, permitted, and approved quotas of Effects upon all Non-Participants.[51]

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[50] Given the opinions of Hessler – this wind farm being "aggressively devised" – the *ad hoc* regulatory limits fashioned here are beyond what the expert considers "ideal." Is this what the legislature intended with a standard of "minimal adverse effects"? A distinction must be made for the Effects and consequences for human health (including that of "Participants"), versus burdens or servitudes placed on property interests owned by such persons. The PUC may have jurisdiction to conduct the former inquiry but the latter is yet challenged by Appellants.

[51] In *Joffer v. Cargill Inc*., 2010 WL 1409444, given the statute, *Kuper*, and *Hedel-Ostrowski v. City of Spearfish*, 679 N.W.2d 491 (S.D. 2004), Magistrate Simko concluded likewise as to grain warehouses, in the face of claims the site emitted dust and mold to the detriment of the neighbor's health.

The linkage between the legislature's findings under SDCL 49-41B-1 and the ancient language of SDCL 21-10-2 is clear.[52] Together, a one-two punch is delivered to the vested property rights of Non-Participants. First, an invasion by noise and shadow flicker is officially licensed in terms of intensity and duration, and then - because of that very license - the neighboring landowner, including each Appellant, is now stripped of legal remedies to challenge the very source of that invasion.

In *Bormann v. Board of Sup'rs In and For Kossuth County,* 584 N.W.2d 309 (1998), the Iowa Supreme Court reviewed that jurisdiction's "right-to-farm" act, affording immunity for nuisance claims against intensive agricultural practices. In the process of determining that section to be unconstitutional,[53] the court concluded this was not a close case:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers. *Id.*, at 322.

As a small group of Non-Participants huddled near and behind the Project boundary line (drawn by Applicant and approved by Agency), the result in *Bormann* is compelling – and disturbing.[54] Here, the State, through the PUC and at the behest of the

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[52] Ironically, SDCL 21-10-2 was borrowed from California in the very same year – 1877 – as SDCL 43-13-2(8). The language of each remains unchanged today, and, Appellants now urge, directly bear on the merits of this case.

[53] Under the Fifth Amendment, U.S. Constitution, and also under article I, section 18, Iowa Constitution, the court noting, at 319-20 "Thus, the state cannot regulate property so as to insulate users from potential private nuisance claims without providing just compensation to persons injured by the nuisance."

[54] In *Stop the Beach Renourishment, Inc. v. Florida Dep't. Environmental Prot., et al*, 560 U.S. 702, 715 (2010), Justice Scalia observed "[T]he Takings Clause bars the State

legislature, on the one hand, has officially licensed the duration and intensity of the Effects each Non-Participant must henceforth endure upon their homes and lands[55] – *permanently*. Then, on the other, the State holds that the prescribed dose of Effects enumerated within the License cannot be challenged by means of the nuisance law.[56] No other judicial remedy seems apparent as to this Project. Taken together, these legislative measures accomplish a taking of Appellants' property rights – and, whether or not presently recognized, the rights of all other Non-Participants.

Mrs. Kranz declined to enter into a wind lease with Applicant's affiliate, with the Effects Easement language of Section 5.2 (*see* Appendix B). Notwithstanding, Applicant now holds a Permit for permanent use of her farm and home in the dumping of the Effects. Applicant's Permit extends to the homes and lands of each Appellant.

Many cases can be cited to illustrate the Takings Clause doctrines of the U.S. Supreme Court – *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), being three in particular. The first two are commonly referenced as "exaction" cases, requirements imposed by governmental entities upon an owner for the privilege of applying for land development rights. For the latter, a landmark law has been applied to thwart further development of the owner's property under the zoning law. Attempts to make these cases fit the circumstances of Appellants is painful, to be sure: Appellants are *not* seeking to develop anything on their

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from taking private property without paying for it, no matter which branch is the instrument of the taking."

[55] Much like a servitude, including those listed in SDCL 43-13-2.

[56] "State, by *ipse dixit* may not transform private property into public property without compensation," *Stop the Beach*, 560 U.S. at 715.

properties, they only seek to continue to make use of their current homes and lands without being forced to endure or suffer the onslaught of Effects.

To be sure, nothing will be quite the same as the wind farm moves into production. There will be wind turbines on the horizon – but this case is not some lament about formerly uncluttered views. Rather, this case is about being required, by force of the Permit, to permanently tolerate the Effects of this wind farm operation, the nearest facet of which is sited some 2,000 to 2,700 feet distant from the homes of Appellants. Meanwhile, Applicant's own experts assured the Agency that Shadow Flicker, for example, fades to insignificance with a separation distance of about one (1) mile.[57]

Applicant counted on the PUC to follow the recent history of "regulatory limits" (as Staff witness Kearney has testified) for the objectionable Effects. In that respect, based on some part of the German "safety" standard (Ex. A12-16, R006006)[58] as Applicant itself has touted (and the Agency has embraced on an *ad hoc* basis), the infliction of Shadow Flicker for 30 hours or less per year on the home of a Non-Participant is perfectly safe and acceptable – at least, in the view of the PUC. (But even this claim of human safety has nothing to do with burdens on property rights.)

Likewise, so long as Noise does not exceed 45 dBA at the homes of Non-Participants, the PUC is content.[59] Mere annoyance or sleep disruption does not compel the Agency to find a risk of adverse health consequences. As such, Applicant has carefully observed and learned the lesson taught - there is no "need" to produce an Effects Easement from Non-Participants when invoking the PUC's jurisdiction, as the

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[57] See note 35, *supra*.

[58] As referenced in Appendix D.

[59] The Agency ignored expert Hessler's view the Project is "aggressively devised."

Permit alone will suffice (so long as that German standard, as parsed and applied in South Dakota, isn't transcended). These suppositions are all mistaken, as argued herein.

CONCLUSION

The trial court correctly determined the PUC lacks jurisdiction to grant or issue easements. On the other hand, the *actual effect* of the Permit is the very thing the Agency itself eschews – *an Effects Easement*. If the State has a legitimate interest in promoting wind development, evidence of a volitional easement from property owners adversely affected by the Effects is essential. Approving the casting of Effects on the property interests of Appellants on the bare authority of a PUC Permit, asserting *this* outcome is exactly what the legislature intended to accomplish, is a pretense - another *ipse dixit* proclamation.

Respectfully submitted:

Date: May 25, 2021

/s/ A.J. Swanson

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GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ,
Appellants

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws, being 33 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 9,023 words and 48,175 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: May 25, 2021

/s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Brief in the above referenced case was served upon each of the following persons, as counsel for Appellees herein, having been accomplished by electronic mail, at the addresses stated below:

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Further, the signed original of Appellant's Brief was transmitted via U.S. Mail to the Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol, Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

All such service being accomplished the date entered below:

Date: May 25, 2021

/s/ A.J. Swanson
A.J. Swanson, Attorney for Appellants

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNT OF DEUEL	)	THIRD JUDICIAL CIRCUIT

IN THE MATTER OF
ADMINISTRATIVE APPEAL GARRY
EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL, AND LARETTA KRANZ

And

AMBER KAYE CHRISTENSON AND
ALLEN ROBISH,

Appellants,

Vs.

CROWN RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION,

Appellees

19CIV20-21 and 20-27

MEMORANDUM OPINION

INTRODUCTION

This matter comes before the circuit court on appeal by Appellants Amber Christenson and Allen Robish (collectively "Christenson Appellants")[1], Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz (collectively "Ehlebracht Appellants")[2], appealing the South Dakota Public Utilities Commission Staff's (the "Commission's" or "Staff's") Final Decision and Order Granting Permit to Construct Facility in EL 19-027 dated April 6, 2020. (AR 14230-14258), Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).[3]

[1] Christenson Appellants – 19CIV20-27
[2] Ehlebracht Appellants – 19CIV20-21.
[3] All citations to the administrative record are referenced as "AR".

STATEMENT OF JURISDICTION

The Christenson Appellants appeal from Commission's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020, and May 5, 2020, in both Codington and Grant Counties, South Dakota. Thereafter, following Commission's unopposed motion to change venue (May 11, 2020), the circuit court entered its Order changing venue herein (May 19, 2020), pursuant to SDCL § 1-26-31.1. This Court ordered that the Intervenors files would be thereafter combined into this appellate file, 19CIV20-27.

The Ehlebracht Appellants appeal from the same April 6, 2020, Final Decision and Order, as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants timely and filed their Notice of Appeal on April 29, 2020, in Deuel County, South Dakota.

STATEMENT OF FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC[4] ("Applicant", "Crowned Ridge", or "CRWII") submitted its application for a facility permit for a 300.6-megawatt (MW) wind energy facility to consist of up to 132 wind turbines in Deuel, Grant, and Codington counties (the "Project").[5] (AR 14230-14258). Within its application, CRWII submitted written testimony from six witnesses.[6] (AR 1-1118, 3233-3254). The commercial operation date of the Project was estimated to be in the fourth quarter of 2020. (AR 11).

On July 11, 2019, the Staff issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status and established an intervention deadline of September 9, 2019. (AR 1122-1123).

On July 31, 2019, the Commission issued an order granting party status as Intervenors to the Christenson Appellants. (AR 1193-1194). On August 26, 2019, the Commission issued an order granting party status as Intervenors to the Ehlebracht Appellants. (AR 1478). On that same

[4] CRWII is a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC.
[5] Besides the turbines, the Project also includes access roads to the turbines and associated facilities, underground 34.5 kV electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230 kV collection substations, two permanent meteorological towers, and an operations and maintenance facility.
[6] Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter.

day, pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission held the public input meeting in Watertown, South Dakota. (AR 1122-1123, 1274-1477).

On September 20, 2019, CRWII submitted pre-filed Supplemental Testimonies and Exhibits.[7] (AR 2007-3223). On October 21, 2019, CRWII filed Corrected Direct Testimony of Witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-Filed Direct Testimony and Exhibits of five witnesses.[8] (AR 3356-4259). On December 12, 2019, several Ehlebracht Appellants[9] each filed Pre-Filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, CRWII submitted Pre-Filed Rebuttal Testimony and Exhibits of seven witnesses[10] (with corrections filed on January 22, 2020, and January 24, 2020). (AR 4267-4338). On January 23, 2020, Staff submitted Pre-Filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

On February 4-6, 2020, the Commission held an evidentiary hearing in Pierre, South Dakota. (AR 8844-13781). CRWII, Staff, and Appellants participated in the evidentiary hearing, presenting testimony, and cross-examining witnesses.[11] (AR 8844-13781). Appellants presented witness testimony,[12] but did not pre-file expert testimony. The Hearing Examiner presided over the hearing and each of the commissioners were present for the entirety of the hearing. On February 27 and March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13820-13919).

On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079). On April 6, 2020, the Commission issued the Permit. (AR 14230-14258). The Permit includes conditions establishing maximum permissible sound levels and maximum levels of shadow flicker at residences near the Project.[13] (AR 14246-14258).

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[7] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Cristopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney.

[8] These include David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson.

[9] Amy Rall, Laretta Kranz, Garry Ehlebracht, and Steven Greber.

[10] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson.

[11] Seventeen witnesses testified at this hearing.

[12] On December 12, 2019, Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz submitted pre-filed direct testimony.

[13] Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residences and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, the Ehlebracht Appellants filed a Notice of Appeal of the Order in the Third Circuit Court located in Deuel County followed by a Statement of Issues on May 7, 2020. On May 1, 2020, the Christenson Appellants filed a Notice of Appeal followed by a Statement of Issues on May 11, 2020. With the consent of the parties, the appeals were consolidated in the Third Circuit Court in Deuel County.

On July 13, 2020, Ehlebracht Appellants filed their initial brief. On August 10, 2020, Christenson Appellants filed their initial brief. On September 11, 2020, Staff filed its Response Brief to Christenson Appellants. ("Staff's Brief to Christenson"). On September 23, 2020, CRWII submitted its Response Brief to both Christenson and Ehlebracht Appellants ("CRWII's Brief"). On September 24, 2020, Staff filed its Response Brief to Ehlebracht Appellants. ("Staff's Brief to Ehlebracht"). On October 8, 2020, Christenson Appellants submitted their Reply Brief to both Staff and CRWII. On October 13, 2020, Ehlebracht Appellants submitted their Reply Brief. On November 23, 2020, a hearing was held on the matter in Deuel County, South Dakota

STANDARD OF REVIEW

The regulatory agency here, the Public Utilities Commission, is governed by the Administrative Rules of South Dakota ("ARSD"), specifically ARSD Chapter 20:10:22 ("Energy Facility Siting Rules"). Decisions by the Commission may be appealed to the circuit court:

> Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.[14]

SDCL § 49-41B-30. Subsequently, SD Ch. 1-26 states the following review procedures:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;

[14] "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL § 1-26-32.1; *see also* SDCL § 15-6-81(c) ("SDCL Ch. 15-6 does not supersede the provisions of statutes relating to appeal to the circuit courts.").

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . ..

SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602.

The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)). A decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 6, 756 N.W.2d 392, 395 (internal citations omitted). It is well-settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, rather, it is the court's function to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *See, e.g., Application of Svoboda*, 54 N.W.2d 325, 327 (S.D. 1952) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)).

Regarding questions of fact, the court affords great weight to the findings made and inferences drawn by an agency. *See* SDCL § 1-26-36. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice. *Anderson*, 2019 S.D. 11, ¶ 10, 924 N.W.2d at 149 (citing SDCL § 1-26-36) (emphasis added). Even if the court finds the Commission abused its discretion, the Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect.[15] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-

[15] A reviewing court will reverse an administrative agency decision when the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law, are clearly erroneous in light of the entire evidence in the record, or are arbitrary and capricious, or are characterized by abuse of discretion, or are clearly an unwarranted exercise of discretion. SDCL § 1-26-36; *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. *See also Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 N.W.2d 787, 791.

26-36(6)) (emphasis added). "An agency's action is arbitrary, capricious or an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary." *In re Midwest Motor Express*, 431 N.W.2d 160, 162 (S.D. 1988) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)) (emphasis added); *see also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'") (internal quotation omitted)). "Substantial evidence" is defined as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9).

Here, Appellants challenge the agency's conclusion that the CRWII wind facility will not harm the social and economic condition of inhabitants in the wind energy facility siting area and that the facility will not substantially impair the health, safety, or welfare of the inhabitants within the siting area as clearly erroneous based upon the record in its entirety.[16] This presents a mixed question of fact and law, reviewable de novo. *Johnson v. Light*, 2006 S.D. 88, ¶ 10, 723 N.W.2d 125, 127 ("Mixed questions of law and fact that require the reviewing Court to apply a legal standard are reviewable de novo.") (quoting *State ex rel. Bennett v. Peterson*, 2003 S.D. 16, ¶ 13, 657 N.W.2d 698, 701)).

PART I: CHRISTENSON APPELLANTS

Burden of Proof

South Dakota law requires the following:

> The applicant has the burden of proof to establish by a preponderance of the evidence that:
> (1) The proposed facility will comply with all applicable laws and rules; [and]
> . . .
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants. . ..

SDCL § 49-41B-22. Furthermore, the ARSD also places the burden upon the applicant:

> In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant,

[16] An applicant for a permit is required to establish that the facility "will not substantially impair the health, safety or welfare of the inhabitants" in accordance with SDCL § 49-41B-22(3).

> applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 ("Burden in contested case proceeding").

Christenson Appellants assert that the PUC's findings of fact were clearly erroneous, and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01. Under this burden of proof issue, the Christenson appellants assert several issues where the burden of proof failed. The court will address them below.

Solid Waste

Christenson Appellants initially raised the issue of "solid or radioactive waste" in their first brief. Christenson Brief, at 9-11. However, as Appellees PUC and CRWII argued in their responsive briefs, Christenson argued the wrong ARSD, as that did not apply to wind energy facilities, such as this Project.[17] The applicable ARSD in this case is the following:

> The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:
>
> (1) A forecast of the impact on commercial and industrial sectors, . . . solid waste management facilities, . . . and other community and government facilities or services. . ..

ARSD 20:10:22:23 ("Community impact"). Christenson acknowledges the previous error, and then argues this "community impact" regulation in their reply brief. Christenson Reply Brief, at 2-4. Although the incorrect statute was cited, the issue of "solid waste" was argued initially.

[17] Christenson initially argued that CRWII did not comply with ARSD 20:10:22:31, which states "The applicant shall provide information concerning the generation, treatment, storage, transport, and disposal of solid or radioactive waste generated by the proposed facility and evidence that all disposal of the waste will comply with the standards and regulations of any federal or state agency having jurisdiction. . .." However, as PUC argued, ARSD 20:10:22:05 states that ARSD 20:10:22:26 to 20:10:22:33, inclusive, apply for a permit for an *energy conversion* facility. *See* SDCL § 49-41B-2(6) for the definition of an energy conversion facility. Rather, this regulation states that ARSD 20:10:22:33.01 and 20:10:22:33.02 apply for a permit for a *wind energy* facility.

Christenson's argument concentrates upon the issue of identifying, analyzing, and forecasting the end of life disposal of the Project's used blades, concrete, and other refuse. The Staff states that the Commission heard evidence on the future disposal of wind turbine blades and received assurance from CRWII that it would comply with the applicable laws for disposal, which could occur decades into the future. CRWII stated at the November 2020 hearing that the statute is limited to the construction, operation, and maintenance of the facility, and that there is nothing in it regarding the decommissioning or tearing down.

Appellees' arguments are more persuasive here. First, the testimonies provided repeated assurances that the Project would follow the applicable laws. Furthermore, in the Application, this ARSD was specifically addressed, and stated in part, "Construction and operation of the Project . . . is not anticipated to have significant short- or long-term effects on . . . solid waste management facilities." Ex. A1, page 93.

Second, the argument of "disposal" here appears moot. While the incorrect, previously cited ARSD 20:10:22:31 requires proper disposal, the correct, applicable ARSD 20:10:22:23 does not mention the words "disposal" or "decommissioning" at all. It specifically refers to a facility's "construction, operation, and maintenance." Christenson's argument here concerns the *end of life* of the Project, and not the *construction, operation, and maintenance* of the Project. This ARSD does not require specific plans for the *disposal* of blades and refuse; therefore, the Commission did not violate SDCL § 49-41B-22, ARSD 20:10:01:15.01, or ARSD 20:10:22:31.

Thus, regarding the issue of "solid waste," the Commission met its burden of proof and did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for "solid waste."

Compliance with Grant County Ordinance

Christenson Appellants argue the following:

> Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRWII will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRWII "complies with both versions of the Grant County Ordinance – the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the December 2018 CUP vote."

Christenson Brief, at 3. In the record, FOF 18 states the following:

> FOF 18. The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules.[18] Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit.[19]

PUC Staff states that the Commission properly determined that the Project will comply with all applicable laws, specifically as it relates to compliance with the Grant County ordinance. Additionally, CRWII states that the record shows CRWII's commitment and ability to comply with the old and new Grant Country Sound Ordinance.

CRWII applied for its CUP for Grant County on September 17, 2018. On December 17, 2018, Grant County approved this CUP. The original ordinance was as follows:

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

On December 28, 2018, the new ordinance was adopted, and on January 28, 2019, it became effective. The new ordinance was as follows:

> 14. Noise. Noise level shall not exceed 45 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of the existing non-participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

In addition to FOF 18, Christenson Appellants argue that FOF 46 is also clearly erroneous:

> 46. The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any

[18] FOF 18 (Footnote 23): Ex. A1 at 72-76, 111-112 (Application) and Ex. A5 at 8-11 (Wilhelm Direct Testimony).
[19] FOF 18 (Footnote 24): At the evidentiary hearing, pro se Intervenor Christenson questioned whether Applicant was in compliance with the Grant County Ordinance in effect at the time Grant County voted to approve the Project or the Ordinance that was made effective after the County's vote to approve the Project. Applicant testified that Grant County has indicated it intends to apply the Ordinance made effective shortly after approval of the CUP for the Project. Evid. Hrg. Tr. at 47-49 (Wilhelm) (February 4, 2020). The record in this proceeding shows that Crowned Ridge Wind II complies with both versions of the Grant County Ordinance - the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the vote. Evid. Hrg. Tr. at 217-218, 233-234, 237-239 (Haley) (February 4, 2020); Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A14-1 through Ex. A14-4 (Supplemental Testimony Sound and Shadow Flicker Studies); Ex. A21-1 through Ex. A21-3; and Ex. A28 and Ex. 29 (Rebuttal Testimony Sound and Shadow Flicker Results); and Ex. AC-19. Therefore, the record shows that Crowned Ridge Wind II will be in compliance with applicable laws, including the Grant County Ordinance.

non-participants' residence and (2) no more than 50 dBA at any participants' residence. . .,[20]

Christenson Brief, at 16. Christenson Appellants argue that Conclusion of Law 9, 13, and 15 are in error:

> COL 9. In the event the Project's contracted life is not extended, the record demonstrates that Applicant has appropriate and reasonable plans for decommissioning. The Project will be decommissioned in accordance with applicable state and county regulations. Applicant has agreed to Permit Condition No. 33 for purposes of decommissioning the Project.
>
> COL 13. Applicant must comply with the applicable requirements in the Deuel County, Grant County, and Codington County ordinances.
>
> COL 15. Based on the preponderance of the evidence presented to the Commission, the Commission concludes that all the requirements of SDCL § 49-41B-22 have been satisfied.

This court will not weigh the evidence or substitute its judgment for that of the PUC. Rather, it is this court's function to determine whether there was any substantial evidence in support of the PUC's conclusion or finding. The PUC found that CRWII followed the Grant County ordinance, and the findings, cited above, are supported by substantial evidence of reports, testimonies, and studies. CRWII held a valid CUP from Grant County. (AR 14235-14236). Furthermore, the Commission concluded the following:

> The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules. Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. The record demonstrates that construction and operation of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

Id. (AR 14235 footnotes citing record evidence omitted).

Christenson cites *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861, and PUC counters that that case is inapplicable, as its facts and laws relate to a county

[20] FOF 46 (Footnote 98): Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A1-1 (Sound Modeling Report); Ex. A14-1 through Ex. A14-3 (Supplemental Testimony Sound Studies); Ex. A21-1; Ex. A21-3; Ex. A28, and Ex. 29 (Updated Rebuttal Sound Results).

zoning ordinance. This is an appeal from an *agency* decision, and not an appeal from a *county* decision. Because this issue is a *county* issue, and currently ongoing in case file 25CIV20-10, the Court will not address the validity of the CUP itself in this case.

Lastly, both Staff and CRWII argue in the alternative that no Appellants are prejudiced by these sound regulations of the Grant County ordinance. The Court refuses to weigh into this argument as it is unnecessary. Because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.

Aircraft Detection Lighting System (ADLS)

The Aircraft Detection Lighting System (ADLS) statute, effective on July 1, 2019, states the following:

> For any wind energy facility that receives a permit under this chapter after July 1, 2019, the facility shall be equipped with an [ADLS] that meets the requirements set forth by the Federal Aviation Administration [FAA]. . ..

SDCL § 49-41B-25.2 (in pertinent part). On April 6, 2020, the Commission issued its permit to CRWII (AR 14230-14258); therefore, this ADLS requirement applies to this permit.

Christenson Appellants argue the following:

> Appellee Commission committed error in violation of statutory provisions insofar as Applicant [CRWII] failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of Appellee CRWII's wind energy facility permit, of being equipped with – or even having applied for – the necessary and statutorily required aircraft detection lighting system (ADLS).

Christenson Brief, at 16. Christenson argues that CRWII failed to even apply for ADLS by the time of the administrative hearing seeking approval (February 4-6, 2020), and that the Commission clearly erred in its Findings of Fact 18,[21] 30,[22] and 66.[23]

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[21] *See* Issue 1A: Compliance with Grant County Ordinance, *supra*.
[22] FOF 30. Applicant will install and use lighting required by the [FAA]. Applicant will equip the Project with a FAA-approved [ADLS] to minimize visual impact of the Project starting with the commercial operation date and for the life of the Project, subject to normal maintenance and forced outages.
[23] FOF 66. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

The Court finds Christenson's argument to be misguided. The plain reading of the statute requires that CRWII, the applicant wind energy facility, which receives a permit, shall be equipped with an ADLS in compliance with the FAA. Christenson appears to argue that CRWII was not equipped with ADLS at the time of the permit, which is a clear misunderstanding of the statute.

Or, alternatively, Christenson argues that CRWII had no plan to install ADLS in its Application for its facility permit (submitted July 9, 2019) at the time of the Commission's Hearing (February 4-6, 2020). This would also be a misunderstanding of the statute, which says a facility that "receives a permit . . . shall be equipped" with an ADLS. Nothing in the statute requires the "merits" of the Applicant's permit being equipped or applied for an ADLS.

Furthermore, this point is moot. Findings of Fact 30 and 51, and Permit Condition 34, all state that CRWII will install and use ADLS in compliance with the FAA. CRWII points to Permit Condition 1 (Applicant will obtain all governmental permits which reasonably may be required by any governmental unit for construction and operation activity of the Project prior to operation) and Permit Condition 34 (Applicant shall apply to the FAA for approval to utilize an ADLS and allow enough time for a FAA determination and system construction prior to operation). FOF 51 requires the Applicant to illuminate the wind turbines as required by the FAA.

Therefore, regarding the ADLS, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for ADLS.

Sound and Air Quality Studies

A. Sound Study

Christenson Appellants argue the following:

> Appellee Commission failed to receive and consider Appellee [CRWII's] complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL § 49-41B-22(3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties.

Christenson Brief, at 18. Staff responds that Applicant met is burden of proof with respect to SDCL § 49-41B-22(3). CRWII responds that it carried its burden that the Project will not substantially impair the health or welfare of inhabitants.

South Dakota law states that the "applicant has the burden of proof to establish by a preponderance of the evidence that . . . the facility will not substantially impair the health, safety or welfare of the inhabitants. . .." SDCL § 49-41B-22(3).

Christenson Appellant states that "[a]lthough four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRWII, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review." Christenson Brief, at 19.

Staff responds that (1) there is no legislative directive as to how an applicant must establish that a project will not substantially impair the health and welfare of the community; and (2) there is no rule that mandates how the applicant must satisfy the burden. Staff's Brief, at 11. Staff then states that the Commission found sufficient evidence in the record to demonstrate that "the sound from the Project would not substantially impair the health and welfare of the community." *Id.*, (Findings of Fact 68, AR 14244). This finding was supported by substantial evidence in the record, including "expert testimony from both health experts and acousticians, with no corresponding intervenor testimony to contradict these experts." *Id.*

Again, the statute, SDCL § 49-41B-22, does not require an act that Appellants claim exists. Rather, it simply states that CRWII must prove its facility will not substantially impair the health, safety or welfare of the inhabitants. As Staff argued, there are no specific mandates on completing this task.

Therefore, regarding the sound study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the sound study.

B. Air Quality Study

Christenson Appellants argue that "contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review." Christenson's Brief, at 20. This ARSD states the following:

> The applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted.

ARSD 20:10:22:21.

CRWII argues that in its Application, it explained in detail that the Project's operations did not implicate air quality standards. CRWII's Brief, at 30. (AR 99-100). The Commission concluded "The evidence further demonstrates that there are no anticipated material impacts to existing air and water quality, and the Project will comply with applicable air and water quality standards and regulations." *Id.*; (AR 14237).

This ARSD does not require that an air quality study be submitted, only that it would comply with standards and regulations. Therefore, regarding the air quality study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the air quality study.

As to each of these issues raised the Commissions finding that the applicant has met its burden of proof as to the applicable rules and laws and that the Project will not negatively impact the health and welfare of the inhabitants was not clearly erroneous and is affirmed by this court.

PART II: EHLEBRACHT APPELLANTS

This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. This court will not address the arguments of easements or takings, the histories of regulatory limitations of shadow flicker borrowed from German standards, or whether this is a discharge of light in accordance with SDCL § 43-13-2(8). This is not the proper place nor time for these arguments. This court does not have the jurisdiction to hear these argument, rendering them moot in this appeal. The court does however, address the following issues raised by Ehlebracht Appellants.

Minimal Adverse Effect

Ehlebracht Appellants argue the following issue:

> Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL § 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effect," may proceed on a case-by-case or *ad hoc* basis to permit a burden of "effects" upon both citizens and their properties under

variable regulatory limits developed by others, including those interested in the promotion of wind development.

Ehlebracht Brief, at 2, 12. This South Dakota statute states the following:

> To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules may be adopted by the commission:
>
> (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
> (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and
> (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a solar or wind energy facility.

SDCL § 49-41B-35 ("Promulgation of rules").

Ehlebracht's argument of the *ad hoc* basis is that the Commission has permitted more stringent standards for other wind energy facilities, specifically Prevailing Wind Park,[24] than others, such as the CRWII Project here. These standards include "effects" such as noise and shadow flicker.

Staff argues that the Commission is not required to promulgate rules defining "minimal adverse effects," but rather is permitted this rulemaking authority. Staff's Brief to Ehlebracht, at 7. Furthermore, Staff argues that the state statute instructs the Commission to review permit applications on case-by-case or ad hoc bases.[25] CRWII likewise makes the same argument, the Commission has discretion, not the legal obligation to adopt rules. CRWII's Brief, at 8-9.

The state statutes and ARSD clearly permit the Commission to adopt rules and procedures. Ehlebracht's argument here focuses on requiring the Commission to adopt a standard that applies to all windfarms. Currently, the laws require that the Commission defers to local county ordinances. As evidenced within this case itself, there are three counties (Codington, Deuel, and Gran), each with their own separate standards.

[24] This wind energy facility is in Bon Homme, Yankton, and Charles Mix counties.
[25] *See* SDCL §§ 49-41B-11 through 49-41B-25, inclusive.

Therefore, regarding this issue, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.[26]

Issue 2: Easements and Servitudes

Ehlebracht Appellants argue the following issue:

> Whether SDCL § 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

Ehlebracht Brief, at 18. This South Dakota statute states the following:

> The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements:
> . . .
> (8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land . . .

SDCL § 43-13-2(8).

Ehlebracht Appellants argue that the right to discharge light upon or over land is an affirmative easement. Ehlebracht Brief, at 21. Staff argues that the "Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines." Staff's Ehlebracht Brief, at 12. CRWII argues that this statute "is wholly outside the statute the Legislature enacted for the Commission to administer." CRWII's Brief, at 20; *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp.*, 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions").

[26] Ehlebracht Appellants also casually state that the equal protection laws are violated (Art. 6, 18, S.D. Const.; 14th Amendment, U.S. Const.). The Court finds this argument without merit, as it does not provide evidence aside for claims that one county ordinance has a more stringent ordinance than that of another county on the other side of the state.

Here, the Court agrees with the appellees that this issue is outside its jurisdiction. This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. Therefore, regarding this issue, the Court will not weigh into the question of easements.

Taking and *Per Se* Nuisance

Ehlebracht Appellants argue the following issue:

> Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and without the provisions of SDCL § 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Ehlebracht Brief, at 27. Ehlebracht Appellants state that they will be subject to the Effects given off by the Project (such as noise and shadow flicker). Without the appellants granting permission, this would in effect "accomplish[] a *taking* of the property interests of these Appellants." *Id.*, at 29.

Staff argues that the Commission's order granting CRWII a permit to construct a wind energy facility is not a taking or a *per se* nuisance. Regarding a "taking," Ehlebracht fails each of the four theories under South Dakota case law. *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006) (a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards). Regarding *per se* nuisance, Staff argues that Ehlebracht's claim is not ripe, nor do the appellants submit sufficient evidence for the court to determine a taking has occurred. *See Boever, v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747 (S.D. 1995). CRWII argues that the per se nuisance is insufficient to create a ripe controversy. *See Boever*, 526 N.W.2d at 750.

The Court here agrees with Appellees' arguments. Ehlebracht has not established that noise and shadow flicker is a taking under South Dakota law, and the per se nuisance is not ripe for controversy. Therefore, the court will not address either of these issues.

CONCLUSION

Considering the Commission's findings, inferences, and conclusions, the Commission was not clearly erroneous and did not abuse its discretion in granting the permit to Crowned Ridge II. The Commission's decision was supported by extensive findings and conclusions that were supported by an exhaustive and complete administrative record. Therefore, the court affirms the Commission's decision and denies all of issues raised by each group of Appellants (Christensen and Ehlebracht). Counsel for the Appellee is directed to prepare an Order affirming the Decision of the Public Utilities Commission.

BY THE COURT:

Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL AND LARETTA KRANZ and AMBER KAYE CHRISTENSON AND ALLEN ROBISH, Appellants, v. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	19CIV20-000021, and 19CIV20-000027 **ORDER**

Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 19-027, and Appellants Amber Christenson and Allen Robish having separately appealed as a part of their separate issues in both Codington County and Grant County, and with the appeals being thereafter combined for purposes of judicial economy, and with all parties having appeared by and through their respective counsel of record, and the Court having considered the Briefs submitted by all parties as well as all arguments of counsel, and the Court having

issued its Memorandum Opinion on February 26, 2021, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission, entered April 6, 2020, is affirmed.

Signed: 3/12/2021 10:56:19 AM

Dated this _____ day of March, 2021.

BY THE COURT:

Honorable Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

Attest:
Reichling, Sandy
Clerk/Deputy

APPENDIX C

APPELLANTS' BRIEF
No. 29610

Appellants' Selected Excerpts of
the "Kranz Easement"
(Ex. I-2, R013269)

Section 5.2 (R013272-3):

Effects Easement. Owner grants to Operator [Crowned Ridge Wind Energy Center, LLC] a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties over and across the Owner's Property ("**Effects Easement**").

Section 11.10 (R013279):

Remediation of Glare and Shadow Flicker. Operator [Crowned Ridge Wind Energy Center, LLC] agrees that should Owner experience problems with glare or shadow flicker in Owner's house associated with the presence of the Turbines on Owner's Property or adjacent properties, Operator [Crowned Ridge Wind Energy Center, LLC] will promptly investigate the nature and extent of the problem and the best methods of correcting any problems found to exist. Operator [Crowned Ridge Wind Energy Center, LLC] at its expense, with agreement of Owner, will then promptly undertake measures such as tree planting or installation of awnings necessary to mitigate the offending glare or shadow.

APPENDIX D

APPELLANTS' BRIEF
No. 29610

List of Studies & Articles Regarding Wind Farm "Effects" –
Sponsored by Applicant's Expert Witness Chris Ollson
(All quoted material selected by Appellants; footnotes added by Appellants)

Exhibit	R	Title
A12-2	005720	*Exposure to Wind Turbine Noise: Perceptual Responses & Reported Health Effects*, Health Canada (2016) R005729: "Study findings indicate that annoyance toward all features related to wind turbines, including noise, vibrations, shadow flicker, aircraft warning lights and the visual impact, increased as WTN levels increased. The observed increase in annoyance tended to occur when WTN levels exceed 35 dB and were undiminished between 40 and 46 dB."
A12-3	005732	*Effects of Wind Turbine Noise on Self-Reported and Objective Measures of Sleep*, Leila Jalali, et al. (2016) R005742: "The WHO's health-based limit for protecting against sleep disturbance is an annual average outdoor level of 40 dBA."
A12-4	005745	*Before-After Field Study of Effects of Wind Turbine Noise on Polysomnographic Sleep Parameters*, Leila Jalali, et al. (2016). R005745. "[A]lleged health-related effects of exposure to wind turbine (WT) noise have attracted much public attention and various symptoms, such as sleep disturbance, have been reported by residents living close to wind developments . . . Further studies with a larger sample size and including comprehensive single-event analyses are warranted."
A12-5	005758	*Impact of wind turbine sound on annoyance, self-reported sleep disturbance and psychological distress*, R. Baker, et al. (2012). R005758: "People living in the vicinity of wind turbines are at risk of being annoyed by the noise, an adverse effect in itself. Noise annoyance in turn could lead to sleep disturbance and psychological distress. No direct effects of wind turbine noise on sleep disturbance or psychological distress has been demonstrated, which means that residents, who do not hear the sound, or do not feel disturbed, are not adversely affected." R005764: "Another question that is worth considering is . . . whether people who live in noisier areas are perhaps better habituated to noise."
A12-6	005768	*The association between self-reported and objective measures of health and aggregate annoyance scores toward wind turbine installations*, David Michaud, et al. (2017). R005775: "[I]n response to concerns

raised during the external peer review of this paper, the association between the non-noise annoyance variables and self-reported and measured health outcomes was evaluated. With the exception of vibration annoyance, which could not be evaluated due to the small sample size, blinking lights, shadow flicker and visual annoyance were found to be statistically associated with several measures of health, including, but not limited to, migraines, dizziness, tinnitus, chronic pain, sleep disturbance, perceived stress, quality of life measures, lodging a WTN-related complaint, and measured diastolic blood pressure. . . . As this area of research matures, new findings may identify an aggregate annoyance value that corresponds to a threshold for community acceptability."

A12-7 005777 *Health-Based Audible Noise Guidelines Account for Infrasound and Low-Frequency Noise Produced by Wind Turbines,* Robert G. Berger, et al. (2015).

A12-8 005791 *Low-Frequency Noise Incl. Infrasound from Wind Turbines and Other Sources,* LUBW-Ministry for the Environment, Climate and Energy of the Federal State of Baden-Wuerttemberg. (2016).

A12-9 005897 An *assessment of quality of life using the WHOQOL-BREF among participant living in the vicinity of wind turbines,* Katya Feder, et al. (2015). R005897: "Living within the vicinity of wind turbines may have adverse impacts on health measures associated with quality of life (QOL). There are few studies in this area and inconsistent findings preclude definitive conclusions regarding the impact that expsoure to wind turbine noise (WTN) may have on QOL."

A12-10 005909 *Monitoring annoyance and stress effects of wind turbines on nearby residents: A comparison of U.S. and European samples,* Gundula Huber, et al. (2019). R005909: "As wind turbines and the number of wind projects scale throughout the world, a growing number of individuals might be affected by these structures. For some people, wind turbine sounds and their effects on the landscape can be annoying and could even prompt stress reactions." R005916: Our results have practical implications for wind farm development and monitoring. For example, the strong links between residents' experiences with wind farm planning processes and their levels of experienced stress impacts suggest that improving planning processes – such as by engaging residents actively from the beginning . . . might reduce annoyance and related symptoms. . . . Although participation cannot guarantee positive perceptions of the planning process, additional problems are more likely in the absence of substantive resident engagement."

A12-11 005918 *Health effects and wind turbines: A review of the literature,* Loren D. Knopper and Christopher A. Ollson. (2011) R005918: "While it is acknowledged that noise from wind turbines can be annoying to some and associated with some reported health effects (e.g., sleep disturbance), especially when found at sound pressure levels greater than 40db(A),[D1] given that annoyance appears to be more strongly related to visual cues and attitude than to noise itself, self reported health effects of people living near wind turbines are more likely attributed to physical manifestations from an annoyed state than from the wind turbines themselves." R005926: "Ultimately it is up to governments to decide[D2] the level of acceptable annoyance in a population that justifies the use of wind power as an alternative energy source. Assessing the effects of wind turbines on human health is an emerging field, as demonstrated by the limited number of peer-reviewed articles published since 2003. Conducting further research into the effects of wind turbines (and environmental change) on human health, emotional and physical, as well as the effect of public consultation with community groups in reducing pre-construction anxiety, is warranted."

A12-12 005928 *Wind Turbines And Photosensitive Epilepsy,* Epilepsy Society. (2019) "The person with photosensitive epilepsy would need to be within a certain distance from the turbine. Regulations for commercial wind farms include placing wind turbines at enough distance from private dwellings for it not to affect people in their houses[D3] . . . . If you have a seizure directly triggered by shadow flicker from wind turbines, and you'd like to tell us about it, we would like to hear from you."

A12-13 005929 *Wind turbines, flicker, and photosensitive epilepsy: Characterizing the flashing that may precipitate seizures and optimizing guidelines to prevent them,* Graham Harding, et al. (2008) R005929: "The provision of energy from renewable sources has produced a proliferation of wind turbines. Environmental impacts include safety, visual acceptability, electromagnetic interference, noise nuisance and visual interference or flicker. Wind turbines are large structures and can cast long shadows. Rotating blades interrupt the sunlight producing unavoidable flicker

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[D1] This Project, of course, includes the Permit Condition of greater than 40 dBA.

[D2] Appellants would argue this point, if governments deem themselves empowered to decide the matter without the consent of landowners subjected to the annoyance.

[D3] This brief article neither relates nor defines the "enough distance" assertedly required by regulations; here, Appellants homes are between 2,000 and 2,800 feet from nearest turbines. Applicant's own experts report that shadow flicker is not noticeable beyond some 5,500 feet (1,700 meters). See Ex. A14-2, R011270.

bright enough to pass through closed eyelids, and moving shadows cast by the blades on windows can affect illumination inside buildings."

A12-14 005933 *Potential of wind turbines to elicit seizures under various meteorological conditions,* Andrew R. D. Smedley, et al. (2009) R005938: "[C]onsidering the tendency of patients to look away from the sun as a natural reaction, but for those who find themselves in the shadow zone, we find that for an observer viewing the ground the contrast is almost always insufficient to be epileptogenic. . . . It is noted that eye closure is a natural immediate protective action when exposed to flicker, and so has the unfortunate consequence of exacerbating its adverse effect in this context. A more effective strategy would be to cover one eye with the palm of a hand as monocular stimulation is known to be generally far less epileptogenic . . . or for the observer to simply avert their gaze to the ground."[D4]

A12-15 005939 *Update of UK Shadow Flicker Evidence Base,* Parsons Brinckerhoff for the Department of Energy and Climate Change. (2009) R005943: "The term 'shadow flicker' refers to the flickering effect caused when rotating wind turbine blades periodically cast shadows over neighbouring properties as they turn, through constrained openings such as windows. The magnitude of the shadow flicker varies both spatially and temporally and depends on a number of environmental conditions coinciding at any particular point in time, including, the position and height of the sun, wind speed, direction, cloudiness, and position of the turbine to a sensitive receptor." R005994: "The extent of the impact that shadow flicker causes is given in a psychology study (Pohl, 1999). This study concludes that the shadow flicker effect did not constitute a significant harassment. However, under specific conditions the increased demands on mental and physical energy, indicated that cumulative long term effects might meet the criteria of a significant nuisance.[D5] This demonstrates the need to reduce the impact where possible. . . . Mitigation measures adopted by developers have been successful. Careful site design to eliminate shadow impacts is important, with mitigation measures such as turbine shut down being used regularly. These systems are acceptable for all parties, and by

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[D4] Appellants are thus given to understand that, when outside in the midst of shadow flicker, it might be best to cover one eye with a hand, or to simply look down at the ground. Got it!

[D5] This phrase – "might meet the criteria of a significant nuisance" – cannot be overstressed. With the permit in hand, the nuisance criteria for neighbors seem obviated.

virtue of their success, the issue of shadow flicker appears to be minor. Mitigation measures are often put into planning conditions."[D6] This article also helps explain, in Appellants' view, the ensuing article received as Ex. A12-16. That explanation appears at R005988, without specifically identifying the source by name.

A12-16 006006 *Information on How to Identify and Assess Optical Immissions Wind Turbines,* Country Committee and Import Protection. (2002). This article, in German and English, opens with the statement:

"Scientific research shows that optical immissio [sic]-can lead to significant nuisance (stressor), especially in the form of periodic shadow discarding. Taking investigations and hearings by experts into account, these indications are intended to unable a uniform and practical and practical identification and assessment of the optical immissions of wind energy plants." (R006007)

The article proceeds with discussion of "[a]stronomically maximum possible shading time (worst case)" – this being the time when "the sun theoretically shines continuously in cloudless skies throughout the time between sunrise and sunset, the rotor surface stands perpendicular to solar radiation and the wind turbine is in operation." On the other hand, "[m]eteorologically probable shading time is the time for which the shadow cast is calculated taking into account the usual weather cnoditions. The long-term measurement series of the German Weather Service (DWD) serve as the basis." (R006009)

The study further asserts: "An influence by expected periodic shadow cast is considered not to be significantly harassing if the astronomically maximum possible duration of the coverage [references omitted] takes into account all WEA contributions at the respective emission site in a reference height of 2 m above ground is no more than 30 hours per calendar year and beyond no more than 30 minutes per calendar day. In assessing the level of harassment, an average sensitive person was used as benchmark." (R006011) Continuing, the study then asserts: "An important technical measure, as the subject of conditions and orders, constitutes the installation of a deduction switching automatically, which uses radiation or lighting strength sensors to detect the specific

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[D6] Other than the PUC's *ad hoc* "regulatory limits" of 30 hours annually (unless one is a Non-Participant in Bon Homme County, in which case it is 15 hours annually and 30 minutes daily) no known flicker mitigation measures were imposed by the Agency. Each Appellant's home is slated to receive shadow flicker *below* the professed regulatory limit. Appellants challenge Agency's right to establish that limit as a burden on land, particularly on an *ad hoc* basis, without also descending into takings jurisprudence.

meteorological shading situation and thus limits the local document duration. Since the value of 30 hours per calendar year was developed on the basis of astronomically possible shading, a corresponding value for defeat automobiles is determined for the actual, real shadow duration, the meteorological shading duration. Based on [reference omitted], this figure is 8 hours per calendar year." (R006012)

Concerning this study, witness Chris Ollson testified in Ex. A12, at R005710, line 5:

Q. ARE THE 30 HOURS OF SHADOW FLICKER STANDARD ADOPTED BY THE COUNTIES THAT WILL HOST THE CRW II PROJECT CONSISTENT WITH THE [SIC] HOW OTHER JURISDICTIONS APPLY THE THRESHOLD FOR SHADOW FLICKER?

A. Yes. For context, the origins of the 30-hour shadow flicker threshold standard can be traced to Germany in 2002. (Exhibit CO-S-16 in German and English). [Introduced in the Agency proceeding as Ex. A12-16] The German standard was based on limiting the nuisance of local residents and was subsequently codified.

Also the United States jurisdictions have successfully adopted shadow flicker restrictions based on the "Realistic/Expected" scenario of no more than 30 hours a year. The following are examples of state-wide legislation. [Witness Ollson goes on to cite regulations adopted by North Dakota Public Service Commission, and Connecticut State Agencies.] [D7]

[D7] Remarkably, this reflects that state-wide regulations have been adopted in at least two jurisdictions, per witness Ollson - *not* in South Dakota, however, where one standard is applied, *ad hoc*, to a wind farm in Bon Homme County, and yet another in Deuel County.

IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

In the Matter of the Administrative Appeal of
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ,

Appellants,

v.

CROWNED RIDGE WIND II, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,

Appellees.

#29610

19CIV20-000021

Appeal from the Circuit Court, Third Judicial Circuit
Deuel County, South Dakota
The Honorable Dawn Elshere

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S BRIEF

Notice of Appeal was filed on April 6, 2021

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PUBLIC UTILITIES COMMISSION

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29610

In the Matter of the Administrative Appeal of GARRY EHLEBRACT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ v. CROWNED RIDGE WIND II, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

PRELIMINARY STATEMENT

Throughout this brief, Appellants Garry Ehlebract, Steven Greber, Mary Greber, Richard Rall and Laretta Krantz are referred to collectively as "Appellants" or "Intervenors". Appellants' brief is cited as "AB" followed by the appropriate page number. The Appellee, Staff of the South Dakota Public Utilities Commission, is referred to as the "Commission Staff". Appellee, Crowned Ridge Wind II, LLC, is referred to as "Crowned Ridge Wind II." The Public Utilities Commission is referred to as "Commission."

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court's Order dated March 12, 2021 affirming the April 6, 2020 Final Decision and Order Granting Permit to Construct Facility (Permit) of the Public Utilities Commission issued in Docket EL19-027. This Court has jurisdiction pursuant to SDCL § 15-26A-3 and SDCL § 1-26-37.

STATEMENT OF ISSUES AND AUTHORITIES

A. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S ORDER TO GRANT A PERMIT TO CROWNED RIDGE II WITHOUT FIRST PROMULGATING RULES REGARDING MINIMAL ADVERSE EFFECTS

The Circuit Court did not err in affirming the Commission's decision to grant a permit to Crowned Ridge Wind II without first promulgating rules regarding minimal adverse effects nor in determining there was no equal protection violation. There is no legal requirement that the Commission promulgate rules regarding what constitutes "minimal adverse effects" and Intervenors failed to establish an equal protection violation.

SDCL chapter 1-26
SDCL § 49-41B-1
SDCL §§ 49-1-11
SDCL § 49-41B-22
SDCL §§ 49-41B-11 through 49-41-25
SDCL § 49-41B-35
Cheyenne River Sioux Tribe Tel. Auth. V. PUC, 595 N.W. 2d 604, 612-614 (S.D. 1999).
In re Groseth Int'l, Inc., 442 N.W. 2d 229 (S.D. 1989).
Interstate Telephone Co-Op, Inc. v. Public Utilities Commission, 518 N.W.2d 749, 753 (S.D. 1994).
Smith v. Canton School Dist. No. 41-1, 599 N.W.2d 637 (S.D. 1999).

B. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING APPELLANT'S SDCL 43-13-2(8) CLAIM REGARDING EASEMENTS AND SERVITUDES IS OUTSIDE ITS JURISDICTION IN AN ADMINISTRATIVE APPEAL

The Circuit Court did not err in concluding Appellant's SDCL § 43-13-2(8) claim was outside the jurisdiction of the administrative appeal. The Commission is not a court of

general jurisdiction and its ability to make decisions is limited to the authority conferred by the Legislature.

SDCL § 43-13-2(8)
Boever v. S.D. Board of Accountancy, 561 N.W.2d 309, 312 (S.D. 1997).

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639, 641 (S.D. 1976).

C. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING APPELLANT'S PER SE NUISANCE CLAIM IS NOT RIPE FOR CONTROVERSY.

The Circuit Court did not err in concluding Appellant's per se nuisance claim is not ripe for controversy.

Boever v. State of South Dakota Board of Accountancy, 526 N.W.2d 747 (S.D. 1995).
Lindgren v. Codington County, 14CIV1-000303 (SD 3rd Cir. Dec. 20, 2019).

D. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING APPELLANTS FAILED TO ESTABLISH THAT THE PERMIT CONSTITUTED A TAKING UNDER SOUTH DAKOTA LAW

The Circuit Court did not err in determining Appellants failed to establish that the permit constituted a taking as Appellant's failed to cite applicable legal authority to support such a claim.

Benson v. State, 710 N.W.2d 131, 149 (SD 2006).
Kostel v. Schwartz, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363 at 377.
Krier v. Dell Rapids Tp., 709 N.W.2d 841, 847 (S.D. 2006).
Penn Central Trans. Co v. New York City, 438 U.S. 104, 125 (1978).

STATEMENT OF THE CASE AND FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC, a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC filed with the Commission an application for a

permit for an up to 301 megawatt (MW) wind energy facility (Project) in Grant, Deuel, and Codington counties, South Dakota. The Project will consist of up to 132 wind turbine generators. (AR 14230-14258, Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).

South Dakota law requires wind energy facilities with a nameplate capacity of 100 MWs or more obtain a permit from the Commission prior to construction. (See SDCL § 49-41B-2(7), (12) and SDCL § 49-41B-4). Pursuant to SDCL § 49-41B-17, Staff is a party to the proceeding. SDCL § 49-41B-17 permits certain individuals and entities to participate as parties in the proceeding. When the parties to the proceeding are unable to reach a full settlement between all parties, the Commission treats the matter as a contested case proceeding pursuant to SDCL Chapter 1-26 and holds an evidentiary hearing. (See SDCL § 49-41B-17.2).

With its Application filed on July 9, 2019, Crowned Ridge Wind II submitted written testimony of five witnesses. (AR 1-1118). On July 11, 2019, the Commission issued public notice of the application and the public input meeting and established an intervention deadline of September 9, 2019. (AR 1122-1123). The Commission held the public input meeting on August 26, 2019 in Watertown, South Dakota. (AR 1274-1477). The Commission received applications for party status from nine individuals prior to the intervention deadline and the Commission granted party status to each of the nine individuals, including Appellants. (AR 1124-1126, 1193-1194, 1197-1214, and 1478). The Commission established a procedural schedule on September 20, 2019. (AR 3227-3228).

On August 6, 2019, Crowned Ridge Wind II filed a request to redact pages 3-6 of the application for party status filed on August 6, 2019 on behalf of Garry Ehlebracht Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz. (AR 1215-1219). On September 9, 2019, Crowned Ridge Wind II filed a revised request for confidential treatment of Section 11.10 of an easement as found in the August 6, 2019, Application for Party Status. (AR 1925-1933). The Commission held a hearing on this matter on September 17, 2019 and denied Crowned Ridge Wind II's request for confidential treatment of Section 11.10 of the easement. (AR 1972-2006 and 3224-3226).

On September 20, 2019, Crowned Ridge Wind II filed Supplemental Testimonies and Exhibits. (AR 2007-3223). On October 21, 2019, Crowned Ridge Wind II Filed Corrected Direct Testimony of witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-filed Direct Testimony of five witnesses. (AR 3356-4250). On December 12, 2019, Amy Rall, Laretta Kranz, Garry Ehlebract and Steven Greber each filed Pre-filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, Crowned Ridge Wind II filed Rebuttal Testimonies of seven witnesses with corrections filed on January 22, 2020, and January 24, 2020. (AR 4267-4338). On January 23, 2020, Staff filed Pre-filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

The Commission held an evidentiary hearing on February 4, 5, and 6, 2020, in Pierre, South Dakota. (AR 8844-13781). Crowned Ridge Wind II, Staff and Intervenors participated in the evidentiary hearing, presenting testimony and cross-examining witnesses. (AR 8844-13781). Intervenors presented witness testimony. The Hearing

Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing.

On March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13878-13919 (Crowned Ridge Wind II), 13934-13969 (Mogen, Robish, Christenson), 13920-13933 (Staff), 13977-13981 (Appellants)). On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079).

On April 6, 2020, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; Notice of Entry. (AR 14230-14258). The Permit includes 49 conditions, including conditions limiting permissible sound levels and levels of shadow flicker at residences in the vicinity of the Project. (AR 14246-14258). Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residence and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, Appellants served Notice of Appeal of the Permit. On May 19, 2020, this Appeal was consolidated with an additional appeal pursuant to SDCL § 1-26-31.1. On February 26, 2021, the Circuit Court issued a Memorandum opinion and on March 12, 2021, issued its Order Affirming the Commission's Decision. Specifically, the Circuit Court determined that regarding "minimal adverse effects," the law requires the Commission to defer to local county ordinances and so the Commission did not err in

granting the Permit; that the SDCL § 43-13-2(8) is outside of the Commission's jurisdiction and outside of the Circuit Court's role in a procedural appeal; and that Appellants have not established that noise and shadow flicker is a taking under South Dakota Law and the per se nuisance claim is not ripe for controversy.

STANDARD OF REVIEW

An agency's conclusions of law are reviewed de novo. *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594at 602. "[Q]uestions of law, including statutory interpretation, are reviewed de novo." *Pesall v. Montana Dakota Util. Co., et al*., 2015 S.D. 81, ¶ 6, 871 N.W.2d 649. Mixed questions of law and fact may be reviewed under either standard, depending upon whether the agency's analysis is predominantly factual or legal. *In re Dorsey & Whitney Tr. Co. LLC*, 2001 S.D. 35, ¶ 5, 623 N.W.2d 468, 471 (noting that when reviewing mixed questions of law and fact, "courts apply the clearly erroneous standard if the 'analysis is essentially factual, and thus is better decided by the agency or lower court …,' and the de novo standard when the 'resolution requires consideration of underlying principles behind a rule of law.'").

The Commission's "findings of fact are reviewed under the clearly erroneous standard .. . . A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594 at 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on factual questions. *Id*. "Factual findings can be overturned only if we find them to be

'clearly erroneous' after considering all the evidence. *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987).

ARGUMENT

A. The Circuit Court did not err because the Commission is not required to promulgate rules regarding what constitutes "minimal adverse effects."

Intervenors' Brief alleges that the Commission imposed an arbitrary and capricious limit on permissible sound and shadow flicker limits on residences near the Crowned Ridge Wind II Project because the Commission did not promulgate rules establishing what constitutes "minimal adverse effects" referenced in SDCL § 49-41B-1. Intervenors further allege that this results in an equal protection violation because the Commission imposed lower limits in a previous permit for a wind energy facility, Prevailing Wind Park.

There is no requirement under SDCL § 49-41B-35, or any other statute, that the Commission promulgate rules regarding what constitutes "minimal adverse effects" as contemplated by Intervenors. While SDCL §§ 49-1-11 and 49-41B-35 do grant some rulemaking authority to the Commission, these statutes use the term "may," conferring a permissive rulemaking authority. "Ordinarily, the word "may" in a statute is given a permissive or discretionary meaning. It is not obligatory or mandatory as is the word "shall."" *In re Groseth Int'l, Inc.,* 442 N.W. 2d 229 (S.D. 1989). Because these statutes do not include a requirement that the Commission shall promulgate rules regarding what constitutes "minimal adverse effects," the Commission did not commit error when it proceeded to review the Crowned Ridge Wind II application on an ad hoc basis.

Contrary to Intervenor's claims, the Commission's use of an ad hoc contested case proceeding and the resulting decision to impose different sound and shadow flicker conditions in Crowned Ridge Wind II than was imposed in a previous matter, the Prevailing Wind Park docket did not result in a violation of equal protection. The equal protection clause does not entirely prohibit a state action from having an inconsistent effect on residents.

The Court has a long-established test to identify whether an equal protection violation has occurred:

> "[W]hen a statute has been called into question because of an alleged denial of equal protection of the laws," we employ our traditional two-part test. *Accounts Management,* 484 N.W.2d at 299–300. First, we determine whether the statute creates arbitrary classifications among citizens. *City of Aberdeen v. Meidinger,* 89 S.D. 412, 233 N.W.2d 331, 333 (1975). Second, if the classification does not involve a fundamental right or suspect group, we determine whether a rational relationship exists between a legitimate legislative purpose and the classifications created. *Accounts Management,* 484 N.W.2d at 300.
>
> *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452, 454 (citations and internal quotations omitted)

In this case, Intervenors fail to show that non-participants in the Crowned Ridge Wind II matter are a protected class under the Equal Protection Act, so the correct test to apply is whether there is a rational basis for applying the law in such a manner that produced a different result. Chey*enne River Sioux Tribe Tel. Auth. V. PUC,* 595 N.W. 2d 604, 612-614 (S.D. 1999).

Intervenors' argument relies heavily on *Smith v. Canton School Dist. No. 41-1,* which ruled that a decision is arbitrary and capricious if there is no standard, or if the

decision-making body failed to apply or disregarded an established standard. *Canton*, 599 N.W.2d 637 (S.D. 1999). *Canton* is not instructive here. In *Canton,* the Court had previously established specific factors for the school board to consider in making boundary determinations. Those factors were not considered by the school board in *Canton,* and the Court ruled the decision arbitrary.

Since *Canton,* this Court has held that "[a]n arbitrary or capricious decision is one that `is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.'" *Hicks v. Gayville-Volin Sch. Dist.,* 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73 (*quoting Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n,* 1999 S.D. 87, ¶ 14, 596 N.W.2d 347, 351). "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.*

In this case, state statute specifically established a procedure and standard with specific factors for the Commission to consider when processing an application for a wind energy permit. SDCL §§ 49-41B-11 through 49-41-25 establishes basic information to be included in the application; a filing fee for the Commission to offset the cost to investigate, review, process, and serve notice of the application; a procedure for the Commission to follow including notifying local governing bodies and scheduling and providing notice for a public input meeting; permitting interested entities to request to be parties to the case; establishing that a party to the proceeding is entitled to a contested case hearing pursuant to SDCL Chapter 1-26; and a requirement that the Commission receive evidence from state and local agencies related to projected changes in environment, social, and economic conditions. The Commission followed that procedure,

held an evidentiary hearing with significant evidence presented regarding noise and shadow flicker limits, and the Commission made a finding of fact that Crowned Ridge Wind II met its burden and the Permit should be granted with specific limitations on the amount of sound and shadow flicker at surrounding residences. Despite Intervenors' claims, no evidence has been shown that the Commission's decision was based on a lack of relevant or competent evidence.

Furthermore, the Court has held that "administrative agencies are not bound by stare decisis as it applies to previous agency decisions." *Interstate Telephone Co-Op, Inc. v. Public Utilities Commission*, 518 N.W.2d 749, 753 (S.D. 1994) (citing *City of Alma v. United States,* 744 F.Supp. 1546, 1561 (S.D.Ga.1990) ("An agency is not forever bound by its prior determinations, as its view of what is in the public interest may change, even if the circumstances do not.")). A change in public interest is particularly evident in this matter because in 2019, between the Prevailing Wind Park and Crowned Ridge Wind II dockets Intervenors referenced, the Legislature amended SDCL § 49-41B-22(2) and (4) to specify that a facility holding a conditional use permit from the applicable locality is in compliance with the subdivisions requiring an applicant prove the facility will not pose a threat to the social and economic conditions of the inhabitants and will not interfere with the orderly development of the region. This shift in law places a significant deference on county determinations and not on past decisions by the Commission. Neither the Prevailing Wind Park decision nor any other past Commission decision establish binding precedent regarding the appropriate levels of sound and shadow flicker on residences near a wind farm. Rather, the Commission considers the evidence before it in each individual docket and makes an informed decision based on the evidence before it.

Therefore, the outcome of the previous decision does not mandate a mirror outcome in this case.

Although Crowned Ridge Wind II and Prevailing Wind Park may have resulted in slightly different sound and shadow flicker conditions imposed in their respective permits, the Commission followed the well-established statutory procedure and applied the statutory standards, and relied on ample evidence to support the conditions imposed. As a result, the decision was not arbitrary and capricious, nor an equal protection violation. The Commission's decision was a finding of fact, based on the substantial record as a whole and should be given deference and the permit affirmed.

B. The Circuit Court did not err in concluding Appellants' SDCL § 43-13-2(8) claim regarding easements and servitudes is outside its jurisdiction in an administrative appeal.

The Commission is a body of limited jurisdiction, holding only the authority conferred by the Legislature, so the Commission was correct in not applying SDCL § 43-13-2. An agency may only act, or promulgate rules, when a Legislative delegation includes "(1) a clearly expressed legislative will to delegate power, and (2) a sufficient guide or standard to guide the agency." *Boever v. S.D. Board of* Accountancy, 561 N.W.2d 309, 312 (S.D. 1997) (citing Application *No. 5189-3,* 467 N.W.2d at 913 (citing *First Nat'l Bank of Minneapolis,* 394 N.W.2d at 718; *In re Ackerson, Karlen & Schmitt,* 335 N.W.2d 342, 345 (S.D.1983)). The Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines.

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639, 641 (S.D. 1976).

While the Legislature has delegated the Commission the authority to process and oversee permits for large wind energy facilities generating more than 99 MW, there is no statutory provision that instructs or even permits the Commission to adjudicate and interpret laws falling outside of the Commission's authority. Because the Legislature has not granted the Commission this authority, the Commission was correct in declining to rule on this matter and the Circuit Court's ruling should be affirmed.

C. The Circuit Court did not err in concluding Intervenors' *per se* nuisance claim was not ripe for controversy.

Boever v South Dakota Board of Accountancy instructs that the court should not waste resources on abstract, hypothetical or remote potential controversies. *Boever v. State of South Dakota Board of Accountancy*, 526 N.W.2d 747 (S.D. 1995). When this case was contemplated by the Circuit Court, Intervenors' *per se* nuisance claim was based entirely on sound and shadow-flicker models for a project that was not yet in service. As described to the Commission, the models presented a conservative scenario of potential noise and shadow flicker possible at specific locations in the proposed project area. (AR 10303-10315). As testified, the models use numerous conservative inputs that show the maximum levels of shadow flicker and sound expected at receptors. (AR 10303-10315). However, the actual sound and shadow flicker levels that would be experienced by Intervenors were merely conjecture or

speculation. Any nuisance claim must present evidence of actual, not potential, impact. The court recognized this in *Lindgren v. Codington County*, and rejected similar arguments made regarding takings and nuisance claims. See *Lindgren*, 14CIV1-000303 (SD 3rd Cir. Dec. 20, 2019). Since Intervenors failed to make such a showing, the Circuit Court did not err in concluding that Intervenors' *per se* nuisance claim was not ripe.

D. The Circuit Court properly determined that the Permit was not a taking under South Dakota Law.

In the appeal before the Circuit Court, Intervenors provided no legal authority nor submitted sufficient evidence for the court to determine a taking or a *per se* nuisance had occurred. *Kostel v. Schwartz* requires legal claims include authority, or the claim is waived. *Kostel,* 2008 S.D. 85, ¶ 34, 756 N.W.2d 363 at 377. "The court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences[,] and sweeping legal conclusions cast in the form of factual allegations." *Mordhorst v. Dakota Truck Underwriters*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323.

Intervenors' claim fails to assert how noise and shadow flicker emitted onto another's property meets the established test to show a taking has occurred. *Benson v. State* concisely explains the four theories available to show a taking:

> plaintiff must allege either 1) a *per se* regulatory physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), "where government requires an owner to suffer a permanent physical invasion of her property"; 2) a *per se* total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), that deprives an owner of "*all* economically beneficial uses of the property"; 3) a

> regulatory taking under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), when a temporary or partial taking is alleged; or 4) a land-use exaction violating the standards as set forth in *Nollan v. California Coastal Comm'n.,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). *Lingle,* 544 U.S. at 125 S.Ct. at 2081-82, 2086-87, 161 L.Ed.2d 876.
>
> *Benson,* 710 N.W.2d 131, 149 (SD 2006).

The facts asserted by Intervenors fail to show 1) any physical invasion of property; 2) that Intervenors have been deprived of "all economically beneficial uses of the property"; or 4) that the state has in any way restricted how Intervenors may use their own property. It is a settled standard that determining whether a regulatory taking has occurred is dependent on the circumstances of each case. *Penn Central Trans. Co v. New York* City, 438 U.S. 104, 125 (1978). "Not every destruction or injury to private property by governmental regulation will be a taking within the meaning of the Fifth Amendment." *Omnia Commercial Co. v. United States,* 261 U.S. 502, 508-510, 43 S.Ct. 437, 438, 67 L.Ed. 773 (1923).

Intervenors further claim the consequential damages rule supports a ruling that a taking occurred based on sound and shadow flicker at Intervenors' residences but misinterprets the rule when taken as a whole. (Appellant Brief 23).

> Under the taking and damaging clause of our constitution and the condemnation statute referred to, it is a basic rule of this jurisdiction governing compensation for consequential damages that where no part of an owner's land is taken but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.

> *Krier v. Dell Rapids Tp.,* 709 N.W.2d 841, 847 (S.D. 2006) *citing State Highway Commission v. Bloom*, 77 S.D. 452, 93 N.W.2d 572 (1958).

In the same case, *Krier* specified "[t]he injury to the plaintiff "must be different in kind and not merely in degree from that experienced by the general public." *Id* at 848 (quoting *Hurley v. State*, 82 S.D. 156 at 162, 143 N.W.2d at 726 (citing *Hendrickson v. State*, 267 Minn. 436, 127 N.W.2d 165 (1964)). A large portion of Intervenors' arguments rest on the different sound and shadow flicker limits imposed in a previous docket and on the different levels between participants and non-participants, but Intervenors have failed to show a separate and distinct injury to themselves. Following *Krier,* the consequential damages rule is not applicable in this matter.

Even if *in arguendo,* a taking occurred, the Permit granted to Crowned Ridge Wind II is not, as argued by Intervenors, the "*sole instrument"* affording adverse use. (Ehlebracht Brief, at. 28). When reviewing a regulatory taking, the court must examine the character of the government action to determine whether that action is the cause-in-fact of the harm. *Benson v. State,* 710 N.W.2d 131, 153 (SD 2006) (citing *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)). *Griggs v. County of Allegheny* applied this test to determine the Civil Aeronautics Administration (CAA) could not be held responsible for a taking merely because the CAA established standards for airstrips and clearance for takeoff and landing strips, instead the entity selecting the site and securing the properties to construct the runway was responsible. *Griggs*, 369 U.S. 84 (1962). This rule was further recognized in *Harms v. City of Sibley* when the Iowa Supreme Court determined the county was not responsible for a taking after property

damage occurred following rezoning of an area from light industrial to heavy industrial, instead the industrial entity that chose to operate within that zone was the responsible party. *Harms*, 702 N.W.2d 91 (Iowa 2005). Under guidance from these cases, it is clear the Commission's granting of a permit is merely incidental to, and not cause-in-fact of any noise and shadow flicker emitted onto Intervenors' property

Based on the instructive cases mentioned, it is clear the Circuit Court was correct in ruling the Intervenors failed to establish that the Permit issued by the Commission constitutes a taking and the decision should be affirmed.

VI. CONCLUSION

Based on the foregoing, Commission Staff respectfully requests the Court affirm the Circuit Court's Order Affirming Decision of South Dakota Public Utilities Commission.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellee PUC Staff's Response Brief complies with the requirements set forth in South Dakota Codified Laws, being 17 pages in length. This Brief was prepared using Microsoft Word, Times New Roman (12 point), and contains 3,928 words and 20,806 characters (no space) and 24,790 characters (with space), excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: July 9, 2021 /s/ Amanda M. Reiss

CERTIFICATE OF SERVICE

I, Amanda M. Reiss, attorney for the Appellee South Dakota Public Utilities Commission, hereby certify that on the 9th day of July, I served the forgoing document via email upon the following:

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I further certify that the signed original and two (2) copies of the foregoing in the above-entitled action were hand-delivered to Clerk of South Dakota Supreme Court, 500 E. Capitol Ave., Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

GARRY EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL AND LARETTA KRANZ
Petitioners-Appellants,

v.

CROWNED RIDGE WIND II, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION *Respondents-Appellees.*

Appeal No. 29610

Appeal from Circuit Court, Third Judicial Circuit, Codington County, South Dakota
The Honorable Dawn Elshere, Presiding

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NOTICE OF APPEAL FILED APRIL 6, 2021

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Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") April 6, 2020 Order ("Order"), issued in Docket No. EL19-027, granting a Facility Permit ("Facility Permit") to Crowned Ridge Wind II, LLC ("Crowned Ridge II") for an energy wind facility ("Project") and the Third Judicial Circuit Court's affirmation of the Order in its March 12, 2021 Memorandum Opinion ("Opinion").

STATEMENT OF THE ISSUES AND AUTHORITIES

Issue 1. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S GRANTING OF A FACILITY PERMIT WHEN THE COMMISSION DID NOT FIRST PROMULGATE RULES RELATED TO WHAT CONSTITUTES MINIMAL ADVERSE EFFECTS?

The Circuit Court properly ruled that the Commission was not legally required to promulgate regulations on what constitutes the minimal adverse effects for sound and shadow flicker produced from the Project.

In re Black Hills Power, 2016 S.D. 92, 889 N.W.2d 631
SDCL § 49-41B-22(3)
SDCL § 49-41B-35

Issue 2. WHETHER THE CIRCUIT COURT ERRED WHEN CONCLUDING THAT THAT SDCL § 43-13-2(8) IS OUTSIDE THE JURISDICTION OF THE COMMISSION?

The Circuit Court correctly concluded that a determination of property rights under SDCL § 43-13-2(8) is outside the jurisdiction of the Commission.

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639 (S.D. 1976)
Sunnywood Common Sch. Dist. No. 46 v. County Bd. of Edu., 131 N.W.2d 105 (S.D. 1964)

Issue 3. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING THAT INTERVENORS FAILED TO ESTABLISH THE COMMISSION'S GRANTING OF A FACILITY PERMIT WAS A TAKING OF PROPERTY?

The Circuit Court properly concluded that Intervenors failed to establish that the sound and shadow flicker produced by the Project constitutes a taking of their property.

Krsnak v. Brant Lake Sanitary Dist., 2018 S.D. 85, 921 N.W.2d 698
Muscarello v. Winnebago County Bd., 702 F.3d 909 (7th Cir. 2012)

Issue 4. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING THAT INTERVENORS' CLAIM OF A *PER SE* NUISANCE IS NOT RIPE?

The Circuit Court properly ruled that Intervenors' claim for *per se* nuisance is not ripe.

Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747 (S.D. 1995)
Muscarello v. Ogle County Bd. of Commissioners, 610 F.3d 416 (7th Cir. 2010)

STATEMENT OF THE CASE

On July 9, 2019, Crowned Ridge II filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County, Deuel County, and Codington County, South Dakota. (AR-1 71-1107) The Commission conducted a contested case to review the Application, which included the submission of prefiled testimony, discovery, the granting of party status to ten intervenors,[1] three days of evidentiary hearings, the submission of legal briefs, oral argument, and the issuance of the April 6, 2020 Order granting a Facility Permit to Crowned Ridge II. On April 29, 2020, Intervenors filed a Notice of Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County ("Circuit Court"). After briefing and oral argument, on March 21, 2021, Circuit Court Judge Elshere issued an Opinion affirming the Commission's granting of a Facility Permit to Crowned Ridge II. On April 6, 2021, Intervenors appealed the Circuit Court's Opinion to this Court.

STATEMENT OF THE FACTS

On July 9, 2019, Crowned Ridge II filed an Application and accompanying appendices with the Commission for a Facility Permit to construct and operate the Project, a 300.6 megawatt wind facility located in Codington, Grant, and Deuel Counties, South Dakota. (AR-1 71-1107) Also, on July 9, 2019, Crowned Ridge

[1] The Intervenors from the underlying proceeding who comprise the Appellants-Intervenors are Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz.

II submitted the prefiled Direct Testimony and exhibits of Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter. (AR-2 5-81)

On July 11, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status. Pursuant to SDCL § § 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on August 26, 2019, at 5:30 p.m. CDT, at the Whitewood Room, Watertown Event Center, 1901 9th Ave. SW, Watertown, South Dakota. (AR-2 124-125)

On July 31, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR-2 156-157) On August 26, 2019, the Commission also issued an order granting party status to Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Loretta Kranz. (AR-2 441) On August 26, 2019, the public input hearing was held. (AR-2 240-440)

On September 20, 2019, Crowned Ridge II submitted the pre-filed Supplemental Testimony and exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Christopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney. (AR-2 972-2183; 2197-2214)

On October 1, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for February 4-7, 2020 to

be conducted in the Matthew Training Center, Foss Building, 523 E. Capital Ave., Pierre, South Dakota. (AR-2 2192-2193)

On December 9, 2019, Staff submitted the pre-filed Direct Testimony and exhibits of David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson. (AR-2 2319-2502; AR-3 512-770) On December 12, 2019, Intervenors submitted the pre-filed Direct Testimony of Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz. (AR-3 772-785)

On January 8, 2020, Crowned Ridge II submitted the pre-filed Rebuttal Testimony and exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson. (AR-3 789-856) An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR-7 432-1152) Seventeen witnesses were called to testify at the evidentiary hearing. On February 27, 2020 and March 2, 2020, post-hearing briefs were filed by Crowned Ridge II, Commission Staff, and Intervenors. (AR-7 4-45; 62-100;103-115; 117-148) On April 6, 2020, the Commission issued an Order granting a Facility Permit to Crowned Ridge II, subject to 49 conditions. (AR-7 403-431)

SUMMARY OF THE ARGUMENT

Intervenors assert that the Circuit Court erred in concluding that: (1) the Commission was not legally required to promulgate rules establishing the minimal effects a wind generating project can produce on sound and shadow flicker prior to issuing the Facility Permit to Crowned Ridge II; (2) a determination of property

rights under SDCL § 43-13-2(8) is outside the jurisdiction of the Commission; (3) Intervenors failed to establish that the sound and shadow flicker produced by the Crowned Ridge II wind project constitutes a taking of their property; and (4) Intervenors' claim that the Facility Permit constitutes a *per se* nuisance is not ripe. Intervenors' assertions, however, ignore the clear, certain, and unambiguous language of the statutes the South Dakota Legislature has entrusted to the Commission to administer, as well as the Commission's well-reasoned findings and conclusions set forth in its April 6, 2020 Order, all of which are based on substantial evidence in the record. Indeed, any reasonable reading of the Commission's Order clearly shows the Commission's findings, conclusions, and conditions are supported by substantial evidence, are reasonable and not arbitrary. Thus, Intervenors' assertions are without merit, and the Circuit Court's Opinion and Commission's Order should be affirmed in all respects.

STANDARD OF REVIEW

The Supreme Court affords great weight to the Commission's findings and the inferences drawn by the Commission on questions of fact. *See* SDCL § 1-26-36; *In Re Prevention of Significant Deterioration*, 2013 S.D. 10, ¶¶ 16, 48, 826 N.W.2d 649, 654, 662 ("We 'give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record.'") (quoting *Williams v. South Dakota Dep't of Agric.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400). Questions of law are reviewed *de novo*. *See Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing

Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co., 2015 S.D. 55, ¶ 11, 866 N.W.2d 545); *State v. Geise*, 2020 S.D. 161, ¶ 10, 656 N.W.2d 30, 36. The Supreme Court will afford a well-reasoned and fully informed Commission decision with "due regard", unless there is a clear error of judgment or conclusion not supported in fact. *In re Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 29, 744 N.W.2d 594, 603.

In addition, the Supreme Court does not weigh the evidence or substitute its judgment for that of the Commission, but, rather, its function is to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *See In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952); *In re Application of Dakota Transp., Inc.*, 291 N.W. 589, 593, 595-596 (S.D. 1940). Under SDCL § 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support the conclusion." The Court only reverses the Commission's factual determinations when it is "left with a definite and firm conviction that a mistake has been committed." *In re Application of Midwest Motor Express*, 431 N.W.2d 160, 162-163 (S.D. 1988). In addition, for the Court to find an abuse of discretion, the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar*, LLC, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856. Even if the court finds the Commission abused its discretion, for the Court to overturn the Commission's decision it must also conclude that the

abuse of discretion had a prejudicial effect. *Id*. at ¶ 20, 871 N.W.2d at 856.

ARGUMENT

I. The Commission was not legally required to promulgate rules establishing the minimal effects for the sound and shadow flicker prior to the issuance of a Facility Permit for the Project.

Intervenors assert that, pursuant to SDCL § 49-41B-35, the Commission was legally required to promulgate uniform rules on the amount of sound and shadow flicker for South Dakota wind projects prior to granting a Facility Permit to Crowned Ridge II. Intervenors Br. at 10-16. Failing to promulgate such rules, according to Intervenors, results in an arbitrary and capricious adoption of sound and shadow flicker thresholds in the Crowned Ridge II Facility Permit, because the Commission adopted lower thresholds in the Prevailing Wind proceeding. *Id*. Intervenors' assertions are without merit in that they misread SDCL § 49-41B-35, SDCL § 49-41B-1, and, the most applicable statute to the Commission review of the Project, SDCL § 49-41B-22.

It is well-established that when the language of statute or regulatory rule administered by the Commission is "clear, certain and unambiguous," the court's function is to follow the clearly expressed meaning. *In re Black Hills Power,* 2016 SD 92, ¶ 9, 889 N.W.2d 631, 634, quoting *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387. In the instant case, the language of SDCL § 49-41B-35 is clear, certain, and unambiguous that the Commission has discretion, not the legal obligation, to implement rules:

> To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules **may be adopted** by the commission:
>
> > (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
> >
> > (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and
> >
> > (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a wind energy facility.

(emphasis added).

SDCL § 49-41B-35 plainly provides the Commission with the discretion to implement rules related to informational filing requirements, procedures for the consideration of proposed facilities, and bonds or other financial instruments for the funding of decommissioning, without any reference to a legal requirement to promulgate uniform rules for sound or shadow flicker thresholds. Thus, there is no reading of the clear, certain, and unambiguous language in SDCL § 49-41B-35 that can be interpreted as a directive from the South Dakota Legislature to the Commission requiring it to promulgate uniform sound and shadow flicker rules. Instead, pursuant to SDCL § 49-41B-22(3),[2] the Legislature vested the Commission with the discretion to impose sound and shadow flicker thresholds

[2] SDCL § 49-41B-22(3) reads: "The applicant has the burden of proof to establish by a preponderance of the evidence that: . . . The facility will not substantially impair the health, safety or welfare of the inhabitants."

based on the record in the underlying proceeding, provided the applicant carried its burden of showing the adopted thresholds would not substantially impair the health and welfare of the inhabitants.

Equally misguided is Intervenors' reference to SDCL § 49-41B-1 along with *Smith v. Canton Sch. Dist. 41-1*, 599 N.W.2d 637 (S.D. 1999), neither of which support the premise that the South Dakota Legislature directed the Commission to adopt "statewide" uniform or specific rules related to "minimal adverse effects". Intervenor Br. at 11-12, 14. As the legislative preamble to Chapter 49, SDCL § 49-41B-1 titled "Legislative findings – Necessity to require a permit for facility" clearly and unambiguously articulates, the legislative purpose of Chapter 49 is to ensure that a proposed facility that falls under the Commission's jurisdiction can only be constructed or operated after the facility first obtains a permit from the Commission.[3] Hence, SDCL § 49-41B-1 cannot be read as the South Dakota Legislature directing the Commission to implement

[3] SDCL § 49-41B-1 reads:

> The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission.

rules, including rules on the sound and shadow flicker thresholds for wind generating projects. Similarly, the Court's decision in *Smith* contains no holding that the Commission must adopt statewide sound and shadow flicker thresholds; instead, the legal error in *Smith* was based on the Canton School Board's rewriting and ignoring of court imposed factors when it denied petitioner's request for a minor school boundary change. Unlike *Smith*, there are no court or legislatively imposed factors controlling the sound and shadow flicker thresholds that can be produced by a wind generating project, and, therefore, Intervenors' citation to *Smith* as authority is unavailing.

In contrast to Intervenors' misguided reading of SDCL § 49-41B-1 and *Smith*, the Commission, pursuant to SDCL § 49-41B-22(3), carefully considered the evidentiary record in the underlying proceeding to determine the sound and shadow flicker thresholds for Crowned Ridge II, a record that includes hundreds pages of studies, reports, and expert testimony from sound and shadow flicker modelers, a Ph.D., and a medical doctor who directly address the applicable statutory question of whether the Project will substantially impair human health or welfare. Based on the substantial evidence in the record, the Commission concluded:

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

> emission levels; (3) the receptors were assumed to be downwind of the wind turbines; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants property boundaries for those residences in Codington County. Applicant modelled sound levels with consideration of the cumulative sound impacts from Deuel Harvest and Crowned Ridge Wind I wind projects. Further, Applicant agreed to Permit Condition No. 27 in order to further reduce certain non-participant sound levels, consistent with the proposal advocated by Staff witness Mr. David Hessler. Pursuant to Permit Condition No. 26, Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.
>
> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow and flicker for the Project to no more than 30 hours for all participants and nonparticipants inclusive of cumulative impacts from Deuel Harvest and Crowned Ridge Wind I, with the understanding that wind turbine CRII-Alt-3 will need to be curtailed to ensure the shadow and flicker is no more than 30 hours at receptor CR1-C10-P. Applicant also used conservative assumptions, such as the greenhouse-mode, no credit for blockage due to tree and assumed the wind turbines were operating 100% of the time to model shadow and flicker, which, in turn, produces conservative results.
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge Wind II witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR-7 414-415) footnotes citing record evidence omitted).

The above passages, and the record evidence cited within the passages, demonstrate that the Commission's determination that the sound and shadow

flicker thresholds satisfied SDCL § 49-41B-22(3)'s requirement that the Project will not substantially impair the health and welfare of the inhabitants was well-reasoned and supported by substantial evidence. *Application of Svoboda*, 54 N.W.2d at 327 ("The court's authority extends only to a determination whether the Commission acted with its power and whether it's determination is supported by substantial evidence."), citing *Application of Dakota Transp., Inc.*, 291 N.W. at 593, 595-596. In addition, in Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge II complying with the sound thresholds of 45 dBA for sound within 25 feet of a nonparticipant's residence and 50 dBA for sound within 25 feet of a participant's residence and a shadow flicker threshold of no more than 30 hours annually unless consented to by the owner of the residence. (AR-7 424-425, 428 Condition Nos. 26 and 35) *See Presell v. Mont. Dakota Utils., Co.*, 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring the resubmittal of the application to consider additional information).

Much of Intervenors' misplaced claim that Commission was required to adopt uniform sound and shadow flicker threshold rules rest on their factual disagreement with the Commission Order's findings on the sound and shadow flicker thresholds. However, any reasonable reading of the above quoted passages of the Order demonstrates the Commission's findings and

ultimate conclusion that, pursuant to SDCL § 49-41B-22(3), the sound and shadow flicker produced from the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence, and were reasonable and not arbitrary. Furthermore, clearly a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge II (including its conservative sound modelling assumptions and the unchallenged testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the findings and conclusion that the sound and shadow flicker to be produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence as being sufficiently adequate to support the conclusion). Additionally, the Commission's findings, conclusions, and imposition of the sound and shadow flicker thresholds in Condition Nos. 26 and 35 are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell*, 2015 S.D. 81 ¶ 8, 871 N.W.2d at 652.

Consequently, the Commission's thorough and reasonable consideration of sound and shadow flicker was within its discretion, which, in turn, requires that the Commission's factual findings and inferences be afforded great weight pursuant to SDCL § 1-26-36, and not second guessed

by the Court, as Intervenors request. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *Application of Svoboda*, 54 N.W.2d at 328 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, concluding that ". . . the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission."); *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 35, 744 N.W.2d at 604 (Commission's application of SDCL § 49-41B-22 upheld: "Our review of the record shows the PUC entered a well-reasoned and informed decision when it concluded that Big Stone II would not pose a threat of serious injury to the environment."); *In Re Northwestern Pub. Serv. Co.,* 297 N.W.2d 462, 467 (S.D. 1980) ("It is not for this court to weigh the evidence."); *Application of Dakota*, 291 N.W. at 593, 595-596 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "[t]he ultimate question is whether there was substantial evidence to support the order of the Commission."). Accordingly, as the Commission's rationale on sound and shadow flicker was well-reasoned, and was based on ample and substantial evidence, the Circuit Court's affirmation of the Commission's Order should be upheld.

Intervenors also failed to show the Commission's actions had a prejudicial effect. *See Sorensen,* 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (even if the decision was an abuse of discretion, a court will not overturn an agency's decision unless the abuse produced some prejudicial effect). The record shows that the modelled sound level at 25 feet away from the residence of each of the Intervenors is substantially below the 45 dBA nonparticipant threshold established in Condition No. 26: Ehlebracht 42.2 dBA; Greber 41.8 dBA; Rall 40.5 dBA; and Kranz 41.2 dBA. (AR-7 69-70). For additional context, the record shows that the sound produced from the Project for the Intervenors is approximately that of a soft whisper at a distance of 3 feet. (AR-1 229) Similarly, for shadow flicker, Intervenors are well below the Commission-imposed shadow flicker threshold of 30 hours annually established in Condition No. 35: Ehlebracht 3 hours and 14 minutes annually; Greber 14 hours and 22 minutes annually; Rall 13 hours and 27 minutes annually; and Kranz 3 hours and 44 minutes annually. (AR-7 69-70) Hence, there is no showing of prejudicial effect, because the Project's sound and shadow flicker for the Intervenors are below the Commission-imposed thresholds that substantial evidence shows will not substantially impair the health and welfare of the inhabitants.

In addition to Intervenors' misplaced reading of statute and the evidentiary record, Intervenors' citations to *City of Aberdeen v. Meidinger,* 233 N.W.2d 331 (1975) and the concurrence in *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 773 (S.D. 1989) as authority for its vaguely presented equal protection clause

claim are unavailing.[4] As a threshold issue, it is undisputable that Intervenors did not identify equal protection as an issue in the underlying proceeding nor did they identify it in their Notice of Appeal or Statement of Issues. Therefore, this argument has been waived. *See Lagler v. Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W.2d 707, 719 (". . . the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified"); *In Re LAC Minerals USA*, 2017 S.D. 44, ¶ 13, 900 N.W.2d 283, 288 (holding that the issue was waived because it was not presented during underlying administrative proceeding).

However, even if the equal protection claim is properly before the Court, Intervenors have failed to carry their burden to show that there is any constitutional impairment on the face of the applicable statute, SDCL § 49-41B-22(3), or the Commission's administration of the statute. *Steinkruger v. Miller*, 2000 S.D. 83 ¶ 8, 612 N.W.2d 591, 595 ("Statutes are presumed constitutional: challengers bear the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision."). In fact, Intervenors' equal protection claim is not even supported by their cited authority – *Aberdeen* and *Lyons* – because

[4] The *Fourteenth Amendment to the United States Constitution* states, "no State shall … 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." USConstAmend XIV, § 1, while *Article VI, § 18, of the South Dakota Constitution* provides that "no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities upon which the same terms shall not equally belong to all citizens or corporations."

these cases are too far afield from the Commission's application of SDCL § 49-41B-22(3). *Aberdeen* involved the question of whether the South Dakota and the U.S. Constitutions were implicated when two separate South Dakota statutes imposed unequal punishments for the same criminal offense based on an arbitrary classification of persons without a rationale relationship between the classification and a legitimate legislative purpose. Unlike *Aberdeen*, in the instant case, there is one statute, SDCL § 49-41B-22(3), administered by the Commission, that on its face makes no classifications, but, instead, requires the Commission to make a finding on whether the applicant has by a preponderance of the evidence carried its burden that the Project will not substantially impair the health and welfare of the inhabitants. Similarly, *Lyons* is not instructive, because it did not involve a regulatory agency administering a statute, but, rather, the Court struck down a statute imposing a classification regarding the minimum age of a plaintiff for filing a malpractice claim. The Court concluded the malpractice statute violated both the South Dakota and Federal equal protection clauses, because the arbitrary age classification on when a person could bring a medical malpractice lawsuit was not rationally related to the legislative goal of alleviating the medical malpractice crisis.

Additionally, a straightforward application of the two-pronged test adopted by this Court to SDCL § 49-41B-22(3) shows the Commission did not violate equal protection requirements. The two-pronged test to determine whether the equal protection clause has been violated is whether: (1) the statute establishes an

arbitrary classification among various people, and, if so, (2) there is a rational relationship between the classification and a legitimate legislative purpose. *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 595 N.W.2d 604, 614 (S.D. 1999). As already discussed, on its face, SDCL § 49-41B-22(3) does not establish a classification, but, rather, the statute expressly directs the Commission to evaluate the evidence presented by the applicant in the context of health and welfare, which is precisely what the Commission did in the underlying proceeding. As shown, *infra*, the Commission carefully and reasonably concluded that evidence of Crowned Ridge II, including substantial evidence from a Ph.D. and a Harvard-trained medical doctor specializing in the field occupational health, showed that the Project will not substantially impair the health and welfare of the inhabitants. The fact that in an earlier case, Prevailing Wind, the Commission set lower and different sound and shadow flicker thresholds based on the evidence in that case is not controlling on the Commission for all subsequent cases, as the clear language of SDCL § 49-41B-22(3) instructs the Commission to base its decision on the evidence provided by the applicant in the case before it. Therefore, consistent with SDCL § 49-41B-22(3), the inhabitants in Prevailing Wind and Crowned Ridge II are treated equally in that the Commission found the sound and shadow flicker produced, based on the evidence in their respective cases, met the statutory imperative that the project not substantially impair the health and welfare of the inhabitants. Furthermore, even if *arguendo* the Commission created a classification of various persons in its Crowned Ridge II Order, which it did not,

as shown, *infra*, the Commission articulated a rational relationship between the establishment of sound and shadow flicker thresholds for the Crowned Ridge II inhabitants and the legitimate legislative purpose of ensuring that Crowned Ridge II, by a ponderance of the evidence, showed the Project would not substantially impair the health and welfare of the inhabitants. Thus, in the event the Court addresses Intervenors' waived equal protection argument, the application of the Court's two-pronged test to the Commission's decision shows it did not implicate equal protection clauses of the South Dakota and Federal Constitutions. *Cheyenne River*, 595 N.W.2d at 612-614 (Commission's action did not constitute a denial of equal protection clause under the South Dakota and Federal Constitutions when Commission had a rational basis for its application of the statute); *United Hospital v. Thompson*, 383 F.3d 728, 732 (8th Cir. 2004) (federal courts use the rational basis or purpose test to evaluate an agency's action in the context of an equal protection clause challenge). Accordingly, for the foregoing reasons, Intervenors' assertion that the Commission was legally required to adopt uniform sound and shadow flicker threshold rules prior to the issuance of a Facility Permit to Crowned Ridge II is baseless, and, therefore, should be rejected.

II. The Circuit Court correctly concluded that SDCL § 43-13-2(8) is outside the jurisdiction of the Commission.

Intervenors assert that the Commission's issuance of a Facility Permit conflicted with SDLC § 43-13-2(8) or otherwise impacted the property rights of Intervenors by imposing a *de facto* easement. Intervenors Br. at 16-22. Contrary

to Intervenors' assertions, the Circuit Court correctly concluded that such claims are outside the jurisdiction of the Commission, and, by extension, outside the Circuit Court's jurisdiction when reviewing whether the issuance of the Facility Permit was clearly erroneous. (AR-7 1512-1514)

A long-settled maxim of administrative law is that an agency, such as the Commission, is a creature of statute. *Sunnywood Common Sch. Dist. No. 46 v. County Bd. of Edu*., 131 N.W.2d 105, 110 (S.D. 1964). Intervenors' citation to SDCL § 43-13-2(8) is therefore misplaced, because this law resides in a statutory scheme related to easements, which is wholly outside the statutes the Legislature enacted for the Commission to administer. In the instant case, the statutory mandate from the Legislature is for the Commission to evaluate the Project against the criteria set forth in SDCL § 49-41B-22, none of which mandate the application SDCL § 43-13-2(8) to wind energy facilities. Further, it is axiomatic that the Commission is not a court. Thus, absent direction from the Legislature, the Commission is not legally empowered to decide Intervenors' private property rights whether those rights arise under SDCL § 43-13-2(8) or simply because they will experience any amount of sound and shadow flicker. *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp*., 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions.") quoting *Application of Svoboda,* 54 N.W.2d at 327. Therefore, absent controlling South Dakota legal precedent interpreting SDCL §

43-13-2(8) as prohibiting a wind project from casting any amount of shadow flicker or sound on the property of a non-easement holder, the Commission correctly did not seek to interpret or apply SDCL § 43-13-2(8) to the Project. Tellingly, Intervenors concede that there is no controlling South Dakota *corpus juris* on SDCL § 43-13-2(8). (Intervenors Br. at 21: "The old statute (SDCL 43-13-2(8)) does not seem to have been cited in *any* decision of this Court . . . .") (emphasis in original). Hence, when boiled down to the logical conclusion, Intervenors' property right assertions turns on a wildly unsupportable premise that Commission is without legal authority to approve Crowned Ridge II, and by extension any generation project, that results in any amount of sound being heard or any amount of shadow flicker being cast on the land of a property owner who has not executed an easement with the project's owner. Given the absurd results that would occur if Intervenors assertions were found to have merit, it is not unexpected, therefore, that this Court rejected a similar argument in the context of SDCL § 49-41B-22. *See*, *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶¶ 34, 35, 744 N.W.2d at 604 ("Our review of the record shows the PUC entered a well-reasoned and informed decision when it concluded that Big Stone II would not pose a threat of serious injury to the environment. . . . Nothing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat . . . . Based on all the evidence and our limited scope of review, the PUC's decision was not clearly erroneous."). Consonant with *Otter*

Tail, as explained in Section I, *infra*, Commission's application of 49-41B-22(3) to the record in the instant case was well-reasoned, informed, and not clearly erroneous, because Crowned Ridge II met its burden through the submission of substantial evidence that the sound and shadow flicker produced from the Project would not substantially impair the health and welfare of inhabitants, which includes inhabitants that executed easements and those that have not executed easements. Hence, fundamentally, Intervenors' hypothetical that SDCL § 43-13-2(8) or some other property right could be interpreted as prohibiting the Project from casting shadow flicker or producing any level of sound on a non-easement holder's property is a wholly insufficient basis upon which remand or otherwise invalidate the Circuit Court affirmation of the Commission's granting of a Facility Permit to Crowned Ridge II.

III. The Commission's granting of a Facility Permit to Crowned Ridge II was not a taking of property.

Intervenors loosely speculate that the Commission's Order constitutes a taking of property without compensation, while, at the same time, conceding that "this is not yet an inverse condemnation case . . . this is an administrative appeal . . . ." Intervenors Br. at 24. Consistent with the Intervenors' concession, mere speculation as to a future impact of the Project is insufficient to create a ripe controversy for a taking claim. *Muscarello v. Winnebago County Bd. ("Winnebago County")*, 702 F.3d 909, 913 (7th Cir. 2012) (holding that "no property of the plaintiff's has yet been taken, or will be until and unless a wind

farm is built near her property – and probably not even then.") In addition, and tellingly, Intervenor-Ehlebracht asserted in response to a series of questions from Commissioner Nelson that any impact from the Project no matter how minor or *de minimis* was a taking of his property.[5] (AR-7 903-904) Unquestionably, however, as a matter of law, minor or *de minimis* impacts – especially those that are the same as are shared by the general public (*i.e.*, the surrounding inhabitants) – do not constitute a regulatory taking of property without compensation. *Krsnak v. Brant Lake Sanitary Dist.*, 2018 S.D. 85, ¶¶ 17-23, 921 N.W.2d 698, 702-704 (holding a taking claim under the "damages clause" of the South Dakota Constitution was properly dismissed, because the odor plaintiffs experienced from treatment pond was not unique or peculiar to odors experienced by other nearby

[5] COMMISSIONER NELSON: . . . . So in responding to Commissioner Fiegen, you indicated that your property had been taken.
THE WITNESS: Yes, sir.
COMMISSIONER NELSON: Your physical property has been taken? Explain to me what has been taken or what will be taken.
THE WITNESS: It will be taken by the effects that the Applicant, what do you want to say, puts on a participant by the means of -- I could read it. "Audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radiofrequency interference, and any other effects attributable to the wind farm or activity located on the owner's property or on or adjacent property over and across owner's property effect easement."
COMMISSIONER NELSON: And so as it relates to any of those things, is there a level of those effects that you would not consider a taking of your property, or is a de minimis amount of any of those something you'd consider a taking of your property?
THE WITNESS: Honestly?
COMMISSIONER NELSON: Yes. Please.
THE WITNESS: It's going to be every one of them. Every one of them is going to affect me. COMMISSIONER NELSON: No matter how small the amount. Is that what I'm understanding? Or is there a small amount that you wouldn't consider to be a taking of your property?
THE WITNESS: Honestly, no. They're going to take it all from me.

landowners); *Winnebago County*, 702 F.3d at 913 ("A taking within the meaning of the takings clause of the U.S. Constitution has to be an actual transfer of ownership or possession of property, or the enforcement of a regulation that renders the property essentially worthless to its owner. . . . . The 2009 Winnebago ordinance does not transfer possession of any of the plaintiff's land or limit her use of it.") (citations omitted) Similar to *Krsnak,* Intervenors cannot and do not even attempt to show that the amount of sound or shadow flicker they will experience is different in kind to the sound and shadow flicker that will be experienced by others. (*See*, Section I, *infra*, comparing the Commission approved limits to the low levels of sound and shadow flicker Intervenors will experience) Likewise, as in *Winnebago County*, not only is Intervenors' taking claim not ripe for adjudication, the Commission's Order does not transfer possession of Intervenors' property or limit their use.

Instructively, similar arguments alleging an unconstitutional taking were brought against the Deuel County and Codington County approvals of Crowned Ridge II, and those arguments were rejected by the SD Third Circuit Court and by this Court. *Lindgren v. Codington County*, 14CIV1-000303, Order Granting Motion to Dismiss and Granting Motion for Costs, J. Means (SD 3rd Cir. Dec. 20, 2019); affirmed by Order Directing Issuance of Judgement of Affirmance, (SD June 1, 2020); *In the Matter of Specific Exception Permit Application of Crowned Ridge II, LLC*, 19 CIV18-000061, J. Elshere (SD 3rd Cir. May 19, 2020).

Accordingly, for these reasons, the Circuit Court correctly concluded that the Intervenors failed to establish that the sound and shadow flicker from the Project amounts to a taking of Intervenors' property without just compensation. (AR-7 1513)

IV. The Circuit Court properly determined that Intervenors' claim of a *per se* nuisance is not ripe.

Intervenors speculate that the Commission's approval frustrates their ability to bring a nuisance claim, while, at the same time, repeating its factual disagreement with the Commission's establishment of sound and shadow flicker thresholds. Intervenors Br. at 22, n. 38; 25-33. As established in Section I, *infra*, Intervenors factual disagreements fail, because Commission's adoption of the sound and shadow flicker thresholds were well-reasoned and supported by substantial evidence and conditions. Furthermore, the Circuit Court correctly rejected Intervenors pontifications on *per se* nuisance law as not bring a ripe controversy. (AR-7 1513) Like Intervenors' vaguely presented taking claim, Intervenors' speculative claim of nuisance is insufficient to create a ripe controversy, and, therefore, it is not properly before this Court. *See Muscarello v. Ogle County Bd. of Commissioners*, 610 F.3d 416, 425 (7th Cir. 2010) (holding action for nuisance was not ripe where there had been no construction of the wind turbines; "the windmills have not been built yet, and so it is difficult to see how they might either by causing a trespass on Muscarello's land or creating a nuisance. . . . We cannot see how the permit, unexercised, causes trespass or

nuisance. . . .") *see also Winnebago County*, 702 F.3d at 915. In addition to the instructiveness of these federal cases, in South Dakota it is well settled that:

> Ripeness involves the timing of judicial review and the principle that '[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.' . . . Courts should not render advisory opinions or decide moot theoretical questions when the future shows no indication of the invasion of a right.

Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747, 750 (S.D. 1995) (internal and other citations omitted). The *per se* nuisance claim posed by Intervenor is the very definition of a hypothetical question – a problem neither real, present nor imminent, but, rather, one that is abstract and hypothetical. This claim is, accordingly, not ripe.

Furthermore, as explained above, the Commission is not a court, and, therefore, its Order is not implicated by Intervenors' vague claim of *per se* nuisance, as it is not the role of the Commission to adjudicate such claims. Similar to Intervenors' taking vague assertion, analogous arguments of *per se* nuisance were rejected in an appeal of the Deuel County and Codington County approvals of Crowned Ridge II. *Lindgren v. Codington County*, 14CIV1-000303, Order Granting Motion to Dismiss and Granting Motion for Costs, J. Means (SD 3rd Cir. Dec. 20, 2019); affirmed by Order Directing Issuance of Judgement of Affirmance, (SD June 1, 2020); *In the Matter of Specific Exception Permit Application of Crowned Ridge II*, LLC, 19 CIV18-000061, J. Elshere (SD 3rd Cir.

May 19, 2020). Similarly, the Circuit Court's affirmation of the Commission's Order should be upheld, because the Order does not constitute a *per se* nuisance.

CONCLUSION

For the foregoing reasons, Crowned Ridge II respectfully submits that the Commission's Order issuing a Facility Permit to Crowned Ridge II should be affirmed in all respects.

Respectfully submitted this 9th day of July 2021.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A66(b). Proportionally spaced font Times New Roman l3 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee Crowned Ridge Wind II, LLC's Brief contains 7,179 words as counted by Microsoft Word.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Miles F. Schumacher
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CERTIFICATE OF SERVICE

Miles F. Schumacher, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 9th day of July 2021, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the foregoing in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Miles F. Schumacher
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

In the Matter of the Administrative Appeal of
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER,
RICHARD RALL, AMY RALL and LARETTA KRANZ,
Appellants,

v.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and
CROWNED RIDGE WIND II, LLC,
Appellees.

 # 29610
19CIV20-000021

Appeal from Circuit Court, Third Judicial Circuit, Deuel County, South Dakota
The Honorable Dawn Elshere, Presiding

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PRELIMINARY STATEMENT

This appeal is related to Appeal # 29352 - the same Appellants residing in Deuel County, the same wind farm project – the difference being the challenge there is the role of the Zoning Power to support Applicant's casting of wind turbine "Effects"[1] onto the homes and lands of Non-Participants. As with the PUC, the county's Board of Adjustment approved Applicant's emission of Effects from wind farm operations without regard to property lines or easements. Participants receive the same Effects (if living near the wind farm, which *is* the case for each of the Appellants), an "Effects Easement" having been given by *each* Participant.[2] Appellants have consistently argued the governmental agencies have adversely taken a *de facto* easement, awarded to and solely for Applicant's benefit.

Appellees maintain that voluntary easements are vital *only* if Applicant itself *wishes* to obtain one from a given landowner, *or* whenever the projected "Effects" are in excess of the Agency's so-called Regulatory Limits.[3] With permits in hand, Appellees' shared theory is that Effects Easements are not required as to Non-Participants.

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[1] Primarily consisting of "shadow flicker" and noise. These Effects originate from wind turbine operations conducted upon the fields, lots and parcels of Participants, the Zoning Power being invoked by Applicant in pursuit of the essential CUP. As deployed in Deuel County, this power then purportedly extends *beyond* property lines to afflict, by some explicit measure, the property interests of those not invoking the Zoning Power.

[2] One small landowner, *not* a participant, has given a "Participation Agreement" with a similar effects easement, also not revealed until *after* the Agency's hearing – see Appellants' brief, 17, and n. 29, being placed in the record post-hearing as Ex. I-8, R013802.

[3] As referenced in the testimony of Staff's expert witness Hessler and Staff member Kearney, cited in Appellant's brief, 26-7.

Two recent U.S. Supreme Court decisions must be noted. *Knick* v. *Township of Scott*, 139 S.Ct. 2162 (2019), cited in Appellant's brief to the trial court below (CR 1399) and also in Appellant's opening brief in # 29352, held that a county ordinance requiring daytime access to old cemeteries comprised a taking of property. The Court then overruled part of *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Williamson County* had established a two-prong test of "special ripeness" for federal jurisdiction of land use takings claims – *first*, had the planning body reached a final, reviewable decision, and *second*, has the property owner unsuccessfully availed itself of a compensatory process afforded by state law?[4] The second prong was overruled in *Knick*.[5] The doors to the federal courthouse are now open to state agency taking claims under 42 U.S.C. § 1983, under a final, reviewable decision.[6]

The second notable decision was issued June 23, 2021, *Cedar Point Nursery* v. *Hassid*, 594 U.S. ____ (2021).[7] *Cedar Point* concerned a California state agency regulation granting union organizers the right to access private property at certain times of the day, for 120 days per year. This access right was seen by the Court as an easement, even though not exactly in the usual form of an easement (slip opinion, at 13):

> As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. See *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *Lucas* v. *South Carolina*

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[4] *Williamson County*, at 195, 199.

[5] *Knick*, 139 S.Ct. at 2179.

[6] Appellants suggest that a fully reviewed agency decision also satisfies the first prong of *Williamson County*.

[7] The Clerk and parties were informed of this ruling by letter of June 24, 2021. Chief Justice Roberts wrote the majority opinions in both *Knick* and *Cedar Point*.

> *Coastal Council*, 505 U.S. 1003, 1030 (1992). But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. See *Allred* v. *Harris*, 14 Cal.App. 4th 1386, 1390, 18 Cal.Rptr. 2d 530, 533 (1993). And no one disputes that the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights "cannot be so easily manipulated." *Horne*, 576 U.S., at 365 (internal quotation marks omitted); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

The Facility Siting Permit (likewise, the CUP issued in Deuel County) is tantamount to a *de facto* easement. Though not bearing the formal requisites, and being neither recorded in the local office nor indexed as a specific burden upon Appellants' properties, these government-issued approvals serve as an easement, providing legal cover for discarding the "Effects" on the lands of neighbors.[8]

Cedar Point concluded the California regulation was a "*per se* physical taking" of property rights: "[t]he regulation appropriates for the enjoyment of third parties the owners' right to exclude" (slip op., at 7). The decision substantially clarifies takings jurisprudence. Cases involving "use restrictions" (or regulatory takings), citing the zoning ordinance in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and noting the Court of Appeals for the Ninth Circuit had reviewed the state's access regulation under the multifactor balancing test of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), are to be distinguished from those that are *per se* or physical takings.[9]

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[8] Just *as if* Appellants had each executed an instrument with the "Effects Easement" language; see Section 5.2 of Ex. I-2, R013269, reproduced in Appendix C, Appellant's brief.

[9] *Cedar Point*, slip op. at 3-7, observing also, at 3, the growers "had made no attempt to satisfy" the *Penn Central* tests. Appellee Agency continues to cite *Penn Central* as the

This is not a case of "use restrictions." Rather, this is (or soon will be recognized as, Appellants suggest) a *per se* takings case.[10] Human agents of Applicant are not licensed to walk or enter the properties of Non-Participants, there is no directive to open their gates to construction equipment and materials. Yet, this case is about the "Effects" of undue proximity to a wind farm designed by Applicant, approved by the PUC, where citizens are nonconsensually enclosed within the boundaries and compelled (by virtue of the Agency's decision) to permanently endure[11] the adverse consequences flowing from Applicant's volitional design.[12] This is an uncompensated compulsion. Meanwhile, the Project is fully constructed. From many lofty perches, rising well above any deflecting veil of trees or other structures, the Effects face little resistance in ferreting out the Appellants within their respective homes and lands. The Effects are a burden on the Appellants' homes, even assuming for sake of argument that burden, even over a long period of time, will neither kill nor maim them.[13]

ARGUMENT

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hurdle that Appellants must leap. Applicant relies on *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416 (7th Cir. 2010); however, the legal foundation of *Muscarello* – involving a *proposed* wind farm, apparently never built - includes *Williamson County*, now swept away by *Knick*. Much of the ground has shifted since *Muscarello* was decided.

[10] This is merely an appeal of the trial court's affirming order on review of the Agency's decision, the inquiry being directed by the full scope of SDCL 1-26-36.

[11] The wind farm leases (with Effects Easement) have a life of 25 years, and perhaps "many more years." See Appellants' brief, 10, n. 18. The Permit itself has no expiration date. Effects will be emitted so long as the turbines remain and the winds blow.

[12] Staff's Expert Hessler opined the Project is "aggressively devised" (Ex. S2, R012746, TR-H 497:24-498:25). Neither Agency nor Applicant mentioned or cited Hessler's opinion below, and now, Appellees continue to ignore it.

[13] Albeit their lives are now lived in permanent annoyance.

Appellants now review the issues pressed by Appellees, each having urged that the trial court be affirmed. Those asserted by Appellees are slightly rephrased, with the first two considered jointly.

Agency's Issue A (at 8), Applicant's Issue I (at 8)

A. IS THE AGENCY ENTITLED TO REGULATE "EFFECTS" ON AN AD HOC BASIS?

Agency's Issue B (at 12), Applicant's Issue II (at 20)

B. IF THE AGENCY HAS NO AUTHORITY CONCERNING EASEMENTS, WHY DOES IT ISSUE ORDERS HAVING THE EFFECT OF EASEMENTS?

The opposing arguments of Appellees assert that as the language of SDCL 49-41B-35 is not mandatory but permissive, the PUC can wade into the regulation of siting these complicated Projects[14] without further substantive rules in place. This position is both curious and dangerous, rather like allowing small children to have matches, near haystacks - on a windy day – during a drought. What could go wrong?

Appellants readily agree the Agency has *no* jurisdiction to determine or to adjudicate land easements. That was never the point - Appellants never claimed Agency *could* grant easements over land. In the void left by having no *suitable regulations*, however, the PUC's decisions and orders have the effect of an easement; the subject matter of the orders affects the use and enjoyment of property, in ways adverse to the fee owner's prerogatives. Agency could certainly read the collected statutes on easements,[15] and come to realize, in consultation with Staff, that wind farms are big, complicated,

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[14] Spread over 3 counties and more than 130 turbine sites, rising to about 500' in height, casting "Effects" of noise and shadow flicker onto literally hundreds of different property owners, both Participants and Non–Participants. Some of the Participants – and all of the Non-Participants – are also residents of the area.

[15] SDCL 43-13-1 to -13, inclusive, copied from California Civil Code in 1877; the chapter then continues, ending with wind and solar easements, generally added in 1996 and extensively and frequently amended since.

intertwined proposals, *permanently* touching the property and incomes of Participants. Likewise, these Projects pose health and safety concerns for Non-Participants residing nearby, even as the property interests and incomes of those same Non-Participants are also *burdened*.[16]

Despite the absence of Agency's jurisdiction to *issue* or *determine* easements, prudence and common sense suggests that regulations might serve as prophylactic, much as already suggested in Appellants' brief, 11, n. 19, repeated following:

> If PUC wishes suggestions for rules, consider these: (1) prohibit the non-consensual embrace of property within the Project's boundary (as implicated here); (2) prohibit the casting of "Effects" onto homes and lands not consensually accepted by easement (likewise at issue). Otherwise, with knowledge of Agency's prior decisions, to quote expert Hessler, those with "aggressively devised" Projects may probe the depths of the ephemeral "regulatory limits" as to Non-Participants. One can assume Applicant favors this approach, with Effects allowed to invade Non-Participants – up to and into their homes - without need of an Effects Easement, so long as the "annual limit" of 30 hours for Shadow Flicker (merely one part of the German standard) is not exceeded.[17]

If proposing to encircle or embrace property within the Project's boundaries, or needing to cast "Effects" into or onto property by reason of proximity,[18] the Project promoter should hold an easement authorizing that burden. However, Applicant chose *not* to even pursue Effects Easements (other than with Mrs. Kranz).

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[16] What was *once* possible for Non-Participants under current zoning law may no longer be possible; for example, no adult child returning home to the parents' farm would build a new home within several hundred feet of an existing 500' wind turbine, even if not strictly prohibited under the County's wind ordinance. By narrowing such choices, the property rights of Non-Participants are burdened or diminished, saddled also with the burden of "Effects."

[17] As Appellants now know, once the hearing had ended, it *is* possible for Applicant to enter into an Effects Easement with a Non-Participant; *see* n. 2, above.

[18] Shadow Flicker does not extend to infinity; *see* Appellants' brief, 19, n. 35.

The proceeding below was a tightly scripted, time-limited dance between the Agency and Staff, with Applicant appearing for a great host of compensated Participants (each holding an "Effects Easement"). Non-Participants were mere observers to this shindig, left standing along the wall.[19] The PUC did note the names of Appellants in the decision, no further details deemed essential to conclude the permitting carnival.

The PUC was pressed to decide (and quickly, in line with the legislature's timetable) the specific doses of "Effects" that can be given to those with easements (Participants as well as that one Non-Participant signing the oddly named "Participation Agreement," referenced in n. 2, above), and likewise, the dosage for all those giving no such easements. Thus, regarding Non-Participants (including Appellants), there is *only* the Agency's decision to establish Applicant's legal right to administer the Effects (over the course of the next 25 or more years) to those living and owning property in proximity to the Project.[20]

Appellants own and live on their respective properties and homes within the immediate vicinity of the Project.[21] Both they and their properties are permanently

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[19] This is not to allege Appellants were denied procedural rights; but what other explanation is there for an Agency decision that mentions the *names – but none of the interests* – of Appellants. Consider the comments of Commissioner Nelson in taking Applicant's counsel to task, as recounted in Appellants' brief, at 6-7, on the issue of confidentiality. The exchange was on the value to Participants of negotiating wind farm leases and easements. The property interests of Non-Participants, however, merited no expression of concern; these interests have been trampled in the process.

[20] Crucially, the Agency's Decision establishes a "lawful dose" of Effects, and even in the absence of an easement, is the purported legal mechanism for Applicant's administration of full measure to Non-Participants and property interests, when and as the wind blows. Appellants thus argue the Agency's own acts – *or the adamant refusal to promulgate regulations* - creates this Catch-22: without an underlying voluntary easement for Applicant's benefit, the PUC's decision steps in to serve as one.

exposed to Effects greater (or more intense) than prescribed for neighbors of the wind farm in Charles Mix County.[22] This enhanced level of Effects will not kill or maim them, we trust. But is decreeing disparate levels of Effects for different counties really part of the Agency's prerogative? The professional literature amassed by Applicant (and Staff) clearly suggests the long-term health consequences of exposure to the Effects is not well understood, and that additional study is required.[23]

In a presumed effort to shore up Appellees' positions, Crowned Ridge, at 16, with reference to the noise levels to be experienced by Appellants, asserts:

> For additional context, the record shows that the sound produced from the Project for the Intervenors is *approximately that of a soft whisper at a distance of 3 feet.* (AR-1 229). (Emphasis supplied.)

Appellants are skeptical that noises emitted from a wind turbine resemble a "soft whisper," at any distance.[24] This writer is hard-pressed to think of a more annoying scenario than required to endure someone speaking to you (whenever the wind is blowing) in a soft whisper at three feet (forever)!

Because the Agency doesn't inquire whether Applicant holds Effects Easements from Non-Participants, the record in this case reflects the dangerous ice onto which the

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[21] These homes being embraced within the Project's boundaries, as shown in Appendices A-1, A-2 and A-3, *Appellants' Reply Brief to Circuit Judge Elshere*, CR 1497, and also Ex. 14-2, R011280.

[22] Noise and shadow flicker estimates at Appellants' homes are asserted in Appellee Crowned Ridge's brief, at 16. However, the asserted levels for noise are *not* in accord with other predictions, as noted in Ex. I-3, R-013292, at 013294, and referenced in Appellants' brief, at n. 34. Appellants did *not* invent those predictions!

[23] The literature collected by just one expert for Applicant – Chris Ollson – is outlined in Appendix D to Appellants' brief.

[24] A quick review of articles collected by Applicant's witness Ollson – listed in Appendix D of Appellants' brief – fails to uncover claims the noise is merely a "soft whisper."

State and its agencies have crawled for purposes of avidly promoting wind energy development. A short list of warnings include: A) South Dakota has approved disparate levels of Effects for wind farms in different counties; B) Experts hired by Staff are effectively forced, in their professional roles, to support and urge approval of Projects emitting Effects beyond the ideals professed by those experts (40 DBA being Hessler's ideal goal); C) Those experts (again, Hessler) are required to support the design of a Project, even though "aggressively devised,"[25] with Hessler further elaborating on his views:

> It's how many turbines are around a particular house or point of interest. . . . [T]he density of turbines is such that there's lots of nonparticipating houses with predicted levels about 40 [dbA]. At my last count I think it was approaching 100 [homes]. It was a lot . . . And I would like to see it a lot lower number there."[26]

The expert's views or worries reflect a disconnect from the legislature's purpose that Projects yield "minimal adverse effects" on the citizens of this state, SDCL 49-41B-1. Hessler's concerns for the design are never cited nor addressed in the Agency's decision of April 6, 2020 (R014230), or the trial court's order (CR-1566) and memorandum (CR-1528).[27]

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[25] Ex. S2, R012746, TR-H 497:24-498:25.

[26] TR-H 507:4-12. Needless to say, Hessler did not see a "lot lower number" from either the PUC or Applicant. (Simply nothing can be done for these unfortunates, it seems.)

[27] Rather than focus on "minimal adverse effects," Applicant's Project, as observed by Hessler, was an aggressive design without exceeding the PUC's "regulatory limits *de jour*" in too many places. One might suppose that needing too many "Effects Easements," in the form of a "Participation Agreement," as referenced in n. 2 – could get expensive. Otherwise, the burden of Effects, up to that regulatory limit, will be laid on lands and homes by the PUC's edict, without cost to Applicant.

To compensate for the void in regulations, the PUC relies on the *ad hoc* opinions of experts hired by Staff (like Hessler), and borrows some convenient part of the regulations of other bodies, in the name of "Regulatory Limits." This includes the German safety rules exemplified by Ex. A12-16 (R006006).[28] The *ad hoc* opinions on Shadow Flicker generally point to those German rules and some mythical "determined court case" as foundations.[29] (The county's own Zoning Power has settled on essentially those same rules for Shadow Flicker duration and noise intensity; in review of the briefs in pending Appeal 29352, the German regulation, said to be ratified by some unidentified German court opinion, are likewise the sources for the zoning standards in Deuel County, at least for cumulative Shadow Flicker duration).

The intended point is that when the PUC borrows part of the German rule for Shadow Flicker, which has both a daily and annual limit of duration,[30] and also adheres to Hessler's ideal model for noise (40 dBA), it is reasonable to assume the same *ad hoc* limits for Charles Mix would be imposed also in Deuel, no matter how aggressive the design. The differences between Hessler's ideal (40 dBA at the receptor, the "ideal"

[28] Sponsored by Applicant's Chris Ollson, and summarized in Appendix D to Appellants's brief.

[29] See Appellants' brief, 9, n. 15 – no citation to that purported case, as referenced by Staff witness Kearney, is found in the briefs of Appellees. Appellants believe no such case exists, or at least, not one that would hold precedental value for this Court and South Dakota property law (including SDCL 43-13-2(8)).

[30] Both limits were applied in the 2018 permit case for *Prevailing Wind Park*, *see* Appellants' brief, n. 14, but not here.

regulatory limit as applied in *Prevailing Wind Park*) and the purported new "regulatory limit" of the PUC (45 dBA, as applied here) are not mere trifles.[31]

Even assuming *arguendo* the borrowed rules (as to the effects of noise and Shadow Flicker) are properly found in the PUC's wheelhouse and are duly applied as to "human health" concerns, this still does not answer the question of the Agency's jurisdiction to impose those same levels or duration of Effects as a permanent burden on the land and homes of Appellants. Appellants never accepted those burdens, and by imposing such a servitude – *permanently* - the PUC's order becomes a *de facto* easement.[32] Spreading the burden of Effects to those unwilling to receive is merely a forced gratuity for Applicant's benefit. This result is not in harmony with Appellants' property rights.

Agency's Issue C (at 13), Applicant's Issue IV (at 26)

C. APPELLANTS DID NOT ARGUE THIS WIND FARM COMPRISES A NUISANCE *PER SE*.

Black's Law Dictionary (Rev. Fourth Ed.) defines nuisance *per se* as "[a]n act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings." Appellants never claimed as such below, even in asserting their property rights, objecting to enclosure behind the Project's boundaries and the burden of "Effects."

[31] In logarithmic scale, every 3dB change represents either a doubling or halving of sound energy, according to professional literature. *See* "Understanding the 3dB rule," https://pulsarinstruments.com/en/post/understanding-3db-rule.

[32] Or, as Chief Justice Roberts wrote in *Cedar Point*, slip op., 13, "The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."

The definition was not fully embraced by this Court in *Town of Colton v. South Dakota Cent. Land Co.*, 25 S.D. 309, 126 N.W. 507, 508 (1910), given that "[n]o one can create a nuisance in the absence of some one affected by the former's act or omission." That said, a "lawful business or erection" (which likely includes 500' wind turbines) "may become a nuisance by reason of extraneous circumstances, such as being located in an inappropriate place." *Id.*, at 509. Siting the turbines to readily cast both noise and shadow flicker into Appellants' homes is one example of an "inappropriate place," even if the Zoning Power has blessed the arrangement, given the full absence of Effects Easements as to Appellants.[33]

The nuisance arguments of Appellants related entirely to the proscribing language of SDCL 21-10-1 and -2. The Project now has a CUP (under challenge in Appeal # 29352) and the Facility Siting Permit at issue here. The Project is fully permitted, entirely built. The casting of Effects upon Appellants is already underway. Appellants have no apparent remedy to challenge the discarding of Effects upon them within the scope of nuisance law; this, too, has elements of an easement, as argued in Appellants' brief.

Agency's Issue D (at 13), Applicant's Issue III (at 23)

D. APPELLANTS DO ASSERT THE AGENCY'S ORDER IS A TAKING OF PROPERTY FOR WHICH NO VOLITIONAL EASEMENT EXISTS

Applicant itself devised the "Effects Easement," making it part of the wind lease instrument and extracting it from compensated Participants, without regard to whether the owner actually lives on the property. Applicant also prepared the "Participation

[33] Mrs. Kranz's farm is capable of hosting turbines; she declined to enter into the proferred Kranz Easement (Ex. I-2, R013269). Ironically, as noted in Appellants' brief, 5, n. 6, 10, n. 18, and 23, n. 39, Ms. Kranz, by virtue of the PUC order, nevertheless must now tolerate the Effects *just as if* the Kranz Easement had been signed and delivered.

Agreement" with the solitary small parcel owner, which includes the Effects Easement language – although this post-hearing production leaves one to wonder whether this instrument exists because: (a) the nearest turbine was too close, (b) the Project produced too much noise, or (c) Shadow Flicker issued for too many hours – counted annually.[34]

In terms of property burdens, what law declares the PUC to be the final arbiter over specific levels (regulatory limits) upon neighbors (and their homes)? If the sound level intensity of 45 dBA (or Hessler's ideal, 40 dBA) is exceeded, or if Shadow Flicker endures for more than 30 hours annually, then (and apparently only then), are those Effects viewed as excessive burdens upon property; this is what Applicant's extraction of a Participation Agreement (see n. 2, above) suggests to Appellants. The PUC does not have that authority. Regulatory Limits, as administered to Appellants and upon their homes, have been borrowed, *ad hoc*, from a German regulatory agency[35] or are constructed for each case on the opinions of experts (forced by Project design here to exceed his own ideals), while being unevenly applied.[36]

The PUC's brief discusses *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005), asserting the Agency is *not* responsible for loss or damage to Appellants' interests. The crux of that case has been missed. The court, at 101, noted:

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[34] *Not daily* – that's *only* for Non-Participants living near the *Prevailing Wind Park* Project. The single example of "Participation Agreement" is Ex. I-8, R013802. *See* Appellants' brief, 17, n. 29, and n. 2, above.

[35] Ex. A12-16, R006006, bearing the daunting title of "Information on How to Identify and Assess Optical Immissions Wind Turbines."

[36] SDCL 43-13-4, declaring that a "servitude can be created only by one who has a vested estate in the servient tenement," comes to mind. The "right" alluded to in the question presented is that of the "right to exclude," a right as noted in *Cedar Point,* slip op.*,* 16, is "[not] an empty formality, subject to modification at the government's pleasure."

> We think the consequential damages rule applies here. The Harms do not challenge the district court's finding that the rezoning ordinance was valid. Joe's Ready Mix and Sandbulte, as the county in [*Griggs v. County of Allegheny,* 369 U.S. 84], *were the promoter and owner of the ready mix plant and decided, subject to the ordinance, where the plant was to be built and how it would be operated. The City in enacting the rezoning ordinance has taken no action in determining these matters.* (emphasis supplied)

It is true that Applicant made the plan, laying it before the PUC. The Staff's hired expert concluded the plan was "aggressively devised," but the Agency approved it regardless – *in every little detail*, with certain limited adjustments negotiated between Applicant and Staff. No design decision of Applicant could be implemented absent the express, highly conditioned approval and ratification of the PUC.

By contrast, the City in *Harms*, after approving the zoning district change, clearly took a hands-off approach, leaving the details of such a facility to the discretion and common sense of the plant developer. The PUC's order issued to Applicant is neither forgiven nor blessed by the "consequential damages rule." Proper regulations issued by this Agency, as suggested, would signal very poor prospects for licensing if a wind farm with gigantic turbines is sited to give Non-Participants a burden of "Effects" without benefit of an easement. Here, the response, in effect, is: "No easement, no problem."

In *Cedar Point*, slip. op., 20, Chief Justice Roberts concluded: "The access regulation amounts to simple appropriation of private property." That conclusion is likewise warranted here, such that the trial court's affirmance of the Agency's order should be reversed. This is not yet an inverse condemnation case, but one where the Agency's actions, in violating or prejudicing the substantial rights of Appellants, are open to question under SDCL 1-26-36. As is likely said before in other settings, the homes and

lands of Appellants are not for sale, even as the PUC lacks the legal authority to place this servitude of "Effects" upon them.

CONCLUSION

The trial court correctly determined the Agency lacks jurisdiction to grant or issue easements. For the lands of Appellants, however, that is precisely what has been issued by means of the order appealed. The order gives the right to burden property, without benefit of an underlying easement, and thus serves just as if an easement.

Respectfully submitted:

Date: July 15, 2021 /s/ A.J. Swanson

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws, being 14 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 4,624 words and 24,449 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: July 15, 2021 /s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Brief in the above referenced case was served upon each of the following persons, as counsel for Appellees herein, having been accomplished by electronic mail, at the addresses stated below:

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The signed original (and two exact copies) of Appellant's Reply Brief was transmitted via U.S. Mail to Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol Ave., Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

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SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUN 24 2021

Clerk

June 24, 2021

Shirley Jameson-Fergel, Clerk
SOUTH DAKOTA SUPREME COURT
500 E. Capitol Ave.
Pierre, SD 57501-5070

Re: Appeal No. 29610
Ehlebracht, et al. v. South Dakota Public Utilities Commission, et al.

Dear Clerk:

Appellants' opening brief was submitted to the Chief Deputy Clerk on May 25, 2021. In both the Appellants' docketing statement (at 7, note 13) and the opening brief (at 5, note 6), reference has been made to *Cedar Point Nursery v. Shiroma*, a matter then pending before the U.S. Supreme Court. Appellants now wish to advise the Court that on June 23, an opinion was issued in *Cedar Point Nursery*, a 6-3 ruling that the California state access regulation served as a *per se* physical taking of property.

A PDF of the slip opinion (majority written by Chief Justice Roberts) accompanies this this letter, along with concurring opinion of Justice Kavanaugh and the dissent of Justice Breyer (joined by Justices Sotomayor and Kagan).

Appellants maintain that yesterday's ruling in *Cedar Point Nursery* has significant implications for the issues presented in this pending appeal, as well as the pending (but fully briefed) appeal in No. 29352, *Ehlebracht, et al. v. Deuel County Planning Commission, et al.* If the Court wishes further briefing from Appellants in either case, we will certainly do so.

A copy of this letter and the slip opinion as referenced has been served by electronic mail on counsel for Appellees in both referenced dockets, as noted on the second page of this letter. I am presently scheduled to carry on without the service of my assistant until July 5, 2021 – if the Court wishes or requires that this letter (and enclosure) be submitted also by U.S. mail, kindly inform me accordingly. For now, this writing - and the opinions in *Cedar Point Nursery* - are submitted to the Clerk's office only by electronic mail. Thank you for your assistance.

Sincerely yours,
ARVID J. SWANSON P.C.

A. J. Swanson

Enc. (as noted)

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CEDAR POINT NURSERY ET AL. *v.* HASSID ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–107. Argued March 22, 2021—Decided June 23, 2021

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, §20900(e)(1)(C). The regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in Federal District Court seeking to enjoin enforcement of the access regulation on the grounds that it appropriated without compensation an easement for union organizers to enter their property and therefore constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The District Court denied the growers' motion for a preliminary injunction and dismissed the complaint, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. A divided panel of the Court of Appeals for the Ninth Circuit affirmed, and rehearing en banc was denied over dissent.

Held: California's access regulation constitutes a *per se* physical taking. Pp. 4–20.

(a) The growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments. Pp. 4–17.

(1) The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner

with just compensation. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321. The Court assesses such physical takings using a *per se* rule: The government must pay for what it takes. *Id.*, at 322.

A different standard applies when the government, rather than appropriating private property for itself or a third party, instead imposes regulations restricting an owner's ability to use his own property. *Id.*, at 321–322. To determine whether such a use restriction amounts to a taking, the Court has generally applied the flexible approach set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Id.*, at 124. But when the government physically appropriates property, *Penn Central* has no place—regardless whether the government action takes the form of a regulation, statute, ordinance, or decree. Pp. 4–7.

(2) California's access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude. The right to exclude is "a fundamental element of the property right." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179–180. The Court's precedents have thus treated government-authorized physical invasions as takings requiring just compensation. As in previous cases, the government here has appropriated a right of access to private property. Because the regulation appropriates a right to physically invade the growers' property—to literally "take access"—it constitutes a *per se* physical taking under the Court's precedents. Pp. 7–10.

(3) The view that the access regulation cannot qualify as a *per se* taking because it does not allow for permanent and continuous access 24 hours a day, 365 days a year is insupportable. The Court has held that a physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due. See *United States* v. *Dow*, 357 U. S. 17, 26. To be sure, the Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, discussed the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical *invasion* is a taking." *Id.*, at 435, n. 12. But the regulation here is not transformed from a physical taking into a use restriction just because the access granted is restricted to union organizers, for a narrow purpose, and for a limited time. And although the

Syllabus

Board disputes whether the access regulation appropriates an easement as defined by California law, it cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state property law.

PruneYard Shopping Center v. *Robins*, 447 U. S. 74, does not cut against the Court's conclusion that the access regulation constitutes a *per se* taking. In *PruneYard* the California Supreme Court recognized a right to engage in leafleting at the PruneYard, a privately owned shopping center, and the Court applied the *Penn Central* factors to hold that no compensable taking had occurred. 447 U. S., at 78, 83. *PruneYard* does not establish that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. Restrictions on how a business generally open to the public such as the PruneYard may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public. Pp. 10–15.

(4) The Court declines to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers' right to exclude. The right to exclude is not an empty formality that can be modified at the government's pleasure. Pp. 15–17.

(b) The Board's fear that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property is unfounded. First, the Court's holding does nothing to efface the distinction between trespass and takings. The Court's precedents make clear that isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights, including traditional common law privileges to access private property. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1028–1029. Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Under this framework, government health and safety inspection regimes will generally not constitute takings. In this case, however, none of these considerations undermine the Court's determination that the access regulation gives rise to a *per se* physical taking. Pp. 17–20.

923 F. 3d 524, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAVANAUGH, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.* VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, §20900(e)(1)(C) (2020). Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

I

The California Agricultural Labor Relations Act of 1975 gives agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right. Cal. Lab. Code Ann. §§1152, 1153(a) (West 2020). The state Agricultural Labor Relations Board has promulgated a regulation providing, in its current form, that the self-organization rights of employees include "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code

Regs., tit. 8, §20900(e). Under the regulation, a labor organization may "take access" to an agricultural employer's property for up to four 30-day periods in one calendar year. §§20900(e)(1)(A), (B). In order to take access, a labor organization must file a written notice with the Board and serve a copy on the employer. §20900(e)(1)(B). Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during the lunch break, and one hour after work. §§20900(e)(3)(A)–(B), (4)(A). Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish. §§20900(e)(3)(A), (4)(C). Interference with organizers' right of access may constitute an unfair labor practice, §20900(e)(5)(C), which can result in sanctions against the employer, see, *e.g.*, *Harry Carian Sales* v. *Agricultural Labor Relations Bd.*, 39 Cal. 3d 209, 231–232, 703 P. 2d 27, 42 (1985).

Cedar Point Nursery is a strawberry grower in northern California. It employs over 400 seasonal workers and around 100 full-time workers, none of whom live on the property. According to the complaint, in October 2015, at five o'clock one morning, members of the United Farm Workers entered Cedar Point's property without prior notice. The organizers moved to the nursery's trim shed, where hundreds of workers were preparing strawberry plants. Calling through bullhorns, the organizers disturbed operations, causing some workers to join the organizers in a protest and others to leave the worksite altogether. Cedar Point filed a charge against the union for taking access without giving notice. The union responded with a charge of its own, alleging that Cedar Point had committed an unfair labor practice.

Fowler Packing Company is a Fresno-based grower and shipper of table grapes and citrus. It has 1,800 to 2,500

employees in its field operations and around 500 in its packing facility. As with Cedar Point, none of Fowler's workers live on the premises. In July 2015, organizers from the United Farm Workers attempted to take access to Fowler's property, but the company blocked them from entering. The union filed an unfair labor practice charge against Fowler, which it later withdrew.

Believing that the union would likely attempt to enter their property again in the near future, the growers filed suit in Federal District Court against several Board members in their official capacity. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. They requested declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them.

The District Court denied the growers' motion for a preliminary injunction and granted the Board's motion to dismiss. The court rejected the growers' argument that the access regulation constituted a *per se* physical taking, reasoning that it did not "allow the public to access their property in a permanent and continuous manner for whatever reason." *Cedar Point Nursery* v. *Gould*, 2016 WL 1559271, *5 (ED Cal., Apr. 18, 2016) (emphasis deleted). In the court's view, the regulation was instead subject to evaluation under the multifactor balancing test of *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978), which the growers had made no attempt to satisfy. *Cedar Point Nursery* v. *Gould*, 2016 WL 3549408, *4 (ED Cal., June 29, 2016).

A divided panel of the Court of Appeals for the Ninth Circuit affirmed. The court identified three categories of regulatory actions in takings jurisprudence: regulations that impose permanent physical invasions, regulations that de-

prive an owner of all economically beneficial use of his property, and the remainder of regulatory actions. *Cedar Point Nursery* v. *Shiroma*, 923 F. 3d 524, 530–531 (2019). On the court's understanding, while regulations in the first two categories constitute *per se* takings, those in the third must be evaluated under *Penn Central*. 923 F. 3d, at 531. The court agreed with the District Court that the access regulation did not fall into the first category because it did not "allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year." *Id.*, at 532. And given that the growers did not contend that the regulation deprived them of all economically beneficial use of their property, *per se* treatment was inappropriate. *Id.*, at 531, 534.

Judge Leavy dissented. He observed that this Court had never allowed labor organizers to enter an employer's property for substantial periods of time when its employees lived off premises. *Id.*, at 536; see *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 540–541 (1992); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956). As he saw it, the regulation constituted a physical occupation and therefore effected a *per se* taking. 923 F. 3d, at 538.

The Ninth Circuit denied rehearing en banc. Judge Ikuta dissented, joined by seven other judges. She reasoned that the access regulation appropriated from the growers a traditional form of private property—an easement in gross—and transferred that property to union organizers. *Cedar Point Nursery* v. *Shiroma*, 956 F. 3d 1162, 1168, 1171 (2020). The appropriation of such an easement, she concluded, constituted a *per se* physical taking under the precedents of this Court. *Id.*, at 1168.

We granted certiorari. 592 U. S. ___ (2020).

II

A

The Takings Clause of the Fifth Amendment, applicable

to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr* v. *Wisconsin*, 582 U. S. ___, ___ (2017) (slip op., at 8).

When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321 (2002). The Court's physical takings jurisprudence is "as old as the Republic." *Id.*, at 322. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 374–375 (1945); *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 270–271 (1943). The same is true when the government physically takes possession of property without acquiring title to it. See *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115–117 (1951) (plurality opinion). And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. See *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917). These sorts of physical appropriations constitute the "clearest sort of taking," *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes. See *Tahoe-Sierra*, 535 U. S., at 322.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. *Id.*, at 321–322. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. See *Horne* v. *Department of Agriculture*, 576 U. S. 351, 360 (2015); *Legal Tender Cases*, 12 Wall. 457, 551 (1871). In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), however, the Court established the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, at 415. This framework now applies to use restrictions as varied as zoning ordinances, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387–388 (1926), orders barring the mining of gold, *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958), and regulations prohibiting the sale of eagle feathers, *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979). To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. 438 U. S., at 124.

Our cases have often described use restrictions that go "too far" as "regulatory takings." See, *e.g.*, *Horne*, 576 U. S., at 360; *Yee* v. *Escondido*, 503 U. S. 519, 527 (1992). But ~~that label can mislead. Government action that physically~~ appropriates property is no less a physical taking because it arises from a regulation. That explains why we held that an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *Horne*, 576 U. S., at 361. The essential question is not, as the Ninth Circuit seemed to think, whether

the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. See *Tahoe-Sierra*, 535 U. S., at 321–323. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

B

The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

The right to exclude is "one of the most treasured" rights of property ownership. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176, 179–180 (1979); see *Dolan* v. *City of Tigard*, 512 U. S. 374, 384, 393 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831 (1987); see also Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the

right to exclude the "*sine qua non*" of property).

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

For example, in *United States* v. *Causby* we held that the invasion of private property by overflights effected a taking. 328 U. S. 256 (1946). The government frequently flew military aircraft low over the Causby farm, grazing the treetops and terrorizing the poultry. *Id.*, at 259. The Court observed that ownership of the land extended to airspace that low, and that "invasions of it are in the same category as invasions of the surface." *Id.*, at 265. Because the damages suffered by the Causbys "were the product of a direct invasion of [their] domain," we held that "a servitude has been imposed upon the land." *Id.*, at 265–266, 267; see also *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 330 (1922) (government assertion of a right to fire coastal defense guns across private property would constitute a taking).

We similarly held that the appropriation of an easement effected a taking in *Kaiser Aetna* v. *United States*. A real-estate developer dredged a pond, converted it into a marina, and connected it to a nearby bay and the ocean. 444 U. S., at 167. The government asserted that the developer could not exclude the public from the marina because the pond had become a navigable water. *Id.*, at 168. We held that the right to exclude "falls within [the] category of interests that the Government cannot take without compensation." *Id.*, at 180. After noting that "the imposition of the navigational servitude" would "result in an actual physical invasion of the privately owned marina" by members of the public, we cited *Causby* and *Portsmouth* for the proposition that

"even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." 444 U. S., at 180.

In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss. New York adopted a law requiring landlords to allow cable companies to install equipment on their properties. 458 U. S., at 423. Loretto alleged that the installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on her roof caused a taking. *Id.*, at 424. We agreed, stating that where government action results in a "permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*, at 434–435.

We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan* v. *California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. 483 U. S., at 828. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach. *Ibid.* As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, "we have no doubt there would have been a taking." *Id.*, at 831; see also *Dolan*, 512 U. S., at 384 (holding that compelled dedication of an easement for public use would constitute a taking).

More recently, in *Horne* v. *Department of Agriculture*, we observed that "people still do not expect their property, real or personal, to be actually occupied or taken away." 576 U. S., at 361. The physical appropriation by the government of the raisins in that case was a *per se* taking, even if a regulatory limit with the same economic impact would not

have been. *Id.*, at 362; see *supra*, at 6. "The Constitution," we explained, "is concerned with means as well as ends." 576 U. S., at 362.

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, §20900(e)(1)(C). It is therefore a *per se* physical taking under our precedents. Accordingly, the growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

C

The Ninth Circuit saw matters differently, as do the Board and the dissent. In the decision below, the Ninth Circuit took the view that the access regulation did not qualify as a *per se* taking because, although it grants a right to physically invade the growers' property, it does not allow for permanent and continuous access "24 hours a day, 365 days a year." 923 F. 3d, at 532 (citing *Nollan*, 483 U. S., at 832). The dissent likewise concludes that the regulation cannot amount to a *per se* taking because it allows "access short of 365 days a year." *Post*, at 11 (opinion of BREYER, J.). That position is insupportable as a matter of precedent and common sense. There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.

To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that "compensation is mandated when a

leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Tahoe-Sierra*, 535 U. S., at 322 (citing *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946)). The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U. S., at 436–437—bears only on the amount of compensation. See *United States* v. *Dow*, 357 U. S. 17, 26 (1958). For example, after finding a taking by physical invasion, the Court in *Causby* remanded the case to the lower court to determine "whether the easement taken was temporary or permanent," in order to fix the compensation due. 328 U. S., at 267–268.

To be sure, *Loretto* emphasized the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical *invasion* is a taking." 458 U. S., at 435, n. 12; see also *id.*, at 432–435. The latter point is well taken, as we will explain. But *Nollan* clarified that appropriation of a right to physically invade property may constitute a taking "even though no particular individual is permitted to station himself permanently upon the premises." 483 U. S., at 832.

Next, we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous. *Causby* held that overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport. 328 U. S., at 259. And while *Nollan* happened to involve a legally continuous right of access, we have no doubt that the Court would have reached the same conclusion if the easement demanded by the Commission had lasted for only 364 days per year. After all, the easement was hardly continuous as a practical matter. As Justice Brennan observed in

dissent, given the shifting tides, "public passage for a portion of the year would either be impossible or would not occur on [the Nollans'] property." 483 U. S., at 854. What matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans' land. And when the government physically takes an interest in property, it must pay for the right to do so. See *Horne*, 576 U. S., at 357–358; *Tahoe-Sierra*, 535 U. S., at 322. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.

Even the Board declines to defend the Ninth Circuit's absolutist stance. It prudently concedes that "a requirement that landowners grant an easement otherwise identical to the one in *Nollan* but limited to daylight hours, might very well qualify as 'a taking without regard to other factors that a court might ordinarily examine.'" Brief for Respondents 25–26 (quoting *Loretto*, 458 U. S., at 432; citation and some internal quotation marks omitted). But the access regulation, it contends, nevertheless fails to qualify as a *per se* taking because it "authorizes only limited and intermittent access for a narrow purpose." Brief for Respondents 26. That position is little more defensible than the Ninth Circuit's. The fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction. Saying that appropriation of a three hour per day, 120 day per year right to invade the growers' premises "does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U. S., at 831 (citation and internal quotation marks omitted).

The Board also takes issue with the growers' premise that the access regulation appropriates an easement. In the Board's estimation, the regulation does not exact a true

easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded. This, the Board says, reinforces its conclusion that the regulation does not take a constitutionally protected property interest from the growers. The dissent agrees, suggesting that the access right cannot effect a *per se* taking because it does not require the growers to grant the union organizers an easement as defined by state property law. See *post*, at 4, 11.

These arguments misconstrue our physical takings doctrine. As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1030 (1992). But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. See *Allred* v. *Harris*, 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530, 533 (1993). And no one disputes that the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights "cannot be so easily manipulated." *Horne*, 576 U. S., at 365 (internal quotation marks omitted); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

Our decisions consistently reflect this intuitive approach. We have recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." *Dow*, 357 U. S., at 21; see also *United States* v.

Clarke, 445 U. S. 253, 256–257, and n. 3 (1980). In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. See *Dow*, 357 U. S., at 21. Yet we recognize a physical taking all the same. See *id.*, at 22. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome. See *Pewee Coal Co.*, 341 U. S., at 116–117. For much the same reason, in *Portsmouth*, *Causby*, and *Loretto* we never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law (nor do we see how they could have). Instead, we followed our traditional rule: Because the government appropriated a right to invade, compensation was due. That same test governs here.

The Board and the dissent further contend that our decision in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), establishes that the access regulation cannot qualify as a *per se* taking. There the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. *Id.*, at 78. The shopping center argued that the decision had taken without just compensation its right to exclude. *Id.*, at 82. Applying the *Penn Central* factors, we held that no compensable taking had occurred. 447 U. S., at 83; cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 261 (1964) (rejecting claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking).

The Board and the dissent argue that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. See *post*, at 8–9. We disagree. Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. 447 U. S., at 77–78. Limitations on

how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public. See *Horne*, 576 U. S., at 364 (distinguishing *PruneYard* as involving "an already publicly accessible" business); *Nollan*, 483 U. S., at 832, n. 1 (same).

The Board also relies on our decision in *NLRB* v. *Babcock & Wilcox Co*. But that reliance is misplaced. In *Babcock*, the National Labor Relations Board found that several employers had committed unfair labor practices under the National Labor Relations Act by preventing union organizers from distributing literature on company property. 351 U. S., at 109. We held that the statute did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise "beyond the reach of reasonable union efforts to communicate with them." *Id.*, at 113; see also *Lechmere*, 502 U. S., at 540 (employees residing off company property are presumptively not beyond the reach of the union's message). The Board contends that *Babcock*'s approach of balancing property and organizational rights should guide our analysis here. See *Loretto*, 458 U. S., at 434, n. 11 (discussing *Babcock* principle). But *Babcock* did not involve a takings claim. Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents. See *Tahoe-Sierra*, 535 U. S., at 322.

D

In its thoughtful opinion, the dissent advances a distinctive view of property rights. The dissent encourages readers to consider the issue "through the lens of ordinary English," and contends that, so viewed, the "regulation does not *appropriate* anything." *Post*, at 3, 5. Rather, the access regulation merely "*regulates* . . . the owners' right to exclude,"

so it must be assessed "under *Penn Central*'s fact-intensive test." *Post*, at 2, 5. "A right to enter my woods only on certain occasions," the dissent elaborates, "is a taking only if the regulation allowing it goes 'too far.'" *Post*, at 11. The dissent contends that our decisions in *Causby*, *Portsmouth*, and *Kaiser Aetna* applied just such a flexible approach, under which the Court "balanced several factors" to determine whether the physical invasions at issue effected a taking. *Post*, at 9–11. According to the dissent, this kind of latitude toward temporary invasions is a practical necessity for governing in our complex modern world. See *post*, at 11–12.

With respect, our own understanding of the role of property rights in our constitutional order is markedly different. In "ordinary English" "appropriation" means "*taking* as one's own," 1 Oxford English Dictionary 587 (2d ed. 1989) (emphasis added), and the regulation expressly grants to labor organizers the "right to *take* access," Cal. Code Regs., tit. 8, §20900(e)(1)(C) (emphasis added). We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a "fundamental element of the property right," *Kaiser Aetna*, 444 U. S., at 179–180, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*: "[W]hen [government] planes use private airspace to approach a government airport, [the government] is required to pay for that share no matter how small." *Tahoe-Sierra*, 535 U. S., at 322 (citing *Causby*). And while *Kaiser Aetna* may have referred to the test from *Penn Central*, see 444 U. S., at 174–175, the Court concluded categorically that the government must pay just compensation for physical invasions, see *id.*, at 180 (citing *Causby* and *Portsmouth*). With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained. See

supra, at 5.

In the end, the dissent's permissive approach to property rights hearkens back to views expressed (in dissent) for decades. See, *e.g.*, *Nollan*, 483 U. S., at 864 (Brennan, J., dissenting) ("[The Court's] reasoning is hardly suited to the complex reality of natural resource protection in the 20th century."); *Loretto*, 458 U. S., at 455 (Blackmun, J., dissenting) ("[T]oday's decision . . . represents an archaic judicial response to a modern social problem."); *Causby*, 328 U. S., at 275 (Black, J., dissenting) ("Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."). As for today's considered dissent, it concludes with "Better the devil we know . . . ," *post*, at 16, but its objections, to borrow from then-Justice Rehnquist's invocation of Wordsworth, "bear[] the sound of 'Old, unhappy, far-off things, and battles long ago,'" *Kaiser Aetna*, 444 U. S., at 177.

III

The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. See *post*, at 11–14. That fear is unfounded.

First, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent. See *Portsmouth*, 260 U. S., at 329–330 ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence."); 1 P. Nichols, The Law of Eminent Domain §112, p. 311 (1917) ("[A] mere

occasional trespass would not constitute a taking."). And lower courts have had little trouble applying it. See, *e.g.*, *Hendler* v. *United States*, 952 F. 2d 1364, 1377 (CA Fed. 1991) (identifying a "truckdriver parking on someone's vacant land to eat lunch" as an example of a mere trespass).

The distinction between trespass and takings accounts for our treatment of temporary government-induced flooding in *Arkansas Game and Fish Commission* v. *United States*, 568 U. S. 23 (2012). There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." *Id.*, at 38. Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. *Id.*, at 38–39. Applying those factors on remand, the Federal Circuit concluded that the government had effected a taking in the form of a temporary flowage easement. *Arkansas Game and Fish Comm'n* v. *United States*, 736 F. 3d 1364, 1372 (2013). Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.

Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. As we explained in *Lucas* v. *South Carolina Coastal Council*, the government does not take a property interest when it merely asserts a "pre-existing limitation upon the land owner's title." 505 U. S., at 1028–1029. For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place. See *id.*, at 1029–1030.

These background limitations also encompass traditional

common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity. See Restatement (Second) of Torts §196 (1964) (entry to avert an imminent public disaster); §197 (entry to avert serious harm to a person, land, or chattels); cf. *Lucas*, 505 U. S., at 1029, n. 16. The common law also recognized a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances. Restatement (Second) of Torts §§204–205. Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, see, *e.g.*, *Sandford* v. *Nichols*, 13 Mass. 286, 288 (1816), government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners. See generally *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 538 (1967).

Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. In *Nollan*, we held that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U. S., at 836. The inquiry, we later explained, is whether the permit condition bears an "essential nexus" and "rough proportionality" to the impact of the proposed use of the property. *Dolan*, 512 U. S., at 386, 391; see also *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 599 (2013).

Under this framework, government health and safety inspection regimes will generally not constitute takings. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1007 (1984). When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the

constitutional conditions framework should not be difficult to satisfy. See, *e.g.*, 7 U. S. C. §136g(a)(1)(A) (pesticide inspections); 16 U. S. C. §823b(a) (hydroelectric project investigations); 21 U. S. C. §374(a)(1) (pharmaceutical inspections); 42 U. S. C. §2201(*o*) (nuclear material inspections).

None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. See *Horne*, 576 U. S., at 366 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection"). The access regulation amounts to simple appropriation of private property.

* * *

The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.*
VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion, which carefully adheres to constitutional text, history, and precedent. I write separately to explain that, in my view, the Court's precedent in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), also strongly supports today's decision.

In *Babcock*, the National Labor Relations Board argued that the National Labor Relations Act afforded union organizers a right to enter company property to communicate with employees. Several employers responded that the Board's reading of the Act would infringe their Fifth Amendment property rights. The employers contended that Congress, "even if it could constitutionally do so, has at no time shown any intention of destroying property rights secured by the *Fifth Amendment*, in protecting employees' rights of collective bargaining under the Act. Until Congress should evidence such intention by specific legislative language, our courts should not construe the Act on such dangerous constitutional grounds." Brief for Respondent in *NLRB* v. *Babcock & Wilcox Co.*, O. T. 1955, No. 250, pp. 18–19.

This Court agreed with the employers' argument that the Act should be interpreted to avoid unconstitutionality. The Court reasoned that "the National Government" via the Constitution "preserves property rights," including "the

right to exclude from property." *Babcock*, 351 U. S., at 112. Against the backdrop of the Constitution's strong protection of property rights, the Court interpreted the Act to afford access to union organizers only when "needed," *ibid.*—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees, *id.*, at 113. See also *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 540–541 (1992). As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a "necessity" exception similar to that noted by the Court today. *Ante*, at 19.

Babcock strongly supports the growers' position in today's case because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows. When this same California union access regulation was challenged on constitutional grounds before the California Supreme Court in 1976, that court upheld the regulation by a 4-to-3 vote. *Agricultural Labor Rel. Bd.* v. *Superior Ct. of Tulare Cty.*, 16 Cal. 3d 392, 546 P. 2d 687. Justice William Clark wrote the dissent. Justice Clark stressed that "property rights are fundamental." *Id.*, at 429, n. 4, 546 P. 2d, at 712, n. 4. And he concluded that the California union access regulation "violates the rule" of *Babcock* and thus "violates the constitutional provisions protecting private property." 16 Cal. 3d, at 431, 546 P. 2d, at 713. In my view, Justice Clark had it exactly right.

With those comments, I join the Court's opinion in full.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.* VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

A California regulation provides that representatives of a labor organization may enter an agricultural employer's property for purposes of union organizing. They may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work. The question before us is how to characterize this regulation for purposes of the Constitution's Takings Clause.

Does the regulation *physically appropriate* the employers' property? If so, there is no need to look further; the Government must pay the employers "just compensation." U. S. Const., Amdt. 5; see *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012) ("'[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner'"). Or does the regulation simply *regulate* the employers' property rights? If so, then there is every need to look further; the government need pay the employers "just compensation" only if the regulation "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922) (Holmes, J., for the Court); see also *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (determining whether a regulation is a taking by

examining the regulation's "economic impact," the extent of interference with "investment-backed expectations," and the "character of the governmental action"); *Arkansas Game and Fish Comm'n*, 568 U. S., at 38–39 (listing factors relevant to the character of the regulation).

The Court holds that the provision's "access to organizers" requirement amounts to a physical appropriation of property. In its view, virtually every government-authorized invasion is an "appropriation." But this regulation does not "appropriate" anything; it regulates the employers' right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes "too far." See, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 434 (1982). In my view, the majority's conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. And though the majority attempts to create exceptions to narrow its rule, see *ante*, at 17–20, the law's need for feasibility suggests that the majority's framework is wrong. With respect, I dissent from the majority's conclusion that the regulation is a *per se* taking.

I

"In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." *Arkansas Game and Fish Comm'n*, 568 U. S., at 31; see also *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) ("[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government'"). Instead, most government action affecting property rights is analyzed case by case under *Penn Central*'s fact-intensive test. Petitioners

do not argue that the provision at issue is a "regulatory taking" under that test.

Instead, the question before us is whether the access regulation falls within one of two narrow categories of government conduct that are *per se* takings. The first is when "'the government directly appropriates private property for its own use.'" *Horne* v. *Department of Agriculture*, 576 U. S. 351, 357 (2015). The second is when the government causes a permanent physical occupation of private property. See *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538 (2005). It does not.

A

Initially it may help to look at the legal problem—a problem of characterization—through the lens of ordinary English. The word "regulation" rather than "appropriation" fits this provision in both label and substance. Cf. *ante*, at 6. It is contained in Title 8 of the California Code of Regulations. It was adopted by a state regulatory board, namely, the California Agricultural Labor Relations Board, in 1975. It is embedded in a set of related detailed regulations that describe and limit the access at issue. In addition to the hours of access just mentioned, it provides that union representatives can enter the property only "for the purpose of meeting and talking with employees and soliciting their support"; they have access only to "areas in which employees congregate before and after working" or "at such location or locations as the employees eat their lunch"; and they cannot engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." §§20900(e), (e)(3), (e)(4)(C) (2021). From the employers' perspective, it restricts when and where they can exclude others from their property.

At the same time, the provision only awkwardly fits the terms "physical taking" and "physical appropriation." The

"access" that it grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (*e.g.*, a fee simple, fee tail, or life estate); any concurrent estate (*e.g.*, a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (*e.g.*, a term of years, periodic tenancy, or tenancy at will). See J. Dukeminier, J. Krier, G. Alexander, M. Schill, & L. Strahilevitz, Property 215–216, 222–224, 226, 343–345, 443–445 (8th ed. 2014). Nor (as all now agree) does it provide the organizers with a formal easement or access resembling an easement, as the employers once argued, since it does not burden any particular parcel of property. See, *e.g.*, *Balestra* v. *Button*, 54 Cal. App. 2d 192, 197 (1942) (the burden of an easement in gross is appurtenant to "the real property of another"); Restatement (Third) of Property: Servitudes §1.2(3) (1998) ("The burden of an easement or profit is always appurtenant"); see also *ante*, at 13 (acknowledging a "slight mismatch from state easement law"). Compare Pet. for Cert. i (asking the Court to address "whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment"), with Reply Brief 8 ("[T]he access required here does not bear *all* the hallmarks of an easement").

The majority concludes that the regulation nonetheless amounts to a physical taking of property because, the majority says, it "appropriates" a "right to invade" or a "right to exclude" others. See *ante*, at 7, 12, 14, 15, 16, 20 (right to invade); *ante*, at 7, 8, 10, 13, 16 (right to exclude). It thereby likens this case to cases in which we have held that appropriation of property rights amounts to a physical *per se* taking. See *ante*, at 5–6 (citing *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115 (1951) (plurality opinion) (seizure and operation of a coal mine by the United States); *United States* v. *General Motors Corp.*, 323 U. S. 373, 375 (1945) (condemnation of a warehouse building by the

United States); *Horne*, 576 U. S., at 361 (transfer of "[a]ctual raisins," and title to the raisins, from growers to the Government)).

It is important to understand, however, that, technically speaking, the majority is wrong. The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners' land. It thereby limits the landowners' right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners' right to exclude.

Why is it important to understand this technical point? Because only then can we understand the issue before us. That issue is whether a regulation that *temporarily* limits an owner's right to exclude others from property *automatically* amounts to a Fifth Amendment taking. Under our cases, it does not.

B

Our cases draw a distinction between regulations that provide permanent rights of access and regulations that provide nonpermanent rights of access. They either state or hold that the first type of regulation is a taking *per se*, but the second kind is a taking only if it goes "too far." And they make this distinction for good reason.

Consider the Court's reasoning in an important case in which the Court found a *per se* taking. In *Loretto*, the Court considered the status of a New York law that required landlords to permit cable television companies to install cable facilities on their property. 458 U. S., at 421. We held that the installation amounted to a permanent physical occupation of the property and hence to a *per se* taking. See *id.*, at 441 ("affirm[ing] the traditional rule that a permanent

physical occupation of property is a taking"); see also *id.*, at 427 (tracing that rule back to 1872). In reaching this holding we specifically said that "[n]ot every physical invasion is a taking." *Id.*, at 435, n. 12 (emphasis deleted); see also *ante*, at 11 (acknowledging that this "point is well taken"). We explained that the "permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Loretto*, 458 U. S., at 435, n. 12. And we provided an example of a federal statute that did *not* effect a *per se* taking—an example almost identical to the regulation before us. That statute provided "'access . . . limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of the organization activity.'" *Id.*, at 434, n. 11 (quoting *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 545 (1972)).

We also explained why permanent physical occupations are distinct from temporary limitations on the right to exclude. We said that, when the government permanently occupies property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," "effectively destroy[ing]" "the rights 'to possess, use and dispose of it.'" *Loretto*, 458 U. S., at 435. We added that the property owner "ha[d] no right to possess the occupied space himself, and also ha[d] no power to exclude the occupier from possession and use of the space." *Ibid.* The requirement "forever denie[d] the owner any power to control the use of the property" or make any "nonpossessory use" of it. *Id.*, at 436. It would "ordinarily empty the right" to sell or transfer the occupied space "of any value, since the purchaser w[ould] also be unable to make any use of the property." *Ibid.* The owner could not "exercise control" over the equipment's installation, and so could not "minimize [its] physical, esthetic, and other effects." *Id.*, at 441, n. 19. Thus, we concluded, a permanent physical occupation "is perhaps the

most serious form of invasion of an owner's property interests." *Id.*, at 435.

Now consider *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980). We there considered the status of a state constitutional requirement that a privately owned shopping center permit other individuals to enter upon, and to use, the property to exercise their rights to free speech and petition. See *id.*, at 78. We held that this requirement was not a *per se* taking in part because (even though the individuals may have "'physically invaded'" the owner's property) "[t]here [wa]s nothing to suggest that preventing [the owner] from prohibiting this sort of activity w[ould] unreasonably impair the value or use of th[e] property as a shopping center," and the owner could "adop[t] time, place, and manner regulations that w[ould] minimize any interference with its commercial functions." *Id.*, at 83–84; see also *Loretto*, 458 U. S., at 434 (describing the "invasion" in *PruneYard* as "temporary and limited in nature").

In *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), we held that the State's taking of an easement across a landowner's property did constitute a *per se* taking. But consider the Court's reason: "[I]ndividuals are given a *permanent and continuous* right to pass to and fro." *Id.*, at 832 (emphasis added). We clarified that by "permanent" and "continuous" we meant that the "real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Ibid.*

In *Arkansas Game and Fish Comm'n*, 568 U. S. 23, we again said that permanent physical occupations are *per se* takings, but temporary invasions are not. Rather, they "'are subject to a more complex balancing process to determine whether they are a taking.'" *Id.*, at 36; see also *id.*, at 38–39 (courts should consider the length of the invasion, the "degree to which the invasion is intended or is the fore-

seeable result of authorized government action," "the character of the land at issue," "the owner's 'reasonable investment-backed expectations' regarding the land's use," and the "[s]everity of the interference" (citing, *inter alia*, *Penn Central*, 438 U. S., at 130–131)).

As these cases have used the terms, the regulation here at issue provides access that is "temporary," not "permanent." Unlike the regulation in *Loretto*, it does not place a "fixed structure on land or real property." 458 U. S., at 437. The employers are not "forever denie[d]" "any power to control the use" of any particular portion of their property. *Id.*, at 436. And it does not totally reduce the value of any section of the property. *Ibid.* Unlike in *Nollan*, the public cannot walk over the land whenever it wishes; rather a subset of the public may enter a portion of the land three hours per day for four months per year (about 4% of the time). At bottom, the regulation here, unlike the regulations in *Loretto* and *Nollan*, is not "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U. S., at 539.

At the same time, *PruneYard*'s holding that the taking was "temporary" (and hence not a *per se* taking) fits this case almost perfectly. There the regulation gave nonowners the right to enter privately owned property for the purpose of speaking generally to others, about matters of their choice, subject to reasonable time, place, and manner restrictions. 447 U. S., at 83. The regulation before us grants a far smaller group of people the right to enter landowners' property for far more limited times in order to speak about a specific subject. Employers have more power to control entry by setting work hours, lunch hours, and places of gathering. On the other hand, as the majority notes, the shopping center in *PruneYard* was open to the public generally. See *ante*, at 14–15. All these factors, how-

ever, are the stuff of which regulatory-balancing, not absolute *per se*, rules are made.

Our cases have recognized, as the majority says, that the right to exclude is a "'fundamental element of the property right.'" *Ante*, at 16. For that reason, "[a] 'taking' may *more readily* be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U. S., at 124 (emphasis added); see also *Loretto*, 458 U. S., at 426 ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause"). But a taking is not inevitably found just because the interference with property can be characterized as a physical invasion by the government, or, in other words, when it affects the right to exclude.

The majority refers to other cases. But those cases do not help its cause. That is because the Court in those cases (some of which preceded *Penn Central* and others of which I have discussed above) did not apply a "*per se* takings" approach. But see *ante*, at 14 (claiming that our "traditional rule" is that when "the government appropriate[s] a right to invade, compensation [i]s due"). In *United States* v. *Causby*, 328 U. S. 256, 259 (1946), for example, the question was whether government flights over a piece of land constituted a taking. The flights amounted to 4% of the takeoffs, and 7% of the landings, at a nearby airport. See *ibid.* But the planes flew "in considerable numbers and rather close together." *Ibid.* And the flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.*, at 266. Taken together, those flights "destr[oyed] the use of the property as a commercial chicken farm." *Id.*, at 259. Based in part on that economic damage, the Court found that the rule allowing these overflights went "too far." See *id.*, at 266 (" '[I]t is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that

determines the question whether it is a taking' " (emphasis added)).

In *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 329 (1922), the Court held that the Government's firing of guns across private property would be a taking only if the shots were sufficiently frequent to establish an "intent to fire across the claimants' land at will." The frequency of the projectiles itself mattered less than whether the Government acted "'with the purpose and effect of subordinating the strip of land . . . to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, *whenever it saw fit*, in time of peace, with the result of depriving the owner of its profitable use.'" *Ibid.* (emphasis added). Again, the Court balanced several factors—permanence, severity, and economic impact—rather than treating the mere fact of entry as dispositive.

In *Kaiser Aetna* v. *United States*, 444 U. S. 164, the Court considered whether the Government had taken property by converting a formerly "private pond" (with a private access fee) into a "public aquatic park" (with free navigation-related access for the public). *Id.*, at 176, 180. The Court held there was a taking. But in doing so, it applied a *Penn Central*, not a *per se*, analysis. The Court wrote that "[m]ore than one factor contribute[d] to" the conclusion that the Government had gone "far beyond ordinary regulation or improvement." 444 U. S., at 178. And it found there was a taking.

If there is ambiguity in these cases, it concerns whether the Court considered the occupation at issue to be *temporary* (requiring *Penn Central*'s "too far" analysis) or *permanent* (automatically requiring compensation). Nothing in them suggests the majority's view, namely, that compensation is automatically required for a *temporary* right of access. Nor does anything in them support the distinction that the majority gleans between "trespass" and "takings."

See *ante*, at 17–18; see also *infra*, at 14.

The majority also refers to *Nollan* as support for its claim that the "fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Ante*, at 12. True. Here, however, unlike in *Nollan*, the right taken is not a right to have access to the property at any time (which access different persons "exercis[e] . . . from time to time"). Rather here we have a right that does not allow access at any time. It allows access only from "time to time." And that makes all the difference. A right to enter my woods whenever you wish is a right to use that property permanently, even if you exercise that right only on occasion. A right to enter my woods only on certain occasions is not a right to use the woods permanently. In the first case one might reasonably use the term *per se* taking. It is as if my woods are yours. In the second case it is a taking only if the regulation allowing it goes "too far," considering the factors we have laid out in *Penn Central*. That is what our cases say.

Finally, the majority says that *Nollan* would have come out the same way had it involved, similar to the regulation here, access short of 365 days a year. See *ante*, at 11. Perhaps so. But, if so, that likely would be because the Court would have viewed the access as an "easement," and therefore an appropriation. See *Nollan*, 483 U. S., at 828. Or, perhaps, the Court would have viewed the regulation as going "too far." I can assume, purely for argument's sake, that that is so. But the law is clear: A regulation that provides *temporary*, not *permanent*, access to a landowner's property, and that does not amount to a taking of a traditional property interest, is not a *per se* taking. That is, it does not automatically require compensation. Rather, a court must consider whether it goes "too far."

C

The persistence of the permanent/temporary distinction

that I have described is not surprising. That distinction serves an important purpose. We live together in communities. (Approximately 80% of Americans live in urban areas. U. S. Census Bureau, Urban Area Facts (Mar. 30, 2021), https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html.) Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go "too far." And it is impractical to compensate every property owner for any brief use of their land. As we have frequently said, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.*, 260 U. S., at 413; see also, *e.g.*, *Murr* v. *Wisconsin*, 582 U. S. ___, ___–___ (2017) (slip op., at 8–9) (same); *Lingle*, 544 U. S., at 538 (same); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 335 (2002) (same); *Dolan* v. *City of Tigard*, 512 U. S. 374, 384–385 (1994) (same); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1018 (1992) (same); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979) (same); *Penn Central*, 438 U. S, at 124 (same). Thus, the law has not, and should not, convert all temporary-access-permitting regulations into *per se* takings automatically requiring compensation. See, *e.g.*, *Hodel* v. *Irving*, 481 U. S. 704, 713 (1987) ("This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners").

Consider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an "invasion of") a property owner's land. They include activities ranging from examination of food products to inspections for compliance with

preschool licensing requirements. See, *e.g.*, 29 U. S. C. §657(a) (authorizing inspections and investigations of "any . . . workplace or environment where work is performed" during "regular working hours and at other reasonable times"); 21 U. S. C. §606(a) (authorizing "examination and inspection of all meat food products . . . at all times, by day or night"); 42 U. S. C. §5413(b) (authorizing inspections anywhere "manufactured homes are manufactured, stored, or held for sale" at "reasonable times and without advance notice"); Miss. Code Ann. §49–27–63 (2012) (authorizing inspections of "coastal wetlands" "from time to time"); Mich. Comp. Laws §208.1435(5) (2010) (authorizing inspections of any "historic resource" "at any time during the rehabilitation process"); Mont. Code Ann. §81–22–304 (2019) (granting a "right of entry . . . [into] any premises where dairy products . . . are produced, manufactured, [or] sold" "during normal business hours"); Neb. Rev. Stat. §43–1303(5) (2016) (authorizing visitation of "foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met"); Va. Code Ann. §22.1–289.032(C)(8) (Cum. Supp. 2020) (authorizing "annual inspection" of "preschool programs of accredited private schools"); Cincinnati, Ohio, Municipal Code §603–1 (2021) (authorizing entry "at any time" for any place in which "animals are slaughtered"); Dallas, Tex., Code of Ordinance §33–5(a) (2021) (authorizing inspection of "assisted living facilit[ies]" "at reasonable times"); 6 N. Y. Rules & Regs. §360.7 (Supp. 2020) (authorizing inspection of solid waste management facilities "at all reasonable times, locations, whether announced or unannounced"); see also *Boise Cascade Corp.* v. *United States*, 296 F. 3d 1339, 1352 (CA Fed. 2002) (affirming an injunction requiring property owner to allow Government agents to enter its property to conduct owl surveys); Brief for Respondents 43–44, 46 (collecting similar regulations); App. to Brief for Local Governments as *Amici Curiae* 1–13

(same); Brief for Virginia et al. as *Amici Curiae* 3–6 (same).

The majority tries to deal with the adverse impact of treating these, and other, temporary invasions as if they were *per se* physical takings by creating a series of exceptions from its *per se* rule. It says: (1) "Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Ante*, at 17. It also would except from its *per se* rule (2) government access that is "consistent with longstanding background restrictions on property rights," including "traditional common law privileges to access private property." *Ante*, at 18–19. And it adds that (3) "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." *Ante*, at 19. How well will this new system work? I suspect that the majority has substituted a new, complex legal scheme for a comparatively simpler old one.

As to the first exception, what will count as "isolated"? How is an "isolated physical invasion" different from a "temporary" invasion, sufficient under present law to invoke *Penn Central*? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent right to stop; thus the court will ask whether the school district has gone "too far." Under the majority's approach, the court must answer a new question (apparently about what counts as "isolated").

As to the second exception, a court must focus on "traditional common law privileges to access private property." Just what are they? We have said before that the govern-

ment can, without paying compensation, impose a limitation on land that "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U. S., at 1029. But we defined a very narrow set of such background principles. See *ibid.*, and n. 16 (abatement of nuisances and cases of "'actual necessity'" or "to forestall other grave threats to the lives and property of others"). To these the majority adds "public or private necessity," the enforcement of criminal law "under certain circumstances," and reasonable searches. *Ante*, at 19. Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?

As to the third, what is the scope of the phrase "certain benefits"? Does it include the benefit of being able to sell meat labeled "inspected" in interstate commerce? But see *Horne*, 576 U. S., at 366 (concluding that "[s]elling produce in interstate commerce" is "not a special governmental benefit"). What about the benefit of having electricity? Of sewage collection? Of internet accessibility? Myriad regulatory schemes based on just these sorts of benefits depend upon intermittent, temporary government entry onto private property.

Labor peace (brought about through union organizing) is one such benefit, at least in the view of elected representatives. They wrote laws that led to rules governing the organizing of agricultural workers. Many of them may well have believed that union organizing brings with it "benefits," including community health and educational benefits, higher standards of living, and (as I just said) labor peace. See, *e.g.*, 1975 Cal. Stats. ch. 1, §1 (stating that the purpose of the Agricultural Labor Relations Act was to "ensure peace in the agricultural fields by guaranteeing justice for

all agricultural workers and stability in labor relations"). A landowner, of course, may deny the existence of these benefits, but a landowner might do the same were a regulatory statute to permit brief access to verify proper preservation of wetlands or the habitat enjoyed by an endangered species or, for that matter, the safety of inspected meat. So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a *per se* taking, then to what other forms of regulation does the Court's *per se* conclusion also apply?

II

Finally, I touch briefly on remedies, which the majority does not address. The Takings Clause prohibits the Government from taking private property for public use without "just compensation." U. S. Const., Amdt. 5. But the employers do not seek compensation. They seek only injunctive and declaratory relief. Indeed, they did not allege any damages. See App. to Pet. for Cert. G–16 to G–17. On remand, California should have the choice of foreclosing injunctive relief by providing compensation. See, *e.g.*, *Knick* v. *Township of Scott*, 588 U. S. __, __ (2019) (slip op., at 23) ("As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed").

* * *

I recognize that the Court's prior cases in this area are not easy to apply. Moreover, words such as "temporary," "permanent," or "too far" do not define themselves. But I do not believe that the Court has made matters clearer or better. Rather than adopt a new broad rule and indeterminate exceptions, I would stick with the approach that I believe the Court's case law sets forth. "Better the devil we know . . . ." A right of access such as the right at issue here, a nonpermanent right, is not automatically a "taking." It is

a regulation that falls within the scope of *Penn Central*. Because the Court takes a different view, I respectfully dissent.

Per Curiam

SUPREME COURT OF THE UNITED STATES

PEYMAN PAKDEL, ET UX. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–1212. Decided June 28, 2021

PER CURIAM.

When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a "final" decision. *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 737 (1997). After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation. *See id.,* at 734; *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525 (2013). In the decision below, however, the Ninth Circuit required petitioners to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency's administrative procedures for seeking relief. Because the latter requirement is at odds with "the settled rule . . . that exhaustion of state remedies is *not* a prerequisite to an action under 42 U. S. C. §1983," *Knick* v. *Township of Scott*, 588 U. S. ___, ___ (2019) (slip op., at 2) (brackets and internal quotation marks omitted), we vacate and remand.

I

Petitioners are a married couple who partially own a multiunit residential building in San Francisco. When petitioners purchased their interest in the property, the building was organized as a tenancy-in-common. Under that kind of arrangement, all owners technically have the right to pos-

sess and use the entire property, but in practice often contract among themselves to divide the premises into individual residences. Owners also frequently seek to convert tenancy-in-common interests into modern condominium-style arrangements, which allow individual ownership of certain parts of the building. When petitioners purchased their interest in the property, for example, they signed a contract with the other owners to take all available steps to pursue such a conversion.

Until 2013, the odds of conversion were slim because San Francisco employed a lottery system that accepted only 200 applications per year. When that approach resulted in a predictable backlog, however, the city adopted a new program that allowed owners to seek conversion subject to a filing fee and several conditions. One of these was that non-occupant owners who rented out their units had to offer their tenants a lifetime lease.

Although petitioners had a renter living in their unit, they and their co-owners sought conversion. As part of the process, they agreed that they would offer a lifetime lease to their tenant. The city then approved the conversion. But, a few months later, petitioners requested that the city either excuse them from executing the lifetime lease or compensate them for the lease. The city refused both requests, informing petitioners that "failure to execute the lifetime lease violated the [program] and could result in an enforcement action." Brief for Respondents 9.

Petitioners sued in federal court under §1983. Among other things, they alleged that the lifetime-lease requirement was an unconstitutional regulatory taking. But the District Court rejected this claim without reaching the merits. 2017 WL 6403074, *2–*4 (ND Cal, Nov. 20, 2017). Instead, it relied on this Court's since-disavowed prudential rule that certain takings actions are not "ripe" for federal resolution until the plaintiff "seek[s] compensation through

the procedures the State has provided for doing so." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). Because petitioners had not first brought "a state court inverse condemnation proceeding," the District Court dismissed their claims. 2017 WL 6403074, *4.

While petitioners' appeal was pending before the Ninth Circuit, this Court repudiated *Williamson County*'s requirement that a plaintiff must seek compensation in state court. See *Knick*, 588 U. S., at ___–___ (slip op., at 19–23). We explained that "[t]he Fifth Amendment right to full compensation arises at the time of the taking" and that "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim." *Id.,* at ___–___ (slip op., at 7–8). Any other approach, we reasoned, would conflict with "[t]he general rule . . . that plaintiffs may bring constitutional claims under §1983 without first bringing any sort of state lawsuit." *Id.,* at ___ (slip op., at 11) (internal quotation marks omitted).

Rather than remand petitioners' claims in light of *Knick*, a divided panel of the Ninth Circuit simply affirmed. Noting that *Knick* left untouched *Williamson County*'s alternative holding that plaintiffs may challenge only "final" government decisions, *Knick*, 588 U. S., at ___ (slip op., at 5), the panel concluded that petitioners' regulatory "takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit." 952 F. 3d 1157, 1163 (2020).* Although the city had twice denied their

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*The Ninth Circuit rejected several of petitioners' alternative theories on the merits. See, *e.g.,* 952 F. 3d 1157, 1162, n. 4 (2020) (considering whether "the Lifetime Lease Requirement effects an exaction, a physical taking, [or] a private taking"). On remand, the Ninth Circuit may give further consideration to these claims in light of our recent decision in *Cedar Point Nursery* v. *Hassid*, *ante*, p. ___.

requests for the exemption—and in fact the "relevant agency c[ould] no longer grant" relief—the panel reasoned that this decision was not truly "final" because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one "through the prescribed procedures." *Id.*, at 1166–1167 (explaining that petitioners waited "six months after [they] had obtained final approval of their conversion . . . and seven months after they had committed to offering a lifetime lease"). In other words, a conclusive decision is not really "final" if the plaintiff did not give the agency the "opportunity to exercise its 'flexibility or discretion'" in reaching the decision. *Id.,* at 1167–1168.

Judge Bea dissented, explaining that the "'finality'" requirement looks only to whether "'the initial decisionmaker has arrived at a definitive position on the issue.'" *Id.,* at 1170. In his view, an additional demand that plaintiffs "follo[w] the decisionmaker's administrative procedures" would "ris[k] 'establish[ing] an exhaustion requirement for §1983 takings claims,' something the law does not allow." *Ibid.* And when the Ninth Circuit declined to rehear the case en banc, Judge Collins dissented along the same lines. He expressed concern that "the panel's unprecedented decision sharply depart[ed] from settled law and directly contravene[d] . . . *Knick*" by "impos[ing] an impermissible exhaustion requirement." 977 F. 3d 928, 929, 934 (2020).

II

We, too, think that the Ninth Circuit's view of finality is incorrect. The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U. S., at 739 (brackets omitted).

In this case, there is no question about the city's position:

Petitioners must "execute the lifetime lease" or face an "enforcement action." Brief for Respondents 9. And there is no question that the government's "definitive position on the issue [has] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government. *Williamson County*, 473 U. S., at 193.

The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually "been injured by the Government's action" and is not prematurely suing over a hypothetical harm. *Horne*, 569 U. S., at 525. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government "regulation has gone 'too far,'" the court must first "kno[w] how far the regulation goes." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986). Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution.

The Ninth Circuit's contrary approach—that a conclusive decision is not "final" unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits. Petitioners brought their takings claim under §1983, which "guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials.'" *Knick*, 588 U. S., at ___ (slip op., at 2). That guarantee includes "the settled rule" that "exhaustion of state remedies is *not* a prerequisite to an action under . . . §1983." *Ibid.* (internal quotation marks omitted). In fact, one of the reasons *Knick* gave for rejecting *Williamson County*'s state-compensation requirement is that this rule had "effectively established an exhaustion requirement for §1983 takings claims." *Knick*, 588 U. S., at ___ (slip op., at 12).

The Ninth Circuit's demand that a plaintiff seek "an exemption through the prescribed [state] procedures," 952

F. 3d, at 1167, plainly requires exhaustion. In fact, this rule mirrors our administrative-exhaustion doctrine, which "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford* v. *Ngo*, 548 U. S. 81, 88–89 (2006) (internal quotation marks omitted). As we have often explained, this doctrine requires "*proper* exhaustion"—that is, "compliance with an agency's deadlines and other critical procedural rules." *Id.,* at 90 (emphasis added). Otherwise, parties who would "prefer to proceed directly to federal court" might fail to raise their grievances in a timely fashion and thus deprive "the agency [of] a fair and full opportunity to adjudicate their claims." *Id.,* at 89–90. Or, in the words of the Ninth Circuit below, parties might "make an end run . . . by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant." 952 F. 3d, at 1166.

Whatever policy virtues this doctrine might have, administrative "exhaustion of state remedies" is not a prerequisite for a takings claim when the government has reached a conclusive position. *Knick*, 588 U. S., at ___ (slip op., at 2). To be sure, we have indicated that a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. See, *e.g., Williamson County*, 473 U. S., at 192–194 ("The Commission's refusal to approve the preliminary plat . . . leaves open the possibility that [the plaintiff] may develop the subdivision according to the plat after obtaining the variances"); *Knick*, 588 U. S., at ___ (slip op., at 5) ("[T]he developer [in *Williamson County*] still had an opportunity to seek a variance from the appeals board"); cf. *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 624–625 (2001) (dismissing accusations that the plaintiff was "employing a hide the ball strategy" when "submission of

[a] proposal would not have clarified the extent of development permitted . . . , which is the inquiry required under our ripeness decisions"). But, contrary to the Ninth Circuit's view, administrative missteps do not defeat ripeness once the government has adopted its final position. See *Williamson County*, 473 U. S., at 192–193 (distinguishing its "finality requirement" from traditional administrative "exhaust[ion]"). It may very well be, as Judge Bea observed, that misconduct during the administrative process is relevant to "evaluating the *merits* of the . . . clai[m]" or the measure of damages. 952 F. 3d, at 1170, n. 2 (dissenting opinion); cf. *Palazzolo*, 533 U. S., at 625. For the limited purpose of ripeness, however, ordinary finality is sufficient.

Of course, Congress always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners. See 42 U. S. C. §1997e(a); *Ngo*, 548 U. S., at 84–85 ("Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies"). But it has not done so for takings plaintiffs. Given that the Fifth Amendment enjoys "full-fledged constitutional status," the Ninth Circuit had no basis to relegate petitioners' claim "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U. S., at ___ (slip op., at 6).

* * *

For the foregoing reasons, we grant the petition for a writ of certiorari, vacate the judgment of the Ninth Circuit, and remand the case for proceedings consistent with this opinion.

It is so ordered.