16-776

No. _____

In the Supreme Court of the United States

JON D. WALKER, JR.,
Petitioner,

v.

PATRICIA J. SHONDRICK-NAU,
EXECUTRIX OF THE ESTATE OF JOHN
R. NOON AND SUCCESSOR TRUSTEE
OF THE JOHN R. NOON TRUST,
Respondent.

On Petition for Writ of Certiorari to the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented involve the limits imposed by the *Due Process Clause* and the *Contracts Clause* to the *United States Constitution* on the application of an amendment to a state statute, when vested property rights have accrued under a prior version of the act. The Ohio Supreme Court reversed lower court decisions wherein the courts ruled that valuable rights to oil and gas underlying the petitioner's real property had vested in petitioner by operation of law, in accordance with the Ohio Dormant Mineral Act (1989). The interests which petitioner obtained through his grantors' deeds had vested in the property title in 1992 – upon expiration of the 20-year dormancy period and 3-year tolling provision after enactment of the Dormant Mineral Act by the Ohio legislature in 1989. Nevertheless, the Ohio Supreme Court applied an amended version of the Ohio Dormant Mineral Act (2006) to strip petitioner of his vested rights. A series of 12 other cases were decided by the state Supreme Court on the same date as this case involving these same issues, and a far greater number of Ohio property owners were adversely affected by the decisions.

Two questions are presented:

1. When a property interest has vested pursuant to a lawful statutory enactment of a state legislature, does the *Due Process Clause* to the *Federal Constitution* preclude the retroactive application of a later-enacted, statutory amendment to divest the property right?

2. When a property interest, vested pursuant to a lawful statutory enactment of a state legislature, has been conveyed by contract in the form of a deed of

conveyance, does the *Contracts Clause* to the *Federal Constitution* preclude the retroactive application of a later-enacted, statutory amendment which destroys such interest?

PARTIES TO THE PROCEEDINGS

The petitioner, Jon D. Walker, Jr., is a citizen of the state of Ohio, who owns real property located in Noble County, Ohio.

The respondent is Patricia J. Shondrick-Nau, in her capacity as Executrix of the Estate of John R. Noon and Successor Trustee of the John R. Noon Trust. John R. Noon owned the property currently titled in the petitioner a number of decades ago, and he had severed the oil and gas interest in the subject property in 1965.

CORPORATE DISCLOSURE STATEMENT

The petitioner and respondent are natural persons. Neither party is a subsidiary or affiliate of a publicly-owned corporation. No publicly-owned corporation has any direct financial interest in the outcome of this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jon D. Walker, Jr., respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is available at ___ Ohio St.3d ___, 2016-Ohio-5793 (Ohio). The state Supreme Court's opinion is reproduced in the appendix hereto at Pet. App. 1. The state Supreme Court reversed the decision of the Ohio Seventh District Court of Appeals. The state appellate court's decision is reported at 2014-Ohio-1499 (7th Dist. Ohio, Apr. 3, 2014). The appellate court's decision is reproduced in the appendix hereto at Pet. App. 14.

STATEMENT OF JURISDICTION

The Ohio Supreme Court entered judgment against the petitioner in this matter on September 15, 2016. This Court has jurisdiction to review on a writ of certiorari the judgment in question as it is a judgment entered by the highest Court in the state of Ohio. 28 U.S.C. § 1257. This petition calls into direct question the validity of an amended state statute which has been given effect in a manner which disturbs vested property rights in contravention to restraints imposed by the *Federal Constitution*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to the instant petition include the following:

United States Constitution, Fourteenth Amendment, Sec. 1 (Pet. App. 41)

United States Constitution, Art. I, Sec. 10 (Pet. App. 41)

Ohio Constitution, Art. II, Sec. 28 (Pet. App. 42)

Ohio Revised Code 1.58 (Pet. App. 43)

Ohio Revised Code 5301.56 (1989) (Pet. App. 53)

Ohio Revised Code 5301.56 (2006) (Pet. App. 44)

STATEMENT OF THE CASE

Properties throughout the state of Ohio have been utilized for oil and gas production for many years. Most recently, the development of Utica Shale regions, primarily in Southeast Ohio, has brought about a major resurgence of oil and gas activities in the state. The petitioner, Jon D. Walker, Jr., owns real property located in Noble County, Ohio, a prime area experiencing Utica Shale development.

Petitioner filed his complaint in this case in the Noble County, Ohio Court of Common Pleas, seeking judgment under the Ohio Dormant Mineral Act ("DMA").[1] The petitioner requested a declaratory

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[1] Petitioner's claim throughout was premised upon the 1989 version of the DMA. In his complaint, he alleged, in part: "The

judgment and to quiet title to the oil and gas rights in his real property. Many years prior to petitioner's acquisition of his property, there had been a severance of the oil and gas interests from the surface interests. That severance occurred by way of an instrument recorded on July 26, 1965. The petitioner filed this case for the purpose of demonstrating that the previously-severed mineral interests had merged, by operation of law, in accordance with the DMA. Consequently, the oil and gas interests in and to the petitioner's property vested with the petitioner.

The Ohio General Assembly enacted the DMA in 1989. Enacted as R.C. 5301.56, the DMA was originally effective March 22, 1989. As explained in the Comments set forth in the Ohio Legislative Service Commission Report, December 1988, for Sub. S.B. 223, the DMA was to operate as follows to provide for when and how a severed oil and gas interest became abandoned:

> Sub. S.B. 223
>
> Sens. Cupp, Schafrath, Nettle, Drake, Burch.
>
> Provides that, in the absence of certain specified occurrences within the preceding 20-year period, a subsurface mineral interest that is not in coal or not of a governmental entity is deemed to be

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mineral interest merged with the surface estate in the plaintiff's Property no later than March 22, 1992. By operation of law, and as a consequence of such merger, the plaintiff's predecessor(s) in title became the exclusive owner(s) of all applicable rights and interests in the Property, including the surface and the oil and gas underlying same."

> abandoned and its title vested in the surface owner. (Effective: March 22, 1989).
>
> The act modifies the Marketable Title Law to prescribe when the holder of a subsurface mineral interest, who is not also the surface owner, is deemed to have abandoned the interest. If deemed abandonment occurs, the act provides that the interest will vest in the surface owner.
>
> Deemed abandonment and vesting will occur if none of the act's specified exceptions applies to a particular subsurface mineral interest. However, the act states that deemed abandonment cannot so occur until three years from its effective date.
>
> . . .

(Pet. App. 57). The statute provided for "certain specified occurrences" that would operate to preserve a severed mineral interest. These were described as follows:

> 5301.56 Abandonment and preservation of mineral interests
>
> (A) As used in this section:
>
> (1) "Holder" means the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.
>
> . . .

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, . . .;

(iii) The mineral interest has been used in underground gas storage operations by the holder;

(iv) A drilling or mining permit has been issued to the holder, . . .;

(v) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section;

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located . . . .

R.C. 5301.56 (1989). (Pet. App. 53). The various occurrences have been denominated "savings events" in the Ohio courts. As noted above, the General Assembly expressly provided for a three-year tolling period following enactment of the DMA, meaning "deemed abandonment [could] not so occur until three years from its effective date" or on March 22, 1992. R.C. 5301.56(B)(2) (1989).

In his suit, the petitioner maintained that there had been no "savings events" following the original 1965 severance of oil and gas underlying his property; thus, the severed interest was both "deemed abandoned" and "vested" in petitioner's surface ownership. The abandonment and vesting occurred automatically, as a matter of law, under the terms of the 1989 enactment of the DMA. Because well over twenty years had passed since the original severance without a savings event occurrence, after the three-year protective tolling provision set forth as part of the law, the vesting in the surface ownership occurred effective March 22, 1992. The merged and vested oil and gas rights were then conveyed to petitioner through the deeds from his grantors.

The old, 1965 reservation was originally recorded and held by John R. Noon, the original defendant thus named in petitioner's suit. Mr. Noon died during the pendency of suit, and the respondent, Patricia J. Shondrick-Nau, in her capacity as Executrix of the Estate of John R. Noon and Successor Trustee of the John R. Noon Trust, was joined in his stead. The parties submitted cross-motions for summary judgment for the determination of the trial court. By Journal Entry filed on March 20, 2013, the trial court granted

the petitioner's motion and overruled the respondent's motion. The state trial court held that the interests in the oil and gas underlying the petitioner's property were quieted in favor of the petitioner.[2]

Respondent pursued an appeal before the Ohio Seventh District Court of Appeals. Finding that the record developed and argued in this case fully supported the determination that the previously-severed mineral interest merged with the surface estate, automatically, under the 1989 version of DMA, the appellate court affirmed. The appellate court's decision was rendered on April 3, 2014. In part, the state appellate court held that:

> When the 2006 version of R.C. 5301.56 was enacted, Noon's mineral interest had already been abandoned and the mineral interest had been vested with the surface owner for 14 years. Once the mineral interest vested in the surface owner, it was reunited with the surface estate. Noon did not have any mineral interest in the subject property after March 22, 1992, because on that date the interest automatically vested in the surface owner by operation of the statute. And once the mineral interest vested in the surface owner, it "completely and definitely" belonged to the surface owner.

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[2] The trial court dispensed with any consideration of the 2006 amendment by stressing that: "Any discussion of R.C. 5301.56, effective June 30, 2006 is moot, because as of June 30, 2006, any interest of Defendant in the oil and gas had been abandoned." (Pet. App. 39).

(Pet. App. 29-30, 2014-Ohio-1499, ¶41).[3] The appellate court held that the 2006 amendment could only apply prospectively. The amendment could not affect any "right, privilege, obligation, or liability previously acquired." *Id.*, ¶37. Other Ohio courts had reached similar conclusions as to the operation of the 1989 version of the DMA. *Swartz v. Householder*, 2014-Ohio-2359 (7th Dist.); *Tribett v. Shepherd*, 2014-Ohio-4320 (7th Dist.); *Wendt v. Dickerson*, 2014-Ohio-4615 (5th Dist.); *Carney v. Shockley*, 2014-Ohio-5830 (7th Dist.); *Dahlgren v. Brown Farm Prop, LLC*, 2014-Ohio-4001 (7th Dist.); *Eisenbarth v. Reusser*, 2014-Ohio-3792 (7th Dist.); *Farnsworth v. Burkhart*, 2014-Ohio-4184 (7th Dist.); *Shannon v. Householder*, 2014-Ohio-2359 (7th Dist.); *Thompson v. Custer*, 2014-Ohio-5711 (11th Dist.); *Albanese v. Batman*, 2014-Ohio-5517 (11th Dist.).

The respondent pursued a further appeal to the Ohio Supreme Court. The state Supreme Court accepted jurisdiction in the appeal and, on September 15, 2016, issued its opinion which reversed the appellate court's judgment. The state Supreme Court applied an amended version of the DMA, passed by the Ohio General Assembly in 2006, in reaching the decision to reverse the lower court judgments in favor of the petitioner. Application of the later-enacted statute – passed well after the oil and gas interests

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[3] Petitioner repeatedly argued below advancing the constitutionality of the 1989 version of the DMA, based upon the similarities between the Ohio statute and that which passed constitutional scrutiny in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). This argument was addressed in petitioner's merit brief before the state Supreme Court. http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=757784.pdf, pp. 30-31.

involved had already become dormant and were deemed abandoned and vested within the surface title – operates to deprive petitioner due process of law. Equally important is the effect on petitioner's deeds, the contracts by which petitioner obtained title to his property. The severed oil and gas rights, which had lapsed, were part and parcel of those deeds of conveyance, and application of the amended statute enacted after the rights had vested in petitioner's grantors directly impairs petitioner's contracted rights. The 2006 version of the Ohio DMA should not have been applied to the operation or effect of the DMA in 1992, when the surface owner's rights to the oil and gas interests fully vested.[4] Due process was satisfied by the self-executing effect of the 1989 version of the DMA; as petitioner argued in reliance upon *Texaco, Inc. v. Short*.

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[4] In defense of the trial court's judgment, the petitioner maintained throughout the state appeals that the amended, 2006 version of the Ohio DMA could not be applied precisely because of petitioner's vested rights to the oil and gas. Petitioner argued in his brief before the appellate court: "The 2006 amendment is presumed to operate prospectively." "Regardless, the 2006 amendment cannot be applied retroactively to impair or take away vested rights." Similarly, before the state Supreme Court, petitioner argued: "Frankly, the only point of constitutional contention ripe for consideration in this case is that addressed herein below - the constitutional prohibition against the amendment or reenactment of a statute from disturbing a previously vested right or interest." "It is fundamental that the 2006 amendment cannot be applied retroactively to impair or take away vested rights." http://supreme court.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=757784.pdf, pp. 30, 33.

REASONS FOR ALLOWANCE OF THE WRIT

Due process of law is a fundamental precept in American jurisprudence, and there is, as a result, the presumption against the retroactive application of statutory enactments or amendments to vested property rights. The state Supreme Court's decision applying a legislative amendment to the DMA passed 14 years after the oil and gas interests at issue had already vested under the former version of the DMA appears patently unjust and prejudicial to the petitioner. Moreover, the state court's opinion has far-reaching implications for thousands of property owners in the state of Ohio who will now find themselves burdened by old, lapsed oil and gas reservations – reservations that should be recognized as having been abandoned – and thereupon merged and vested with the title to the surface by operation of law. The state Supreme Court's decision in this case implicates countless millions of dollars in lost, unrecoverable value – in the form of lease signing bonuses and production royalties – to Ohio property owners.

The Court's jurisprudence identifies a variety of grounds historically advanced for the protection of vested rights from the retroactive application of statutory enactments. Those include: the *Ex Post Facto Clauses* of the *United States Constitution*, the *Bill of Attainder Clauses*, the *Contracts Clause*, the *Takings Clause* and the *Due Process Clauses*. The *Ex Post Clause* is generally accepted as confined to laws respecting criminal punishments. *Johannessen v. United States*, 225 U.S. 227, 242 (1912); *Calder v. Bull*, 3 U.S. 386, 390, 3 Dallas 386, 1 L.Ed 648 (1798); but see, *E. Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) and

Carmell v. Tex., 529 U.S. 513, 567 (2000). The *Bill of Attainder Clauses* and *Takings Clauses* both have their role in this context. As applied to the facts and procedures of this case, it appears as though the *Due Process* and *Contracts Clause* analysis are most fitting. Both questions presented herein are inextricably connected to the vested rights position held by petitioner below. Although, a Justice of the Ohio Supreme Court opined that application of the 2006 version of the DMA operated to affect a taking of property without compensation.

We must begin the analysis by accepting a series of well-established principles. "The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Lynce v. Mathis, Super.*, 519 U.S. 433, 439, 117 S. Ct. 891, 137 L.Ed 2d 63 (1996), citing, *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). As expressed above, "[t]his doctrine finds expression in several provisions of our Constitution." *Lynce v. Mathis*, supra. "The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *United States v. Winstar Corp.*, 518 U.S. 839, 135 L.Ed. 2d 964, 116 S. Ct. 2432 (1996), but also the indigent defendant engaged in negotiations that

may lead to an acknowledgment of guilt and a suitable punishment." *Lynce v. Mathis*, 519 U.S. at 440.

I. REVIEW IS WARRANTED BECAUSE THE *DUE PROCESS CLAUSE* TO THE *FOURTEENTH AMENDMENT* PROHIBITS THE APPLICATION OF AN AMENDED STATE STATUTE TO DISTURB PROPERTY RIGHTS WHICH VESTED UNDER THE FORMER VERSION OF THE LAW.

The Ohio General Assembly made a bargain with Ohio citizens in the form of the Dormant Mineral Act passed in 1989. In spite of the tortured reading of the statute by the state Supreme Court majority, that first version of the Ohio DMA operated automatically, to unite previously-severed oil and gas interests, abandoned after years without use or other act of preservation, and vested those rights in the title of the surface owner.[5] The statute relied upon by the petitioner, and by countless other Ohio property owners, stated clearly and unambiguously that:

> 5301.56 Abandonment and preservation of mineral interests

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[5] Adhering to its *Corban* ruling, the majority of the state Supreme Court ignored any retroactivity analysis by fashioning a "conclusive presumption" as an "evidentiary device" in its interpretation of the 1989 DMA. This approach is thoughtfully criticized in the *Corban* dissent. Pfeifer, J. "In doing so, *Corban* has simplified the law. All it took was rewriting it." *Id.* The state court should have recognized the self-executing feature of the 1989 DMA and its validity under *Texaco, Inc. v. Short*. There is no meaningful difference between an unused, lapsed mineral interest being deemed abandoned and vested or, alternatively, extinguished. *Corban*, at ¶98.

> (A) As used in this section:
>
> (1) "Holder" means the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.
>
> . . .
>
> **(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies**: . . . .

R.C. 5301.56 (1989). (Emphasis added). (Pet. App. 53). The General Assembly could have written the DMA (1989) to create a right of action for a surface owner to claim an abandoned oil and gas interest. It did not, however, draft R.C. 5301.56 in such a fashion. The 1989 DMA contained no provision that could reasonably be interpreted to require a surface owner to take some form of legal action in order to effectuate the abandonment and vesting. The words of the statute do not support such an interpretation; and the Report of the Ohio Legislative Service Commission does not support such an interpretation.

In the absence of a "savings event" after the severance and preceding the statutory period of abandonment, the interests were "deemed abandoned ***and vested*** in the owner of the surface." R.C.

5301.56(B)(1) (Emphasis added). That is how specifically the 1989 DMA operated. Thus, no one had to serve or file any form of notice, did not have to record any type of instrument, and did not have to somehow claim the vested rights through a cause of action or otherwise. The 1989 version of the statute actually used that essential word to describe the merger of the mineral interest – it "vested" in the surface owner.

This Court passed on the constitutionality of just such an automatic-vesting, dormant mineral act in the case of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) ("[S]evered mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property."). *Id.*, 518. "The Mineral Lapse Act . . . is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs." *Short v. Texaco, Inc.*, 273 Ind. 518, 522, 406 N.E. 2d 625 (1980). In *Short v. Texaco*, for instance, the Indiana Supreme Court recognized the following:

> The purposes of this Act . . . are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which

> have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the state and does not unconstitutional impair the obligation of contracts.

Short v. Texaco, 273 Ind. at 526.

When this Court affirmed the Indiana judgment, the Court endorsed automatic abandonment by operation of a mineral lapse statute:

> Each of the actions required by the State to avoid an abandonment of the mineral estate furthers a legitimate state goal. Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. The State surely has the power to condition the ownership of property on compliance with conditions that impose such a

> slight burden on the owner while providing such clear benefits to the State.

Texaco v. Short, 454 U.S. at 529-30.

Operation of the Ohio 1989 Dormant Mineral Act is perhaps best described by Justice Paul Pfeifer in his dissent in the state Supreme Court's opinion in *Corban v. Chesapeake Exploration, L.L.C.*, ___ Ohio St.3d ___, 2016-Ohio-5796, announced the same day as the decision in this case.[6] Justice Pfeifer was, by chance, a member of the Ohio General Assembly when the 1989 version of the DMA was enacted:

> The federal court certified two questions to this court. I dissent from the majority's response to the first question. I would hold that the 1989 version of R.C. 5301.56 applies to quiet-title actions filed after 2006 in which the surface owner alleges that mineral rights automatically vested in the surface owner as a result of abandonment prior to the effective date of the

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[6] The other cases decided by the Ohio Supreme Court on the authority of *Corban*, in addition to petitioner's case, were: *Swartz v. Householder*, ___ Ohio St.3d ___, 2016-Ohio-5817 (Ohio); *Tribett v. Shepherd*, ___ Ohio St.3d ___, 2016-Ohio-5821 (Ohio); *Wendt v. Dickerson*, ___ Ohio St.3d ___, 2016-Ohio-5822 (Ohio); *Carney v. Shockley*, ___ Ohio St.3d ___, 2016-Ohio-5824 (Ohio); *Dahlgren v. Brown Farm Prop, LLC*, ___ Ohio St.3d ___, 2016-Ohio-5818 (Ohio); *Eisenbarth v. Reusser*, ___ Ohio St.3d ___, 2016-Ohio-5819 (Ohio); *Farnsworth v. Burkhart*, ___ Ohio St.3d ___, 2016-Ohio-5816 (Ohio); *Shannon v. Householder*, ___ Ohio St.3d ___, 2016-Ohio-5817 (Ohio); *Thompson v. Custer*, ___ Ohio St.3d ___, 2016-Ohio-5823 (Ohio); *Albanese v. Batman*, ___ Ohio St.3d ___, 2016-Ohio-5814 (Ohio); *Taylor v. Crosby*, ___ Ohio St.3d ___, 2016-Ohio-5820 (Ohio).

2006 amendments to R.C. 5301.56. I concur in the majority's response to the second question that a payment of delay rental is neither a title transaction nor a saving event under the Ohio Dormant Mineral Act ("ODMA').

1989 ODMA

In 2006, hindsight may have provided the General Assembly the vision it wished it had had when it passed the first version of the ODMA in 1988. But regardless of the changes the General Assembly implemented in 2006, former R.C. 5301.56 ("1989 ODMA") functioned as the law in this state for 17 years, and through its operation created vested rights in certain property owners. Those vested rights cannot be taken away without running afoul of the Ohio Constitution and the Ohio Revised Code.

As the lead opinion relates, the General Assembly enacted the 1989 ODMA "to provide a method for the termination of dormant mineral interests and the vesting of their title in surface owners, in the absence of certain occurrences within the preceding 20 years." Sub.S.B. No. 223, 142 Ohio Laws, Part I, 981 ("S.B. 223"). It implemented that clear and unambiguous purpose through a statute that was bluntly efficient. The 1989 ODMA stated that "[a]ny mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies." Former R.C. 5301.56(B)(1), S.B. 223, 142 Ohio Laws, Part I, 986. The

statute set forth the few conditions that could prevent the reunification of mineral and surface rights in the land: if the mineral interest was coal or was owned by a government entity (former R.C. 5301.56(B)(1)(a) and (b)) or if one of the saving events under former R.C. 5301.56(B)(1)(c) had occurred within the past 20 years. *Id.* Those saving events required some indication of use by the mineral-rights holder and ranged from filing a claim to preserve the interest to actual drilling or mining. *Id.* at 986-987.

The impact of the law was not immediate—the General Assembly included in the 1989 ODMA a three-year grace period during which a mineral-rights holder could preserve his interest by performing one of the saving events listed in former R.C. 5301.56(B)(1)(c). Former R.C. 5301.56(B)(2), S.B. 223, 142 Ohio Laws, Part I, 987. A process was thus in place for a mineral-rights holder to prevent the statutory reunification of the mineral rights with the surface rights. Mineral-rights holders who had done nothing with their rights in the previous 20 years still had an additional three years to preserve their interests.

. . .

The plain language of the 1989 ODMA states that absent a saving event, a separate mineral interest shall be deemed abandoned and the mineral interest shall vest in the owner of the surface property. The statute uses the word "shall—the mineral interest "shall be deemed

abandoned and vested in the owner of the surface"—and this court has "repeatedly recognized that use of the term 'shall' in a statute or rule connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary." *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28.

The former statute plainly set forth the few conditions that the mineral-rights holder needed to meet to prevent the reunification of mineral and surface rights in the land. Former R.C. 5301.56 is absolutely silent as to any action required by the surface owner to effectuate the vesting of the mineral rights. There is no provision requiring the surface owner to affirmatively assert any claim, record any claim, or file any form of suit or other declaration of the vested interests. There is no statutory language that suggests that the vesting of the mineral rights was anything other than automatic. The statute mandated that it "shall" occur.

The General Assembly could have required some further affirmative action by the surface owner prior to vesting, but it did not. The Uniform Dormant Mineral Interests Act ("UDMIA"), which the National Conference of Commissioners on Uniform State Laws approved and recommended in August 1986 and which was thus available as a model at the time Ohio's ODMA was enacted, requires the surface owner to "maintain an action to terminate a dormant mineral interest" that is "in the nature of and

requires the same notice as is required in an action to quiet title." UDMIA, Section 4(a), available at http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf (accessed Dec. 16, 2015). Ohio did not incorporate that provision into the 1989 ODMA.

The fact that it did not had no constitutional consequence. The General Assembly stood on solid constitutional ground in not requiring notice or filing of suit by the surface owner prior to the mineral interest being deemed abandoned and vested in the surface owner. Before Ohio adopted the 1989 ODMA, the United States Supreme Court upheld the constitutionality of Indiana's Dormant Mineral Interests Act, "a statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." *Texaco, Inc. v. Short*, 454 U.S. 516, 518, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). The Indiana statute "contained a 2-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office." *Id.* at 518-519. Like Ohio's 1989 ODMA, the Indiana statute did not require the surface owner to provide any notice to the mineral-rights holder before the lapse and reversion occurred; the court referred to the statute as "self-executing":

Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. *Id.* at 536.

The court held that the inaction of the mineral-rights holder rather than any act of the surface owner had caused the property right to lapse:

[T]he State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. None of the cases cited by appellants suggests that an individual must be given advance notice before such a rule of law may operate. *Id.* at 537.

Like Indiana, Ohio enacted a self-executing statute that vested in a surface owner any separated mineral rights that had been dormant for a period of 20 years. Like Indiana's, Ohio's statute was constitutional, and respondents do not argue that it was unconstitutional. They are left instead to argue that the General Assembly did not mean what the statute clearly said.

The Lead Opinion's Interpretation of the 1989 ODMA

The lead opinion subjects the 1989 ODMA to judicial modification under the guise of interpretation. What does the lead opinion

interpret the General Assembly to have meant? Where the General Assembly wrote that dormant mineral interests "shall be deemed abandoned and vested in the owner of the surface," the lead opinion interprets something like, "To reunite mineral rights with the surface rights, the surface owner must successfully prosecute a quiet-title action against the owner of the mineral interest based upon the mineral-rights holder's alleged abandonment of the mineral rights, and in that quiet-title action, the surface owner shall enjoy a conclusive presumption that the mineral rights have been abandoned." That is, under the lead opinion's interpretation, if the mineral rights are deemed abandoned under the 1989 ODMA, the surface owner enjoys only a "conclusive presumption" (a term not used in the statute) in a potential quiet-title action (an action that is not required by or even referred to in the statute). The lead opinion accomplishes this interpretation almost entirely through inserting words not used by the General Assembly. And the lead opinion virtually ignores the word "vested."

The Meaning of "Deemed Abandoned"

The lead opinion's interpretation finds its genesis in the words "deemed abandoned." The lead opinion states that deeming something abandoned creates a conclusive presumption of abandonment that can be used in a future action for proof of abandonment. But instead, the lead opinion should have employed the common usage of the word "deem." There is no hidden

meaning involving future proceedings embedded in the word "deemed." " ' "Deemed" has been defined as "considered," "determined," or "adjudged" * * *.'" *Jacot v. Secrest*, 153 Ohio St. 553, 559, 93 N.E.2d 1 (1950), quoting *State ex rel. Hoagland v. Prairie Cty. School Dist. No. 13*, 116 Mont. 294, 298, 151 P.2d 168 (1944). At the time the 1989 ODMA was passed, Black's Law Dictionary defined "deem" as "[t]o hold; consider; adjudge; believe; condemn; determine; treat as if; construe." Black's Law Dictionary 374 (5th Ed.1979). In *State ex rel. Brecksville Edn. Assn. v. State Emp. Relations Bd.*, 74 Ohio St.3d 665, 666, 1996 Ohio 310, 660 N.E.2d 1199 (1996), fn. 1, this court noted that bargaining units that had been "deemed certified" by an uncodified section of an act "are treated as if they had been certified normally." In *Texaco*, the United States Supreme Court indicated that private property that is "deemed to be abandoned" is "treat[ed] * * * as abandoned." *Texaco*, 454 U.S. at 530, 102 S.Ct. 781, 70 L.Ed.2d 738.

This court has previously addressed statutes containing the word "deemed" and interpreted them to mean that the deemed result occurred automatically by operation of law. In *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 239, 533 N.E.2d 301 (1988), the statute at issue, R.C. 305.03(A), provided, "Whenever any county officer fails to perform the duties of his office for ninety consecutive days, * * * his office shall be deemed vacant." *Id.* at 239. This court held that "[t]he inquiry established by this statute is not whether one has the right to a particular office

but whether, upon certain facts, he has abandoned the office. * * * [T]he statute deems the office to be vacant automatically, upon the occurrence of the statutorily determined events." Id. This court stated that the statute was "by its terms, self-executing. Upon the happening of the enumerated events, the office is then vacant." *Id.* at 241. [Other examples applying "deemed" omitted]. . . .

Thus, under the plain meaning of the word "deemed" and under the interpretation of the word by this court, the "deemed abandoned" language in the 1989 ODMA means that the mineral rights were, by operation of law, to be considered or treated as abandoned.

But the lead opinion claims that the "deemed abandoned" language created a presumption of abandonment that "was only an evidentiary device that applied to litigation seeking to quiet title to a dormant mineral interest." Lead opinion at ¶ 26. The Michigan Supreme Court, in addressing the "deemed abandoned" language in Michigan's dormant-mineral-interest act rejected the idea that it created any evidentiary presumption:

Contrary to defendants' arguments, the act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon * * *. Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to

undertake minimal acts indicative of ownership at least every 20 years. The statutory approach to these issues has the added advantage of eliminating uncertainty and minimizing litigation, see *In re Mercure Estate*, 391 Mich. 443, 448, 216 N.W.2d 914 (1974).

(Footnote deleted in original). *Van Slooten v. Larsen*, 410 Mich. 21, 50-51, 299 N.W.2d 704 (1980).

Like the Michigan statute, the 1989 ODMA did not create a presumption to be employed in a future action—instead, it created a rule of substantive law. The law vested a property right by operation of law upon the nonoccurrence of a saving event within a certain period. The 1989 ODMA did not merely create a simplified way to prove abandonment in a quiet-title action; instead, *on its own*, it vested in the surface owner the interest in the minerals under the surface.

Still, a surface owner may choose to bring an action to quiet title pursuant to R.C. 5303.01 in order to enforce the rights vested through the operation of the 1989 ODMA. But the lead opinion conflates the substantive property right vested by the operation of the 1989 ODMA with a quiet-title action brought pursuant to R.C. 5303.01 to achieve judicial recognition of that property right. The 1989 ODMA vested the right, and a separate quiet-title action would allow the surface owner to confirm that the statutory elements had been met and that the reversion of the mineral rights had occurred.

Vesting is not delayed until the surface owner brings a quiet-title action; the quiet-title action simply shows the world that the interest had vested.

Van Slooten recognized that vesting under a dormant-mineral-interest act with "deemed abandoned" language occurs without a hearing. The court held that "due process does not require a hearing prior to vesting title in the owner of the surface estate" and that a person who had been deemed to have abandoned his mineral interest would have an opportunity after vesting "for a hearing to determine whether the statutory requirements have been met and to ascertain the ownership of the property." *Van Slooten*, 410 Mich. at 55, 299 N.W.2d 704. The vesting does not follow a quiet-title action; the quiet-title action follows the vesting.

. . .

Vesting

The lead opinion spends a great deal of time discussing the words "deemed abandoned" and precious little time addressing the word "vested." The 1989 ODMA stated that the mineral rights "shall be deemed abandoned and vested in the owner of the surface." That word, "vested," is a problem for the lead opinion. The General Assembly's use of the word "vested" in the 1989 ODMA belies the lead opinion's assertion that the reunification of the mineral rights with the surface rights is somehow incomplete, short of litigation, upon the passage of 20 years of inactivity by the mineral-rights

holder. Far from being incomplete, a vested right is "complete, consummated and subject to involuntary divestiture only upon due process of law." *Viers v. Dunlap*, 1 Ohio St.3d 173, 176, 1 Ohio B. 203, 438 N.E.2d 881 (1982), overruled in part on other grounds, *Wilfong v. Batdorf*, 6 Ohio St.3d 100, 6 Ohio B. 162, 451 N.E.2d 1185 (1983), paragraph three of the syllabus. This court has recognized that "as defined, a right is 'vested' when it 'so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.'" *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, ¶ 9, quoting Black's Law Dictionary 1324 (7th Ed.1999). That the mineral interest is "vested in the owner of the surface" means that there is no further procedure necessary to complete the reunification of the mineral rights with the surface rights.

That vesting is crucial. "A 'vested right' can 'be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.'" *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150, ¶ 9, quoting *Washington Cty. Taxpayers Assn. v. Peppel*, 78 Ohio App.3d 146, 155, 604 N.E.2d 181 (4th Dist.1992).

It is because those property rights vested in the qualifying surface owners pursuant to the 1989 ODMA that the 2006 amendment to the statute

cannot apply to those surface owners. First, the 2006 changes, which are still in effect today, create a process—where none had existed before—requiring surface owners to perform certain tasks prior to mineral interests being reunited with the surface interest and vested in the surface owner:

> Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies. R.C. 5301.56(B).

The requirements of R.C. 5301.56(E)—providing notice to the mineral-rights holder and filing an affidavit of abandonment with the county recorder—must be met before the mineral rights can be deemed abandoned and vested in the surface owner. The 2006 amendment applies—by its own terms—only to situations in which vesting in the surface owner has not yet occurred and places conditions on surface owners before the mineral rights can vest in them. Nothing in the 2006 amendment suggests that it applies in situations in which mineral rights had already vested before the effective date of the amendment. It simply sets forth how mineral interests that had not vested in the surface owner before the effective date of the amendment can become vested in the surface owner.

Any other interpretation is contrary to the protections from retroactive legislation provided by R.C. 1.58 and Article II, Section 28 of the *Ohio Constitution*. R.C. 1.58(A)(2) states that the amendment of a statute does not "[a]ffect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder." Property rights automatically vested in the surface owner under the 1989 ODMA when the statutory conditions were met; thus, any amendment to the statute that operates to affect those rights—by requiring, for instance, that mineral rights cannot be vested in the surface owner without the performance of certain notice procedures—contravenes R.C. 1.58.

Further, Article II, Section 28 of the *Ohio Constitution* prohibits the General Assembly from passing retroactive laws. There is no indication that the General Assembly intended the 2006 amendment to be retroactive, but statutory amendments that appear prospective in operation nonetheless violate the prohibition against retroactive laws if the statute's prospective operation would retroactively destroy rights that had already vested: We have also stated that the "retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].' *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752." *Bielat [v. Bielat]*, 87 Ohio St.3d [350,] 352-353, 2000 Ohio 451, 721 N.E.2d 28 [2000]. In *Van Fossen* [v.

Babcock & Wilcox Co., 36 Ohio St.3d 100, 522 N.E.2d 489 (1988)], this court stated that the constitutional limitation against retroactive laws "'include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws.'" [Id. at 10], quoting Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence (1936), 20 Minn.L.Rev. 775, 781-782. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 14.

To apply the requirements of the 2006 amendment to surface owners who had obtained vested mineral rights pursuant to the 1989 ODMA implements a textbook example of an unconstitutionally retroactive law. Under the majority's holding, the new law reaches back and divests the surface owners of property rights that vested prior to the operation of the 2006 amendment to the statute. As applied by the majority, the 2006 amendment impairs substantive vested rights and thus is unconstitutional.

. . .

Applying the 2006 amendment to surface owners whose rights to mineral interests had vested pursuant to the 1989 ODMA constitutes nothing less than a taking. The 1989 ODMA provided that a mineral-rights holder's interest was considered abandoned by operation of law,

> having lapsed due to the mineral-right holder's 20 years of inaction, and was subject to a three-year grace period during which a mineral-rights owner could preserve the interest through a simple filing. In contrast, under the majority's interpretation of the 2006 amendment, a surface owner whose mineral-rights interest vested by operation of the 1989 ODMA lost those mineral rights immediately on the effective date of the 2006 amendment—without any required period of inactivity by the surface owner and with no opportunity to preserve the property right through satisfying a statutory condition—for no reason other than that the General Assembly wished the rights to revert to someone else. The General Assembly gave no indication that the 2006 amendment should be interpreted that way, and R.C. 1.58 and the Ohio Constitution should prevent it from being interpreted that way.

Id., at ¶¶ 107-140.

The petitioner repeatedly advocated the position below that application of the 2006 amendment to the Ohio DMA to the facts of his title would violate the prohibitions against retroactive law applied to disturb vested property rights and violate the specific provision of R.C. 1.58. R.C. 1.58 provides that:

> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> . . .

> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; . . . .

[Division (B), regarding reduction of penalties and punishments, is not applicable here]. Because the petitioner's predecessor in title acquired the mineral interest at issue in this case, by the merger of same with the surface estate under the 1989 version of the statute, the amendment of that statute in 2006 does not affect such rights. "[T]he enactment of the 2006 law is of no effect because the mineral rights on the subject properties were already abandoned. This case is really that simple." *Thompson v. Custer*, Trumbull C.P. Case No. 2013 CV 2358, p. 4 (June 16, 2014).

This case represents precisely what was best characterized in the dissent in *Corban*: "To apply the requirements of the 2006 amendment to surface owners who had obtained vested mineral rights pursuant to the 1989 ODMA implements a textbook example of an unconstitutionally retroactive law." *Corban*, at ¶ 138.

II. REVIEW IS NECESSARY BECAUSE THE *CONTRACTS CLAUSE* TO THE *UNITED STATES CONSTITUTION* PROHIBITS THE APPLICATION OF AN AMENDED STATE STATUTE WHICH IMPAIRS CONTRACT RIGHTS WHICH VESTED BY OPERATION OF THE FORMER VERSION OF THE LAW.

Under Ohio law, all written instruments, including deeds of conveyance, are treated as contractual and, thus, construed and enforced under contract rules. "The construction of written contracts and instruments, including deeds, is a matter of law." *Dassel v. Hershberger*, 2010-Ohio-6595, ¶18 (4th Dist.). As with any contract, the courts endeavor to find the parties' intent within the written words of the instrument. "The intent of the parties to a deed controls its interpretation." *Id.* "The principles of deed construction dictate that a court presumes that a deed expresses the intentions of the grantor and grantee at the time of execution." *Galambros v. Estep*, 2016-Ohio-5615, ¶15 (5th Dist.). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), syllabus. Summarized succinctly, "A deed is a contract, and is therefore subject to the parol evidence rule." *Rice, Admix. v. Rice*, 2002-Ohio-3459, ¶44 (7th Dist.).

The petitioner acquired his property at issue in this case by way of two, properly-recorded deeds of conveyance. One of the deeds was a statutory form Deed of Fiduciary, and the other a General Warranty Deed. Both deeds were recorded in 2009.

A General Warranty Deed "has the force and effect of a deed in fee simple to the grantee, the grantee's heirs, assigns, and successors . . . with covenants on the part of the grantor with the grantee . . . that the granted premises were free from all encumbrances . . . ." *Griffin v. First Natl. Acceptance Co.*, 2013-Ohio-4302, ¶21 (11th Dist.). "In the context of property law, a 'covenant' denotes a contract . . . ." *Orwell Natl. Gas Co. v. Fredon Corp.*, 2015-Ohio-1212, ¶23 (11th Dist.). The petitioner's interests under his deeds are contractual and, importantly, the previously-severed oil and gas interests involved had already been abandoned and vested with the ownership of the surface prior to the delivery of the deeds to the petitioner. There were no reservations or exceptions set forth in petitioner's deeds limiting the breadth of interest conveyed to him. In other words, the deeds delivered to the petitioner conveyed all interests then held by the grantors, which included the merged and vested rights to the oil and gas underlying the subject property.

As thoroughly discussed herein above, the oil and gas rights in and to the petitioner's property vested by operation of law under the 1989 version of the Dormant Mineral Act. Those interests had already merged with the holder of the surface title (petitioner's grantors) in 1992, after the 3-year grace period or tolling period of the DMA had expired. The state Supreme Court's decision, applying the later, 2006 amendment of the DMA, strips the oil and gas rights from the deeds of conveyance to the petitioner. Application of the amended statute fundamentally changes the contractual bargain between the petitioner and his grantors represented by the deeds. This dramatic alteration of petitioner's interests is prohibited by the

Contracts Clause, Art. I, Section 10 of the *United States Constitution*. "No state shall . . . pass any . . . Law impairing the Obligations of Contracts." *Id.*

"When the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state, whereby the obligation of the contract is alleged to be impaired, a federal question is presented." *Cross Lake Club v. Louisiana*, 224 U.S. 632 (1912); *New Orleans Water Works Co. v. Louisiana*, 125 U.S. 18 (1888).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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