IN THE SUPREME COURT OF IOWA

No. 13-0723

LAURIE FREEMAN, SHARON MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT, and BOBBIE LYNN WEATHERMAN,

Plaintiffs-Appellants,

vs.

GRAIN PROCESSING CORPORATION,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF MUSCATINE COUNTY
NO. LACV021232
HON. MARK J. SMITH, JUDGE

BRIEF OF *AMICI CURIAE*

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SUMMARY OF ARGUMENT

Among the liberties government is instituted to preserve, and therefore respect, are property rights defined by the common law doctrines of private nuisance, negligence and trespass. Without provision for just compensation, the preemption or displacement of these common law remedies is an unconstitutional taking under both the United States and Iowa Constitutions. In the absence of federal occupation of the field or clear conflict between the Clean Air Act (and/or Iowa Code Chapter 455B) and state common law remedies, this Court should presume that both Congress and the Iowa General Assembly acted within their constitutional authorities and responsibilities and left Plaintiffs' common law remedies of private nuisance, negligence and trespass undisturbed.

ARGUMENT

I. Common Law Nuisance, Negligence and Trespass Define Boundaries of Private Property. A Central Responsibility of Government is to Enforce Those Boundaries and a Constitutional Duty of Government is to Respect Those Boundaries.

Among the self-evident truths proclaimed in The Declaration of Independence is that "Governments are instituted" "to secure" liberty and

other "unalienable Rights." The father of the United States Constitution, James Madison, recognized, as had John Locke before him, that property and liberty are integrally linked. Madison elaborated on Locke's observation that "every man has a property in his own person"[1] when he wrote that "[g]overnment is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses."[2] "The right of property is the guardian of every other right," declared Continental Congress delegate Arthur Lee of Virginia, "and to deprive a people of this, is in fact to deprive them of their liberty."[3]

The securing of liberty is not a simple matter. At least since Magna Carta, a core function of government in the Anglo-American tradition has been to protect property owners from the predations of neighbors and others. But as Madison recognized, government also stands as a threat to liberty and property. "[L]iberty may be endangered by the abuses of liberty, as well as by the abuses of power,"[4] wrote Madison. The takings clause of the 5th Amendment and the due process clauses of the 5th and 14th Amendments to the United States Constitution and Sections 1 and 18 of Article I of the Iowa

[1] John Locke, *Second Treatise on Civil Government*, Chapter V, Section 27 (1689).
[2] Quoted in Philip B. Kurland and Ralph Lerner, *The Founders' Constitution*, Chapter 16, Document 23 (1987) (http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html).
[3] Quoted in James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 3rd ed. (2008) at p. 26.
[4] James Madison, *The Federalist* #63 (J.R. Pole, editor), p. 341 (2005).

Constitution stand as protections against government infringements on property rights, while the state stands in defense against private intrusions and offenses.

As this Court has made clear in *Bormann v. Board of Supervisors In and For Kossuth County*, 584 N.W.2d 309, 320 (1998), the common law remedies of private nuisance, negligence and trespass are constitutionally protected property rights. Like boundary fences, nuisance, negligence and trespass help define the extent and limits of property rights in land. Common law courts have long enforced these boundaries, as they have enforced public rights against private intrusion pursuant to the doctrine of public nuisance. But the courts have not been alone in guaranteeing both private and public rights. The legislative and executive branches of government also play an important role pursuant to what was originally the power of 'internal police' and came to be the police power in 19th century America. The police power, said the New Jersey Supreme Court in 1882, is "the mere application to the whole community of the common law maxim, '*sic utere tuo, ut alienum non lædas*' [so use of your own as not to cause harm to others]." *State v. Wheeler*. 44. N.J.L. 88, 91 (N.J. 1882).

Thus the police power of the State of Iowa and the federal government's power to regulate interstate commerce, pursuant to which the

Clean Air Act (CAA) was enacted, originated in the government's core function of securing liberty. Today the much-expanded regulatory powers of the state and federal governments continue to serve that purpose, but, as the founders anticipated, they also sometimes burden individual liberty. It would be more than ironic if government powers that originated to protect private rights are now a source of state and federal authority to preempt or displace those rights.

II. When Government Regulates to Enforce Property Rights Defined by the Background Principles of Common Law Nuisance, Negligence and Trespass, There is no Unconstitutional Taking. But When Government Regulations Effectively Change or Ignore Those Background Principles, There is the Taking of an Easement Under the Iowa and United States Constitutions.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the plaintiff claimed that the state's police powers were being exercised in a way that intruded on his property rights. Writing for the Court, Justice Scalia agreed. In doing so he observed that there would be no taking where regulation pursuant to the historic police power prohibits a property owner from doing what "background principles" of common law already prohibited. *Id*. at 1029-30. In other words, there could be no taking if, absent the objected-to regulation, the property owner has no right to do what

the regulation prohibits. There can be no taking of a nonexistent property right.

But looking to background principles to determine the legitimate scope of the police power is only half of the picture. The background principles of private nuisance and trespass that impose duties on some people (which the state can exercise the police power to enforce) also help define the constitutionally protected property rights of others (which the police power is exercised to protect). Property owners have a duty to use their property so as not to create a nuisance for their neighbors. Their neighbors have a right not to be subjected to a nuisance. Just as the common law duty to use one's property so as not to cause a nuisance to others shields legislative prohibitions of nuisance from takings claims, so too does legislative displacement of a common law action in private nuisance result in the taking of a vested property right. It is the symmetry of Wesley Hohfeld's jural opposites brought to life in defining the constitutional extent and limits of state power.[5]

As noted above, this Court has held that the property right inherent in the common law nuisance remedy is an easement and that the legislative

[5] *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1919). Hohfeld contended that most legal relations could be understood as one of four jural opposites: right – no-right; privilege – duty; power – disability; and immunity – liability.

displacement of that remedy constitutes an unconstitutional taking under the Iowa Constitution. In *Bormann v. Board of Supervisors*, this Court stated that "the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance." That holding was reaffirmed in *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171 (2004).

Preemption of state common law remedies by federal law is no different from the perspective of constitutional takings doctrine. While federal statutory or administrative law could preempt Iowa common law remedies, it cannot do so in violation of the property rights guarantees of the U.S. Constitution. Absent just compensation, federal preemption of the common law remedies of private nuisance, negligence and/or trespass will violate the 5th and 14th Amendments just as the Iowa Legislature's displacement of private nuisance remedies has constituted a taking under the Iowa Constitution.

Among the liberties our governments have been created to secure is freedom from governmental interference with vested private property rights. The 5th Amendment to the United States Constitution guarantees that no "person . . . shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just

compensation." For well over a century it has been settled that the 14th Amendment due process clause incorporates these guarantees as limits on the powers of state governments. *Chicago, Burlington & Quincy Railroad v. City of Chicago,* 166 U.S. 226 (1897). Article I, Section 1 of the Iowa Constitution confirms the inalienable right to acquire, possess and protect property. Section 18 of the same Article guarantees that "[p]rivate property shall not be taken for public use without just compensation . . . ."

Ordinarily, the takings issue arises in the context of government regulation of, or other interference with, private property. The United States Supreme Court has established that where such government action or regulation results in the physical occupation or total diminution in economic value of private property, there is a per se taking. *See e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982). The constitutionality of other government actions negatively affecting private property is determined under the so-called *Penn Central* balancing test pursuant to which courts are to consider the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the

governmental action. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

As this court held in *Bormann* and *Gacke*, displacement of the common law remedies of private nuisance, negligence and trespass has the effect of granting an easement to Plaintiffs' neighbors (in this case the Defendant), authorizing them to invade and occupy with harmful pollutants (at the discretion of the state) Plaintiffs' properties. While it might be argued that the CAA and Iowa Code Chapter 455B prevent such invasions of Plaintiffs' property, the evidence is to the contrary and, in any event, Plaintiffs' common law rights will sometimes provide greater protection against invasions by pollution than do regulations of general application. As explained below, regulations that balance various public interests can displace common law public nuisance without invading Plaintiffs' property rights. The same is not true of statutes and regulations that purport to displace private common law remedies.

According to Professor Cass Sunstein, the United States Supreme Court has made clear that, absent just compensation, congressional preemption of common law trespass can constitute a taking. "[A] fair reading of the opinion [in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980)] is that some abrogations of state trespass law would

amount to an unconstitutional taking—a conclusion that should be unexceptionable." Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 887 (1987)). It is true that the displacement of common law tort actions against employers by workers' compensation were found not to result in unconstitutional takings, but that was because the legislative remedy of prompt and certain compensation in the event of injury was found to be just compensation for the lost common law remedy. *New York Cent. R. Co. v. White*, 243 U.S. 188, 201-204, 37 S.Ct. 247 U.S. 1917.

Similarly, some statutes and regulations that preempt or displace (take) property owners' common law remedies are constitutionally legitimate because they provide implicit compensation to those affected – what Justice Holmes called "average reciprocity of advantage" in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L. Ed. 322 (1922). For example, most zoning regulations burden the property of all with offsetting benefits for all. But the displacement of the private common law remedies of nuisance, negligence and trespass cannot, given the individualized nature of harms actually suffered, provide average reciprocity of advantage. Some properties, like the Plaintiffs, will suffer the severe harms of industrial pollution. Other properties face little risk of harmful invasions by their neighbors. Even though the common law remedies would

be preempted for all property owners in Iowa under the lower court's ruling, the individualized nature of every private nuisance, negligent action or trespass presents the classic case of "[g]overnment . . . forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

III. Courts and Judges are Peculiarly Competent to Resolve the Fact Intensive, Case by Case, Issues That Arise in Common Law Private Nuisance, Negligence and Trespass.

The individualized nature of private nuisance, negligence and trespass claims underscores why the lower court is mistaken in concluding that "the court or a jury lacks judicially discoverable and manageable standards for resolving the complex environmental issues involved in this case." (Lower court opinion at p 19.) The trial court's failure to distinguish between public nuisance and private common law remedies leads it astray.

By definition, public nuisance requires assessment of broad social impacts that are traditionally for the state legislature or Congress to decide. That is why courts have found that common law public nuisance has been displaced when there is legislation and regulation governing the same. But adjudication of private nuisance, negligence and trespass actions requires exactly the kind of specific fact finding that trial courts are experienced at

doing. Such claims are in their nature fact dependent – not the facts relating to the wisdom of various public policy alternatives, but the facts of the particular case. This is what courts do and have always done far better than the political branches of government. Indeed, the first responsibility of the judge or jury is to put all matters of politics and personal preference to the side and consider only the facts of the case at hand.

Similarly, the lower court's suggestion that the continued availability of private common law remedies "would result in a 'balkanization of clean air regulations and a confused patchwork of standards'," (lower court opinion at p. 8) is misplaced. The court quotes from *N. Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 296 (4th Cir. 2010), but that case involved displacement of common law public, not private, nuisance. "It would be odd, to say the least," wrote the Fourth Circuit, "for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds." 615 F.3d at 309. The same could be said of a judicial countermand of those permissions on common law public nuisance grounds, which is why displacement of common law public nuisance is often the right answer.

But, as the *TVA* court recognized, private nuisance is different. While the court held that North Carolina's public nuisance lawsuit that sought "to replace comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends" was preempted, 615 F.3d at 304, it catalogued other remedies available to the state and noted that its "list of possible remedies does not even include private law remedies . . . " 615 F.3d at 311. Repeatedly, the *TVA* Court is explicit in stating that the issue in the case is CAA preemption of a public nuisance cause of action.

There is no conflict between the CAA and the Iowa Code Chapter 455B on the one hand and private common law remedies on the other. Pollution not regulated or prohibited by the federal or state standards might nonetheless infringe upon the rights of individual property owners. No institution of government is better positioned than the courts to determine when such infringements have occurred and what remedy is appropriate.

IV. This Court Should Find That, Because the CAA and Iowa Code Chapter 455B do not Provide Substitute Remedies that Could be Said to Constitute Just Compensation, Congress and the Iowa General Assembly did not Intend to Preempt or Displace the Common Law Remedies of Nuisance, Negligence and Trespass.

It might be argued that generally cleaner air promised by the CAA compensates for loss of common law remedies, but there is no better evidence of the lack of just compensation than the fact that the CAA and the corresponding Iowa statute have failed to protect Plaintiffs from Defendant's pollution that clearly constitutes a private nuisance under common law.

The central error in the lower court's argument is made crystal clear in this surprising statement in the penultimate paragraph of its opinion: "[W]hen an individual's rights to seek damages for economic or physical harm conflict with the economic well-being of a large local employer, those rights must be carefully weighed and reconciled through political compromises achieved by the legislative and rule-making processes." (Lower court opinion at p. 22.)

The statement is surprising in two respects. It totally ignores the federalism issues inherent in this case, though not addressed in this brief. It also ignores the fundamental difference between private and public nuisance. If the court had reference to the displacement of a common law public nuisance claim by state legislation or state administrative regulations,

the lower court's statement would be apropos. But as this Court has held in the aforementioned *Bormann* and *Gacke* cases, constitutionally guaranteed private rights may not be sacrificed to political compromise. To hold otherwise is to deny the existence of those rights and the primacy of the U.S. and Iowa constitutions.

Rather than rule that the CAA and the Iowa Code Chapter 455B preempt and displace the private common law remedies of nuisance, negligence and trespass with the result that Plaintiffs' property rights are taken, the lower court should have presumed that Congress and the Iowa General Assembly did not intend to infringe constitutionally protected property rights and thus incur liability for the resultant losses.

V. In Determining Whether the CAA or Iowa Code Chapter 455B Preempt or Displace Common Law Remedies of Nuisance, Negligence or Trespass, it Should be Presumed that Congress and the Iowa General Assembly Have Not Intentionally Violated the Constitutional Rights of Iowa Property Owners.

The lower court's holdings that the CAA and Iowa Code Chapter 455B preempt or displace Iowa common law remedies take from Plaintiffs their constitutionally protected property right to be free from harmful nuisance, negligence and trespass. Reversing those holdings will restore Plaintiffs' property rights without negatively affecting the achievement of the purposes of the CAA or Iowa Code Chapter 455B. Indeed, restoring

Plaintiffs' common law rights will contribute to the fulfillment of the CAA's public mission by allowing private actions to limit pollution where the general emissions standards of the CAA and Chapter 455B fail to protect the rights of particular property owners.

In deference to Congress, and out of respect for the constitutional separation of powers, the U.S. Supreme Court has stated on various occasions that the courts should presume that Congress has acted constitutionally. *See e.g., Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827); *United States v. Morrison*, 529 U.S. 598, 607 (2000). Often this presumption is understood to place the burden of proving unconstitutionality on the party objecting to laws or regulations claimed to violate individual liberties. But it would be incongruous for this presumption to be applied so as to limit the rights guaranteed by the Constitution. To the contrary, in a government instituted to secure the unalienable rights of its citizens, a presumption of constitutionality must encompass a parallel presumption that Congress and state governments act, and intend to act, consistent with their constitutional responsibilities.

Whether or not the preemption or displacement of the common law remedies sought by the Plaintiffs constitute a taking for which just compensation is due is not a question to be resolved in this case to which

neither the United States nor Iowa are parties. However, that does not mean the takings issue is irrelevant to the questions that are before this Court. If the displacement of any of the common law remedies of nuisance, negligence or trespass would result in a taking, this Court should reverse the lower court's holding with respect to preemption and displacement on the ground that Congress and the Iowa General Assembly must be presumed to act in conformance with their responsibilities to respect the constitutional rights of Iowa property owners.

The general presumption of constitutionality makes sense only if courts assume that the coordinate branches of government respect the constitutional limits of their powers. In interpreting the CAA and the Iowa Code Chapter 455B, this Court should assume that neither Congress nor the Iowa General Assembly intended to violate their constitutional responsibilities by taking the property rights of citizens.

VI. Cases Finding Statutory and Regulatory Preemption or Displacement of Federal Common Law Public Nuisance Remedies are not Precedent for Statutory and Regulatory Displacement of the Common Law Remedies of Private Nuisance, Negligence and Trespass.

The lower court relies on several cases in which common law remedies were held to be preempted or displaced by legislation. Most of the referenced cases are not relevant to this case because they relate only to

federal common law or to state common law public nuisance. Unlike the private nuisance, negligence and trespass claims asserted by Plaintiffs in this case, preemption or displacement of federal common law or state law public nuisance implicates no private rights.

This fundamental distinction between public and private nuisance is recognized by this Court:

> There are public nuisances, and there are private nuisances. A public or common nuisance is a species of catchall criminal offenses, consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures. *Prosser and Keeton,* at 618. A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land. *Id.*

Guzman v. Des Moines Hotel Partners, Ltd. Partnership, 489 N.W.2d 7, 10 (Iowa 1992). Because public nuisances offend public rights, displacement of common law public nuisance actions with legislative and regulatory remedies puts no constitutionally guaranteed private rights at risk. The displacement of common law public nuisance by statutes and regulations enacted by the representatives of the public simply reaffirms those public rights and deprives no one of their constitutional liberties. However, the displacement of common law private nuisance, negligence or trespass will deprive property owners of their rights, unless the displacing statutory or regulatory remedies can be said to be compensating substitutes for the

displaced common law remedies. The court below fails to recognize this important difference.

The lower court relies on *American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011), in which the U.S. Supreme Court held that the CAA displaces any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. In reaching this conclusion the Supreme Court relied on its earlier decision in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), in which it held that amendments to the Federal Water Pollution Control Act displaced a federal common law claim previously recognized in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Considering the two *Milwaukee* decisions in chronological order serves to underscore the distinction between displacement of federal common law, on the one hand, and preemption or displacement of state common law actions in private nuisance, negligence and trespass, on the other. In *Milwaukee I* the Court held that the Federal Water Pollution Control Act effectively permitted courts to develop a federal common law of environmental pollution. In *Milwaukee II* the Court held that, through amendments to the FWPCA, Congress had displaced at least some of the federal common law approved in *Milwaukee I*. Given that the federal

common law of *Milwaukee I* was held to be authorized by Congress in the FWPCA, there could be no other result in *Milwaukee II* than that Congress can displace whatever federal common law the courts may have developed pursuant to the Act. Indeed, the Court in *Milwaukee I* stated exactly that: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107.

In numerous cases the Supreme Court has made clear that the "federal common law of nuisance" recognized in *Milwaukee I* and found displaced in *Milwaukee II* and *American Electric Power* is akin to the public nuisance of state common law. *New York v. New Jersey*, 256 U.S. 296, 313 (1921); *North Dakota v. Minnesota*, 263 U.S. 365, 374, 44 S.Ct. 138, 139, 68 L.Ed. 342 (1923); *New Jersey v. New York City*, 283 U.S. 473, 481, 482, 51 S.Ct. 519, 521, 75 L.Ed. 1176 (1931); *Missouri v. Illinois*, 200 U.S. 496, 520-521, 26 S.Ct. 268, 269-270, 50 L.Ed. 572 (1906). The alleged harm in such actions is to the public in general, not to individual property owners. Much modern regulation enacted by Congress and state legislatures supplements and often displaces judge made rules intended to protect public rights and interests. In a democratic republic the legislature must have authority to displace those judge made rules.

The judge made rules of private rights – the common law of private nuisance, negligence and trespass – are different. Though Congress can regulate the exercise of private rights pursuant to its enumerated powers, and states may do the same pursuant to their police powers, neither Congress nor the states can do so in a manner that infringes the constitutional liberties of citizens. The U.S. and Iowa Constitutions guarantee that Plaintiffs' properties will not be taken, except for a public use and with just compensation. There can be no doubt that Congress and the Iowa General Assembly have authority to regulate air pollution and that doing so serves a public purpose. But if Plaintiffs' properties are taken as a result, compensation must be paid or the offending regulations must be repealed.

The lower court does cite two cases in which private common law remedies were held to be preempted by the CAA. In *Bell v. Cheswick Generating Station*, 903 F. Supp.2d 314 (2012), the court ruled that the plaintiffs' common law claims (public and private) were preempted, but the court relied largely on other cases (including *American Electric Power* and *TVA*) that dealt only with preemption of common law public nuisance. More significantly, the *Bell* court declined to consider plaintiffs' private injury claims while focusing exclusively on questions relevant to public nuisance on the ground that it was constrained by the "four corners" of plaintiffs'

complaint. *Id*. at 320. In *Comer v. Murphy Oil USA, Inc*., 839 F.Supp.2d 849 (2012), the court also found CAA preemption of common law private nuisance, negligence and trespass claims, but the focus was again on plaintiffs' demand for emissions regulation and their failure to plead facts sufficient to prove causation of the private harms alleged. Thus, although both *Bell* and *Comer* purport to find CAA preemption of common law private nuisance, negligence and trespass, both cases rely almost exclusively on factors relating to public nuisance.

Following on *Bell* and *Comer*, the lower court dismisses Plaintiffs' private nuisance, negligence and trespass claims on the ground that, "Plaintiffs are asking the jury to make a judgment about the reasonableness of Defendant's air emissions." If that were the case, their claim would sound of public nuisance and the Court could properly conclude that it is preempted or displaced by the CAA and the Iowa Code Chapter 455B. But the Plaintiffs have alleged private injuries that can be remedied by injunction and/or financial compensation. The fact that Defendant's emissions are the alleged source of the harm means only that Defendant would have to regulate its own emissions (as it has always been required to do under the common law) if it desires to limit or avoid future damages.

CONCLUSION

If upheld, the lower court's ruling that the CAA and Iowa Code Chapter 455B preempt or displace common law private nuisance, negligence and trespass remedies means that the CAA and Chapter 455B deprive Plaintiffs of their constitutionally protected property rights. Whether that taking is understood to result from the lower court's ruling or from the CAA and Iowa Code Chapter 455B as interpreted by the lower court matters not. Either way, long vested property rights to be free from trespass by others and from nuisances caused by others are taken.

Rather than affirm a ruling that results in an unconstitutional taking of private property, this court should presume that Congress and the Iowa General Assembly intended to act within their constitutional responsibilities and reverse the lower court's holding on preemption and displacement of Plaintiffs' common law remedies.

Dated this 26th day of July, 2013.

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Dated this 26th day of July, 2013.

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