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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38510

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

HON. MATTHEW WILSON, First Judicial District Court Judge, et al.,

Respondents,

And

PEREZ ENTERPRISES, LLC, et al.,

Real Parties in Interest.

REAL PARTIES IN INTEREST'S ANSWER BRIEF

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INTRODUCTION

The government ends its introduction of the arguments before the Court with a most telling misrepresentation of reality, which should crystallize for this Court exactly why this Court should not wade deeply in the waters as requested by the Petition when it states "[t]his concern is not academic; here, the State would be forced to choose between incurring enormous potential liability from the **indirect** effects of public health laws and abandoning regulations that save lives." BIC at pg. 4 (emphasis added). Putting aside how utterly ridiculous it is to argue that because they have to pay for the damages they have **directly** caused, instead of other government expenditures that they prefer to spend the public's monies on, lest more people die, this Court should first examine the idea that these are indirect effects. Not one of the cases before the Court in this Petition alleges that these are purely indirect effects. Quite to the contrary, each of these cases alleges that the effects, at least in major part, are the direct result of being ordered by one of the public health orders to take some direct action with the citizens' property, up to shuttering the businesses indefinitely. These are <u>not</u> mere regulations that indirectly impact these citizens' ability to use their property to earn a living; these are direct orders that carry with them the threat of great fines and jailing if the citizen does not take the action required by the order. And then to argue that when they have trampled the citizens' liberty in such a fashion as to destroy their livelihoods, that to require the government

to pay for its use of such destructive power would cost lives is, frankly, reprehensible and should not be countenanced in America.

Justice Gorsuch's recent concurrence admonishing the infringement on the First Amendment by the Governor of New York, should be persuasive to this Court in the context of the Fifth Amendment and the protections of our New Mexico Constitution when he states unequivocally that:

> The parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long.
>
> It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Roman Catholic Diocese of Brooklyn v. Cuomo, 2020 WL 6948354, at *7 (U.S. Nov. 25, 2020). Here in New Mexico, the government has made a choice, they chose to believe that unless they seized control of the citizens' lives and properties, like those of Real Parties in Interest here, that people could not be trusted to make decisions for their own lives that would combat the spread of the virus adequately. Perhaps the government was right, but right or wrong is, to a large extent, irrelevant to issue before the Court, because without question exerting that kind of power to take away liberty has always had a price tag in our Republic. The government made the

decision to own that decision and now they run to this Court to avoid paying for what they bought. This Court should not excuse them from the bill, merely because they had noble intentions, that is simply not a result that our Constitutions, our laws our jurisprudence or our people will tolerate. The government is right, this is not academic, this is the real world and here, its choices, however well-intentioned, damaged people, it is time they take responsibility for their choices.

ARGUMENT

I. These are Not Typical Takings Cases and Require Deeper Analysis, Not to Mention Actual Factual Development

Beyond a doubt this Court faces a difficult question, a strong public interest in combating the spread of a disease that at the onset presented emergent concerns coupled with a lack of scientific information, combined with a lack of faith in the ability of the people to achieve that objective without government control of their individual choices, led the New Mexico government to seize control of unprecedented amounts of her people's fundamental liberties and their property. Such heavy-handed deprivations by state governments are largely unprecedented in our Nation's history, even in times of great uncertainty such as war or even during smallpox or the Spanish flu. Luckily, New Mexico's history enjoys none of the blackmarks such as the one made by the federal government in the 1940's to lock up Japanese Americans in internment camps, thus, this Court should be hesitant before issuing a decision in this matter that could become as ill-regarded as the United

States Supreme Court decision in *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The New Mexico government's decision to lock up her citizens inside their homes and to seize control of their business – in the case of some of the Real Parties in Interest in this proceeding completely and indefinitely – may be viewed through the lens of history as the right decision for the state based upon the threat of the pandemic, but what history will most certainly not reflect kindly on would be this Court's decision to adopt the position of Petitioners - that because they were exercising police power for the common good of combating a disease, they owe no responsibility to the citizens for making these decisions for people collectively in the public's interest to take or damage individuals' property and livelihoods. Taking such actions, as was done in 2020, without providing for the indemnification of the damage done is, frankly, directly contrary to the pattern of the American system of government as recognized by the author of the Fifth Amendment, James Madison writing:

> [T]hat is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.
> …
> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in

> the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.[1]

Thus, in reviewing this matter to see whether the government of New Mexico may be held liable for seizing control of a citizen's property or damaging the same in such an unprecedent manner and scale without providing just compensation, this Court must evaluate whether or not such actions comport with the notions upon which our Nation was founded and upon which form the basis for the United States Constitution. After all, this Court cannot construe the New Mexico Constitution nor the statutes of this State in a manner that is inconsistent with those principles as is requested by Petitioners. For example, Alexander Hamilton declared during the Constitutional Convention that "[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property . . . ." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farranded., 1937). In Federalist 70, Hamilton argues that energy in the executive is essential "to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice . . . ."[2] Madison, in Federalist 54, argues that

[1] *See* James Madison, Property, NAT'L GAZETTE, Mar. 27, 1792, in 14 J. MADISON,THE PAPERS OF JAMES MADISON 266-67 (R. Rutland & T. Mason eds., 1983)

[2] THE FEDERALISTNO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed.,1961)

"government is instituted no less for the protection of the property, than of the persons of individuals."[3]

Thus, deprivations of property at the unprecedent levels experienced in 2020 by citizens such as the Real Parties in Interest here cannot simply be dispensed with by dismissing them as regulatory police exercise and therefore ineligible for compensation. In fact, such an interpretation of the law on such a large scale can only yield an absurd result that is directly contrary to the bedrock principles that form the basis for our laws as stated in William Blackstone's Commentaries that:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

[3]THE FEDERALIST NO. 54, at 370 (James Madison) (Jacob E. Cooke ed., 1961).

See 1 WILLIAM BLACKSTONE, COMMENTARIES *135. Thus, making it clear that though New Mexico's government is entrusted to seize or damage private property to combat the spread of Covid-19, however, that if they go too far in that taking of property, they may not do so without providing just compensation. This is consistent U.S. Supreme Court's hold in *Pennsylvania Coal Corp. v. Mahon*. In *Mahon*, Justice Holmes, writing for the majority, declared:

> Government 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. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922).

Thus, while it is arguable that for a short duration of time in a limited manner for the police powers to override the requirement for just compensation to be paid to business owners to have their property seized or damaged in order to stop the spread of Covid, such an imposition can only plausibly be justified in April or maybe even into May; but beyond that it becomes a fact specific determination for which no factual development yet exists in these cases, almost identically as the issue was presented to this Court but declined in *Lujan Grisham v. Reeb,* wherein the Court

acknowledged that a takings inquiry required "…complex factual assessments of the purposes and economic effects of government actions" to which this Court declined to entertain the takings claim as "insufficient facts to resolve the issue had been presented to the Court. *Grisham v. Reeb,* 2020 WL 6538329, at *3 (N.M. Nov. 5, 2020). The matter before the Court bears many similarities to that of *Reeb* in the factual development arena. Each of the fourteen cases has vastly different damages, as some business were temporarily closed, while others have been closed since the onset of the public health orders beginning with the one on March 23, 2020. Moreover, for this Court to attempt to determine if a valid regulatory takings claims was present, at this juncture, would run this Court squarely afoul of recognized pleading standards in a takings case to attempt to engage in a *Penn Central* analysis before any factual record had been developed; contrary to the fact that federal appellate courts routinely explain that the "standard for determining whether a regulatory taking has occurred is both fact-intensive and case-specific." *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172 (2005) (citing *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336–37, 342 (2002)); *see also Gardens v. United States*, No. 93-655, 2014 U.S. Claims LEXIS 925, at *11 (Fed. Cl. Sept. 5, 2014) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (referring to regulatory taking claims as "essentially ad hoc, factual inquiries.")) ("Regulatory takings claims are fact intensive cases.")

More importantly, these cases are not just read against the historical underpinning of the Fifth Amendment to the United States Constitution, they must be read against the plain language of our New Mexico Constitution's Article 2, § 20 as it was originally intended stating that "private property shall not be taken *or damaged* for public use without just compensation." *Id.* (emphasis added). It is beyond argument that the addition of the words "or damaged" at the adoption of the New Mexico Bill of Rights in 1912, is different from the words of 1789 that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, and that a greater level of protection was intended for the private property of citizens of New Mexico lowering the threshold for diminution to include something less than complete seizure for the requirement of just compensation to be triggered. Again, just like the Supreme Court in *Penn Central*, this Court has outlined a test that requires a fact-specific case by case evaluation to determine whether or not compensation is required for damage to property. This Court held that:

> It is the law of New Mexico, regardless of what other jurisdictions have held, that a condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, **unless** the period of construction was unduly long or the conduct of the condemnor causing the loss was unreasonable, arbitrary or capricious.

State ex rel. State Highway Dept. v. Kistler-Collister Co., Inc., 1975-NMSC-039, ¶ 21, 88 N.M. 221, 226, 539 P.2d 611, 616 (emphasis added); *citing Hill v. State*

Highway Commission, 85 N.M. 689, 516 P.2d 199 (1973). Thus, the loss of access of the public to these businesses in this instance is not caused by construction, but it is clearly caused by public health orders requiring the shuttering or limitation of access under the public health orders addressed to the pandemic, which requires, just the same, that the courts must make a fact specific inquiry into the duration of the closure to see if was unduly long and to the conduct of the government to see if it is unreasonable, arbitrary or capricious. Each of these businesses closed or damaged here, allegedly on the basis of science, presents a different stick by which to measure the duration of the limitation to see if was unduly long. Moreover, each of these businesses closed or damaged before the Court, allegedly on the basis of science, presents a different stick by which to measure whether the conduct of limiting or closing their businesses was unreasonable, arbitrary or capricious.

Importantly, determining whether or not the conduct of the government undertaken here was unreasonable, arbitrary or capricious is also the inquiry that must be accomplished to determine whether or not the actions of the government were lawful. The Real Parties in Interest in these cases, including the Hinkle Real Party in Interest which is also a party to a pending federal case, have alleged that the actions of the government are not lawful because they violate the Fourteenth Amendment to the United States Constitution. Again, whether or not the government's actions are arbitrary and capricious is a fact specific inquiry that

requires looking at the data relied upon by the government to see if it supports a rational speculation or instead results in an irrational speculation. Real Parties in Interest acknowledge that at the onset, when the gravity of the threat was unknown and information was scarce as to how to combat the spread of the virus, that COVID-19 presented an emergent crisis that justified to a certain extent drastic measures such that for a short time it was necessary to subordinate individual liberties and the people's livelihoods under the rubric of *Jacobson v. Massachusetts,* 197 U.S. 11, 31 (1905). COVID-19 is certainly a grave concern, just like smallpox was, and the exercise of infringement into personal liberty by the government of requiring a vaccine as considered in *Jacobson* stands on solid ground without a doubt. But it is a far cry between the succinct invasion of the person's body to require a vaccine and indefinitely suspending constitutionally protected liberties and confiscating property to call that rational.

Moreover, allowing the government to ignore data to continue to justify suppression of liberty is inconsistent with *Jacobson* and is the epitome of arbitrary and capricious actions. In evaluating whether the actions of the government are lawful under the United States Constitution we are now well into the realm that the *Jacobson* Court cautioned of, stating:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local

> body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38, 25 S.Ct. 358. Here again, without the benefit of factual development before the district courts, Petitioners ask this Court to make a *Jacobson* based ruling reached in reliance on a lack of data, based upon facts about the dangerousness of the pandemic from the beginning of the pandemic, to justify ignoring scientific data collected in New Mexico nine months after the pandemic began. In one particular case evaluating this concept, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, (Jul. 24, 2020), Justice Alito's dissent (joined by Justices Thomas and Kavanaugh) casts doubt on whether *Jacobson* can, consistent with modern jurisprudence, be applied to establish a diminished, overly deferential, level of constitutional review of emergency health measures that are imposed months into a public health concern with no end in sight. In arguing that the Supreme Court should have granted the requested injunction, Justice Alito stated: "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Id.* at 2604. Justice Alito pointed out:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and

> those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Id. at 2604 (2020). Of course, that also means the protection of property under the Fifth Amendment. That was July, this is December, this Court cannot simply ratify decisions reached under different circumstances as lawful to justify the seizure and damage of property without just compensation and remain consistent with the Constitution or even *Jacobson* as we sit here today.

The Petitioners assume that it is a forgone conclusion that this Court agrees with their interpretation of the law. But, if this Court were to agree with the general expansive rule that because the taking occurred under the guise of the exercise of police powers to protect public health, this Court would be deciding that it is essentially a limitless exception which runs squarely afoul of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) and the U.S. Supreme Court's more recent decision in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36, 133 S. Ct. 511, 521, 184 L. Ed. 2d 417 (2012) abrogating that principle further. "It has been long recognized some values are enjoyed under

an implied limitation and must yield to the police power…[however], the implied limitation must have its limits or the contract and Due Process Clauses are gone." *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922). Here, there is an unresolved question (also currently pending before the Federal District) as to whether the government acted unconstitutionally in its exercise of its police powers and it cannot automatically be assumed that the character of these actions automatically places them beyond liability for just compensation for a taking. "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992). Thus, if the government's actions are unlawful because they have acted in violation of the Fourteenth Amendment when measured against the facts and science available to the government, now, not nine months ago, or if based upon those facts (yet undeveloped in these cases), that the way in which the government conducted itself was unreasonable, arbitrary or capricious, then they are not a *valid* exercise of police powers and not entitled to the presumption of being a non-compensable taking. "A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property. '[I]t is the character

of the invasion, not the amount of damage resulting from it, *150 so long as the damage is substantial, that determines the question whether it is a taking.'" *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 149–50, 98 S. Ct. 2646, 2672, 57 L. Ed. 2d 631 (1978); *citing United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746 (1917); *United States v. Causby*, 328 U.S., at 266, 66 S.Ct., at 1068. *See also Goldblatt v. Hempstead*, 369 U.S., at 594, 82 S.Ct., at 990.

II. In Intending to Grant Broad Powers to Combat a Public Health Emergency, the Legislature Also Granted a Broad Responsibility to Provide Compensation to Those Directly Deprived of Property Under Those Powers

Hopefully, without sounding too comic book-esque, it is easily accepted as true that the Legislature understood that with great power comes great responsibility. Unquestionably, the intention cannot be for the government to get great power with no responsibility for the exercise of that power. Such a notion flies in the face of the very concept of our government of the people that exists to protect the natural rights of its people. The taking of unprecedent control over and/or shutting down businesses has been determined by this Court to be a valid, lawful exercise of the State of New Mexico's governmental powers necessary to respond to a public health emergency, stating:

> We conclude that, the Governor having declared a public health emergency and having empowered the Secretary of Health to coordinate a response to the COVID-19 crisis (*see* EO 2020-004, *supra*, ¶¶ 2-3), the Secretary was authorized (under the PHERA and the PHA, concurrently) to issue emergency orders forbidding gatherings of

> people to "control and abate" the transmission of COVID-19 in locales such as restaurants.

Grisham v. Reeb, 2020 WL 6538329, at *9 (N.M. Nov. 5, 2020). This Court must then determine that it is also clear that in so acting the government is bound by NMSA §12-10A-15 adopted by the Legislature to address the exercise of those powers which states:

> The state shall pay just compensation to the owner of health care supplies, a health facility or any other property that is lawfully taken or appropriated by the secretary of health, the secretary of public safety or the director for temporary or permanent use during a public health emergency. The amount of compensation due shall be calculated in the same manner as compensation due for taking of property pursuant to nonemergency eminent domain procedures, as provided by the Eminent Domain Code; provided that the amount of compensation calculated shall include lost revenues and expenses incurred due to the taking or appropriating of property, including a health facility.

Id.

Thus, this Court having acknowledged it "liberally construe[s] Petitioners' authority under the PHERA to enable the Secretary of Health and others to manage and coordinate a response to a public health emergency such as the COVID-19 pandemic," Reeb at *8, it cannot consistently now interpret the responsibility associated to the exercise of those powers narrowly to find that § 12-10A-15 does provide for a waiver of the police powers exception to responsibility to provide just compensation for property taken and damaged under those powers. Petitioners have previously sought, and this Court has agreed, that when it comes to interpreting the PHERA that the *act* – not just some portions of the act - should be construed liberally

and broad. Indeed, this Court has stated "[t]his interpretation is consistent with the liberal construction given to statutes enacted for the protection of public health during an emergency. Reeb at *8; *citing Srader v. Pecos Constr. Co.*, 1963-NMSC-010, ¶ 12, 71 N.M. 320, 325, 378 P.2d 364. Thus, reading § 12-10A-15 in harmony with the broad interpretation that the Legislature intend to grant broad powers in the PHERA and PHA, the Petitioners' request to so narrowly read a portion of those acts would be wholly inconsistent with reading the statutes together in a way that facilitates their operation and the achievement of their goals. *See Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350. After all, a chief complaint of the Governor has been for months that individuals have refused to comply with the shutdown orders and that belies that she failed to realize that it was, in part, her own actions at issue in this Petition to withhold just compensation after shutting down and damaging these people's livelihoods that is driving the non-compliance. Faced with orders closing your business corresponding with statements that the government will take no responsibility for the damage done, nor provide just compensation for the loss even though it is provided for in the law, it is entirely understandable that a great number of people acting out of survival instinct have refused to comply with the orders.

Moreover, the *ejusdem generis* argument lacks merit on its face. Petitioner would have this Court agree with a reading that would potentially yield an absurd

result that would limit their authority to seize control of a great and extensive variety of businesses that are necessary for combating the public health crisis. For example, it may, even now, become necessary for the government to seize a cold storage facility used for meat packing to store the vaccine and refrigerated trucks to transport the vaccine to places where it is needed in New Mexico. Clearly if the Legislature intended that these types of property/businesses - which are not at all health care or health care supply facilities - to be subject to the broad power of condemnation for the public good of combating the crisis, the Legislature intended that such a business was one of the "any other business[es]" that should be indemnified for that seizure. Likewise, seizing control of an "other business" engaged in close contact recreation to shutter it indefinitely in order to combat the spread of the virus must have been part of the broad contemplation of the Legislature for just compensation. Any other reading is plainly incongruent with basic common sense. Therefore, for the Petitioners to argue that the police powers granted to them by the Legislature under PHERA exempt them from liability from any taking, not just a regulatory taking, but a physical taking without providing just compensation beyond peradventure by narrowly construing one statute in the act under *ejusdem generis,* is not supported by this Court's standards for interpretation of statutes.

III. Asking for Enforcement of an Administrative Process that is Clearly Futile as the Attorney General Does Here with Unclean Hands is Nothing But Disingenuous.

It should be abundantly clear to the Court that even prior to *Reeb* the Attorney General's preliminary determination was that <u>no business other than one that provides health care supplies or a health care facility</u> are eligible for just compensation. That initial determination is so clear that the Attorney's General's Office has taken no steps whatsoever to establish the administrative process, that he now argues must be exhausted before proceeding to Court. It is, in fact, hard to fathom a clearer example of legal futility. Arguably, if this Court consistently construes the act to find that these takings are, initially pursuant to the Constitutions and § 12-10A-15 and until a showing of proof to the contrary, a compensable taking, to reverse the Attorney General's preliminary determination, a proper course would be to remand these cases back to an administrative process that the Attorney General is ordered to establish consistent with his responsibilities under § 12-10A-15(B). However, for the time being it is inarguable that Attorney General has not already made his preliminary determination under the statute and effectively all of these cases are already on appeal. The Petitioners should not be rewarded for coming to the Court with the unclean hands of having refused to establish an administrative process after they have already apprised the Court that they have preliminarily determined that these are not compensable takings under the statute.

CONCLUSION

Proper factual development in the matters before the Court has not yet occurred. Furthermore, the PHERA statute clearly provides for compensation when the actions taken pursuant to the act directly shutter businesses in order to protect the public health. However, if PHERA does not apply then this Court must find that these are not ready for review by this Court and any attempts to abridge the typical course for this litigation runs this Court squarely afoul of its own previous holdings and the clear holdings of the United States Supreme Court. If the State of New Mexico can afford to litigate enforcement of its public health orders as they are doing in just as many cases as the number forming the basis for this Petition, then they most assuredly can afford to honestly litigate to the proper answer to these cases in front of the district courts. This Court should again decline to exercise superintending control.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I certify that this Petition complies with the type-volume, font size, and word limitations set forth in Rule 12-504(G)(3) NMRA. The body of this Petitions is in 14-point, Times New Roman font and contains 6,211 words, according to a count by Microsoft Word 2018.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

CERTIFICATE OF SERVICE

I certify that on December 22, 2020, I caused a true and correct copy of the foregoing Response to Petition for Writ to be served by email upon Petitioners and Respondents either through their counsel of record and/or using the email addresses below.

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