IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38510

STATE OF NEW MEXICO,
KATHYLEEN KUNKEL,
in her official capacity as the
Secretary of the Department of Health,
MICHELLE LUJAN GRISHAN,
In her official capacity as the Governor
Of New Mexico,

Petitioners,

v.

HON. MATTHEW WILSON,
First Judicial District Court Judge,
HON. ERIN B. O'CONNELL,
Second Judicial District Court Judge,
HON. BEATRICE J. BRICKHOUSE,
Second Judicial District Court Judge,
HON. MARCI BEYER,
Third Judicial District Court Judge,
HON. JARED G. KALLUNKI,
Fifth Judicial District Court Judge,
HON. THOMAS E. LILLEY,
Fifth Judicial District Court Judge,
HON. MATTHEW G. REYNOLDS,
Seventh Judicial District Court Judge,
HON. MATTHEW E. CHANDLER,
Ninth Judicial District Court Judge,
HON. DAVID P. REEB,
Ninth Judicial District Court Judge,
HON. CURTIS R. GURLEY,
Eleventh Judicial District Court Judge, and
HON. ELLEN R. JESSEN,
Twelfth Judicial District Court Judge,

Respondents,

And

PEREZ ENTERPRISES, LLC,
ELITE FITNESS & TANNING, LLC,
COWBOY CAFE, LLC,
MAD MAC, LLC,
HM PROPERTIES, LLC,
CAMP2, LLC,
ELI'S BISTRO, INC.,
DAVID HETT,
SPORTS ADVENTURE,
KRK PROPERTIES, LLC,
ALLSTAR AUCTION CO., LLC,
OOPS A DAISY FLORAL LTD.,
BEDONIE CASKET LTD, CO.,
LONE TREE, INC.,
MAUGER ESTATES B&B,
GRAND AVENUE ENTERPRISES, LLC,
HINKLE FAMILY FUN CENTER, LLC,
SANTA FE OXYGEN & HEALING BAR, LLC, and
APOTHECARY RESTAURANT, LLC,

Real Parties in Interest.

RESPONSE TO PETITION

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Attorneys for Real Parties in Interest

COMES NOW, the Real Parties in Interest, by and through undersigned counsel Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq. and Jared R. Vander Dussen, Esq.) and respectfully provide their Response to the *Verified Petition for Writ of Superintending Control and Emergency Request for Stay* filed by the State of New Mexico, Secretary Kathyleen Kunkel and Governor Michelle Lujan Grisham.

ARGUMENT AGAINST GRANTING THE WRIT

The admission of petitioners that the "paramount reason" for granting the writ is "to avoid inconsistent result" is precisely the reason that should animate this court to decline to issue the writ. Petition at 12. It is also the reason why this court should decline to consolidate these cases because such an assumption is based upon the faulty premise that all of the facts are identical and the plaintiffs in these cases have only alleged a regulatory taking. Such a representation by the Petitioners here is completely incorrect and absolutely premature. It appears that the petitioners may be unfamiliar with the paramount precept of takings law, that resolution of whether the takings is physical or regulatory is a fact specific determination that is inappropriate for determination before the summary judgment phase of a case.

In fact, there are key factual differences between a physical taking and a regulatory taking. Both types of takings are highly fact intensive and this Court cannot adequately attempt, nor should it attempt at this juncture, to determine what

type of taking has occurred without the benefit of any factual development. Moreover, 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."). This Court plainly should not accept the invitation from the Petitioners to engage in *Penn Central* balancing as an override attempt to determine plausibility at the pleading stage without any factual development in the record.

Thus, despite the ridiculous assertion that 20 cases portends that the sky-is-falling, this Court should readily recognize that what Petitioners seek here is to override the independent judgment of lower court judges that is based on the

necessary fact specific evaluation of the thirteen Respondents[1] to reach the result that they want on their pending motions to dismiss; which runs this Court squarely afoul of its clearly enunciated legal precept that granting motions to dismiss is strongly disfavored. Clearly a Rule 1–012(B)(6) motion to dismiss solely tests the *legal sufficiency* of the complaint, not the factual allegations of the pleadings. *Coleman v. Eddy Potash, Inc.,* 120 N.M. 645, 650, 905 P.2d 185, 190 (1995)(emphasis added), *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.,* 2001–NMSC–034, ¶ 23 n. 3, 131 N.M. 272, 34 P.3d 1148. Because motions brought per Rule 12(b)(6) review legal sufficiency only, such motions are infrequently granted because their purpose is to *test the law of the claim, not the facts that support* it. *McCasland v. Prather,* 92 N.M. 192, 585 P.2d 336 (Ct.App.1978); *McNutt v. New Mexico State Tribune Company,* 88 N.M. 162, 538 P.2d 804 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975); *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 1978-NMCA-117, 92 N.M. 297, 300, citing *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465 (5th Cir. 1968). A Rule 12(b)(6) motion is *only* properly brought and granted by the court when plaintiff can neither recover nor obtain relief under *any*

[1] The Honorable Dustin Hunter for the Fifth Judicial District has been incorrectly omitted from this proceeding as has the Honorable David Reeb of the Ninth Judicial District that is presiding over the *Strebeck* case that has already been before this Court on this issue and where the Court has already declined to issue the writ as to the takings issue in *Lujan Gisham v. Reeb;* S-4-SC-38336.

state of facts provable under the identified claim. *Runyan v. Jaramillo,* 90 N.M. 629, 567 P.2d 478 (1977). Here, the Real Parties in Interest have alleged that a physical taking has occurred (which requires a fact specific determination on a case by case basis before you can even begin a fact specific determination of whether or not a regulatory taking occurred.)

Moreover, the Real Parties in Interest have alleged that as a matter of law that though the government may have had the authority under the law for their actions, their actions on a base level may also be unconstitutional under the Fourteenth Amendment to the United States Constitution and therefore unlawful.[2] In any event, it is clear the Legislature intended to give the government the power to shut down *any and all* business that it felt were necessary to be closed to address a public health crisis under the Public Health Emergency Response Act, and in the same act provided that *any business* that was shut down pursuant to the exercise of those police powers was entitled to just compensation for lost revenues and expenses. However, the Petitioners' stance is at direct conflict with the statute, which provides for compensation. Petitioners contend that their imposed regulations were acceptable

[2]The constitutionality of the shutdown of people's livelihoods under the Fourteenth Amendment is a matter currently pending before the United States District Court for the District of New Mexico, Exhibit 1 and has recently been addressed in *Butler et al v. Wolf et al,* in the Federal District Court of Pennsylvania and is pending before the Third Circuit Federal Court of Appeals. A copy of Judge Stickman's Memorandum Opinion and Order is attached hereto as Exhibit 2.

and legal under the police powers as granted by the PHERA, but that the plain text of the statute providing compensation under 12-10A-15 of PHERA isn't applicable to the very exercise of that power. Thus, the Petitioners argue in their Petition 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 such that the competent judges of the district courts of this state are incapable of reaching a consistent result. A more absurd interpretation of the statute is hard to fathom. Thus, if the Petitioners were being honest, what they would admit is that they don't believe that our district court judges are capable of reaching the legal conclusion that they want and that the Petitioners have previously requested from this Court, but been declined.

Finally, even if 12-10a-15 did not create an statutory waiver of the police powers exception; the police powers exception is not available to the government in this instance because their actions may be determined to be unconstitutional and therefore unlawful, which must then beg the question of what happens if this Court decides against the Petitioners? 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 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*

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. Here, there is an unresolved question (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 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. Thus, Petitioners argument that a failure of this Court to intercede into a relatively small number of cases before either our state district courts or the Federal District has had a chance to do their critical job in our judicial system betrays that they have failed to consider the inverse potential outcome, wherein this Court disagrees with Petitioners and it is made clear that the State is liable for the taking of private property without just compensation, ensuring the very flood of cases that the Petitioners attempt to worry this Court with, that 20 cases with varying outcomes based on varying facts before 17 different judges will lead to. That logic is simply backwards, clearly there is no run on the courthouses as parties wait to see the outcomes of currently pending litigation as it makes it was through the legal process.

Most importantly, there is no public health wildfire concern that goes to the concept that the government may owe just compensation for the actions it took for the public benefit to stem a public health issue. 20 cases, 19 of which are filed by one 2 lawyer law firm surely doesn't threaten to "swamp[] the courts" or much less overwhelm the resources of the State of New Mexico, especially given that the legal theory is also to some significant extent likely dependent of the success of federal litigation in cases brought by those same 2 lawyers. At the most, this Court should

stay the pending litigation in state courts while the Federal District Court evaluates the constitutionality of the due process and equal protection claims brought there in the interests of judicial economy, before returning these cases to the competent district court judges for factual development and application of the law to those developed facts. At which point consolidation may then become appropriate on appeal if the parties feel an appeal is necessary. More appropriately, this Court should have faith that our district court judges were selected by the people for this job to oversee the development of a needed factual record and to apply the precedent of our appellate Courts to those facts, Petitioners cannot demonstrate that our district court judges are not capable of handling the 20 pending cases or the matters of law before them, and at this juncture it is obvious that this Petition boils down to the very judge shopping that this Court has frowned upon in the past. Each of the facts of these cases are in fact very different; and this Court would benefit from the resolution of those disputed facts before deciding the overarching questions of law if this Court needs to exercise that appellate review. Finally, Petitioners discuss that this Petition is necessary to protect "New Mexico's economic fabric," Petition at 12, but such a policy consideration is not the purview of this branch nor of the executive branch, that is the province of the Legislature and there is absolutely no evidence whatsoever that supports that the legislative branch, with an upcoming 60-day legislative session, shouldn't be given the opportunity to craft an economic policy that

addresses these concerns.

CONCLUSION

The Court should deny the Petition.

Respectfully Submitted,

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

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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 2,174 words, according to a county by Microsoft Word 2018.

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

CERTIFICATE OF SERVICE

I certify that on October 26, 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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