IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, KATHYLEEN KUNKEL, in her official capacity as the Secretary of the Department of Health, and MICHELLE LUJAN GRISHAM, in her official Capacity as the Governor of New Mexico,

Petitioners,

S-1-SC-38510

v.

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

Respondents,

and

PEREZ ENTERPRISES, LLC, et al.,

Real Parties in Interest.

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INTRODUCTION

New Mexico faces a flurry of lawsuits around the state alleging injuries to business caused by the mass gathering restrictions in the Public Health Orders ("PHOs") designed to combat the COVID-19 pandemic. In these lawsuits, plaintiffs—the Real Parties in Interest—contend that the PHOs constitute takings of their property supporting claims for compensation under both Article II, Section 20 of the New Mexico Constitution and Section 12-10A-15 of the Public Health Emergency Response Act (PHERA), NMSA 1978, §§ 12-10A-1 to -19 (2003, as amended through 2015).

The State's Public Health Orders are an effort to preserve the health and lives of New Mexicans from a pandemic that has already caused the death of over 1,700 residents of the State, 280,000 Americans, and more than 1.5 million people worldwide. The PHOs limit the activities most likely to accelerate the spread of COVID-19 while still permitting essential activities. Because the virus that causes the disease is highly contagious, particularly among groups of people in indoor spaces, the PHOs prohibit mass gatherings of more than five people with a host of listed exceptions. Additionally, the PHOs regulate the manner in which businesses, including businesses owned by the Real

Parties, may use their property by temporarily restricting activities likely to spread COVID-19.

Due to the proliferation of cases raising similar, often identical claims for compensation as a result of the PHOs, the State, Governor Michelle Lujan Grisham, and then-Secretary of Health Kathyleen Kunkel (the "State Petitioners") petitioned for a writ of superintending control to answer in a consolidated proceeding whether such claims are subject to dismissal. The Court directed the parties to file briefs addressing the question of law raised by the petition: whether the PHOs could support a claim for just compensation under either Article II, Section 20 or Section 12-10A-15 of the PHERA. The answer is clear: Under both the Constitution and PHERA, the PHOs are not takings requiring just compensation. Thus, the State Petitioners respectfully requests that the Court hold that a takings claim may not be brought against the State based on the PHOs.

First, because the PHOs and their restrictions on mass gatherings are exercises of the State's police power, they are not takings. Under well-established law, harms caused by the exercise of the State's police power to protect public health are not compensable. This is for good reason: the State should not be hamstrung in its efforts to respond to emergencies and stop

activities that endanger the public by the prospect of liability. Additionally, even if this police power exclusion for takings claims did not apply, the PHOs would not constitute regulatory takings because they are partial, temporary restrictions on the use of property for a proper purpose.

Nor can the PHOs support a claim for compensation under PHERA. That Act's compensation provision is a limited remedy that only applies to the taking of medical facilities and supplies to provide health care during an emergency. The PHOs do not provide for the taking of medical facilities or supplies—nor have the Real Parties alleged a taking of medical facilities or supplies—and therefore PHERA's compensation scheme does not apply. A different reading of PHERA, permitting compensation for any property taken during a public health emergency, is contrary to rules of statutory construction and the purposes of the law. And even if PHERA's compensation provision did apply as broadly as the Real Parties in Interest claim, their claims must be dismissed for failure to exhaust their administrative remedies under the Act.

Were the Constitution or PHERA to permit takings claims based on the State's police powers to regulate activity that endangers public health, this specter of liability would hobble the State's ability to take emergency action—

whether destroying a burning building or prohibiting activity known to spread a pandemic—that is necessary to protect health and safety. This 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. Fortunately, neither the Constitution nor PHERA compels this choice.

SUMMARY OF PROCEEDINGS

1. The COVID-19 Pandemic.

As the Court has taken judicial notice of, COVID-19, the disease caused by the coronavirus SARS-CoV-2, is a "highly contagious and potentially fatal" disease. *Lujan Grisham v. Reeb*, 2020-NMSC-___, ¶ 23, ___ P.3d ___ (No. 38,336, Nov. 5, 2020). As of the date of filing, 1,749 New Mexicans have died of COVID-19 among over 108,000 diagnosed cases,[1] with many others suffering long-term health effects of the illness.[2] The pandemic is a global crisis, with over

[1] *Coronavirus Disease 2019 in New Mexico*, N.M. Dep't of Health, https://cv.nmhealth.org/ (last visited Dec. 7, 2020).

[2] *See* P. Belluck, *Covid Survivors With Long-Term Symptoms Need Urgent Attention, Experts Say*, N.Y. Times (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/health/covid-long-term-symptoms.html (describing NIH workshop discussing need to study long-term effects of COVID-19).

1,500,000 lives lost thus far.[3]

The nature of COVID-19 causes it to spread rapidly without protective measures. The virus "spreads through respiratory droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes."[4] "There is growing evidence that droplets and airborne particles can remain suspended in the air and be breathed in by others, and travel distances beyond 6 feet (for example, during choir practice, in restaurants, or in fitness classes). In general, indoor environments without good ventilation increase this risk."[5] Furthermore, people may be contagious 48 to 72 hours before experiencing symptoms,[6] and many may never develop

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[3] *Coronavirus Resource Center*, Johns Hopkins Univ. & Med., https://coronavirus.jhu.edu/map.html (last visited Dec. 7, 2020).

[4] *Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions*, Ctrs. for Disease Control and Prevention (Dec. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread.

[5] *Id.*

[6] *COVID-19 Basics: Symptoms, Spread and Other Essential Information About the New Coronavirus and COVID-19*, Harvard Medical School (Dec. 3, 2020), https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics.

symptoms at all,[7] making it difficult to prevent the spread of COVID-19 by only asking people with symptoms of the illness to avoid others.

The number of COVID-19 cases and deaths in New Mexico and nationwide are at record highs.[8] The illness is currently the leading cause of death in the United States.[9] In New Mexico, the strain of COVID-19 on medical care has caused hospitals to prepare to implement plans to ration care based on how likely a patient is to survive.[10]

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[7] Katie Kerwin McCrimmon, *The truth about COVID-19 and asymptomatic spread: It's common, so wear a mask and avoid large gatherings*, UCHealth Today (Nov. 5, 2020), https://www.uchealth.org/today/the-truth-about-asymptomatic-spread-of-covid-19/ (stating that studies should that at least 40-50% of people who test positive for COVID-19 have no symptoms).

[8] D. Andone & C. Maxouris, *The US Hit a Record 7-Day Average of New Covid-19 Cases as Hospitals Are Further Strained*, CNN (Dec. 5, 2020), https://www.cnn.com/2020/12/05/health/us-coronavirus-saturday/index.html; Dan McKay, *40 COVID-19 Deaths Set Another Record as Tiered Restrictions Plan Begins*, Albuquerque Journal, (Dec. 2, 2020), https://www.abqjournal.com/1522902/nm-sets-new-red-to-green-map-with-surprise-county-in-yellow.html.

[9] Adriana Diaz, *COVID-19 Was the Leading Cause of Death in the U.S. This Week, Report Says*, CBS News (Dec. 5, 2020), https://www.cbsnews.com/news/covid-19-leading-cause-of-death-united-states-this-week/.

[10] Tony Raap, *New Mexico Hospitals on Brink of Rationing Care*, Santa Fe New Mexican (Dec. 6, 2020), https://www.santafenewmexican.com/news/coronavirus/new-mexico-hospitals-on-brink-of-rationing-care/article_84cdb094-3730-11eb-8416-

2. The Public Health Orders.

To mitigate these catastrophic harms to the health of New Mexicans, the State—through the Governor and Secretary of Health—have implemented a series of Public Health Orders (PHOs). When COVID-19 was first identified as having spread to the United States, Governor Lujan Grisham declared a public health emergency under PHERA, and invoked the All Hazards Emergency Management Act (AHEMA), NMSA 1978, §§ 12-10-1 to -1 (1959, as amended through 2007), by directing all cabinets, departments, and agencies to comply with the directives of the emergency declaration and the further instructions of the Department of Health.[11]

Shortly thereafter, the Secretary of Health, Kathyleen Kunkel, issued the first in a series of PHOs encouraging New Mexicans to stay in their homes to the greatest extent possible and to practice all possible precautions when required to enter public spaces.[12] Beginning on March 23 and continuing

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334535abfbfe.html.

[11] *See* Governor Michelle Lujan Grisham, *Executive Order 2020-004* (Mar. 11, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/03/Executive-Order-2020-004-r.pdf.

[12] *See generally Public Health Orders & Executive Orders*, N.M. Dep't of Health, https://cv.nmhealth.org/public-health-orders-and-executive-orders/ (last visited Dec. 7, 2020) (collecting PHOs).

through today, the PHOs generally have prohibited "mass gatherings" defined as "any public gathering, private gathering, organized event, ceremony, parade, or other grouping that brings together five (5) or more individuals in a single room or connected space, confined outdoor space, or an open outdoor space."[13] Notwithstanding this prohibition on mass gatherings, the PHOs have generally permitted—with adjustments based on the number of COVID-19 cases in the State and developing science about the virus—defined "essential businesses" and other establishments to operate so long as they comply with certain occupancy and other restrictions that protect public health.[14]

The latest Public Health Order contains three tiers of restrictions ("Red," "Yellow," and "Green") based on the number of cases per capita and test-positivity rates in a given county.[15] Depending on the prevalence of

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[13] *See, e.g.*, Public Health Order, at 4, N.M. Dep't of Health (Mar. 23, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf.

[14] *See, e.g.,* Public Health Order, at 5-7, N.M. Dep't of Health (Apr. 11, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/04/04_11_20_PHO_Amended.pdf (listing occupancy requirements for various establishments); *see generally* N.M. Dep't of Health, *supra* note 12.

[15] Public Health Order, at 6, N.M. Dep't of Health, (Dec. 2, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/12/120220-PHO.pdf (the

COVID-19 in a county, the PHO provides different degrees of capacity limits at establishments like retail stores and restrictions on activities like indoor dining.[16] These adjustments to the PHO's restrictions are tailored to ensure that the least restrictive measures are imposed that protect the public's health.

Collectively, AHEMA, PHERA, and the Public Health Act, NMSA 1978, §§ 24-1-1 to -41 (1973, as amended through 2019), empower the Governor and Secretary of Health to protect New Mexicans in times of emergency, including as the result of a "condition of public health importance" such as the COVID-19 pandemic. *See, e.g.,* NMSA 1978, § 24-1-2(A) (2018) ("'[C]ondition of public health importance' means an infection, a disease, a syndrome, a symptom, an injury or threat that is identifiable on the individual or community level and can reasonably be expected to lead to adverse health effects in the community."). The State's authority to issue and enforce the PHOs has been upheld by the courts in the face of repeated challenges. *See, e.g.*, *Reeb*, 2020-NMSC-___, ¶ 45 (ordering the district court to resolve in the Governor's favor a challenge to the issuance of civil administrative penalties under PHERA for violations of restrictions on mass gatherings and business operations

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"Current Public Health Order").

[16] *See id.* at 7–11.

contained in PHOs); *Legacy Church v. Kunkel*, No. CIV 20-0327, ___ F. Supp. 3d. ___, 2020 WL 3963764 (D.N.M. July 13, 2020) (upholding PHOs as applied to houses of worship against First Amendment challenge); Writ of Mandamus, *State ex rel. Balderas v. Hicks*, No. S-1-SC-38279 (N.M. Sup. Ct. May 28, 2020) (ordering the respondent mayor to refrain from operating city facilities in a manner that violates the PHOs and from issuing directives that contradict the PHOs).

3. The Petition for Writ of Superintending Control.

In recent months, at least 20 cases have been filed against the State seeking compensation for takings allegedly caused by the PHOs. *See* October 5, 2020, Verified Petition for Writ Superintending Control & Emergency Request for Stay ("Petition"); *see also* Oct. 22, 2020 Letter from N. Bell to Court (identifying additional cases). The lawsuits have substantially similar allegations and seek compensation under both Article II, Section 20 of the New Mexico Constitution and Section 12-10A-15 of PHERA. Petition at 1.

The State, together with its Governor and Secretary of Health, filed a petition seeking a writ of superintending control to decide an important, preliminary question of law on which all these lawsuits—and potential future lawsuits—rest. That preliminary question is whether the PHOs can constitute

a taking for the purpose of the New Mexico Constitution or the specific compensation procedure in Section 12-10A-15. *See* Petition at 10–12. The Court ordered the State Petitioners and the Real Parties in Interest to the Petition to file briefs on this preliminary legal question, set the matter for oral argument, and stayed the underlying cases. *See* Nov. 20, 2020, Order.

ARGUMENT

I. The State's Efforts to Protect Public Health by Restricting Mass Gatherings and Regulating the Safe Operation of Businesses Cannot Support a Takings Claim Under Article II, Section 20 of the New Mexico Constitution.

Facing a deadly pandemic, the Governor and the Secretary of Health used their authority under the State's public health laws to limit the circumstances in which mass gatherings—and the associated risk of accelerating the virus's spread—may occur. This effort to protect the public health and save New Mexicans' lives is a quintessential exercise of the State's police power. When the State uses its police power to protect the health and welfare of its citizens, the State's actions do not constitute a taking. Long-established legal principles in New Mexico and at common law make clear that a government may act to protect the public—whether by quelling fires, seizing adulterated food, or here, limiting the contagion of a deadly, communicable disease—without incurring incapacitating liability.

Furthermore, even if a takings claim could be based on the PHOs, their temporary, partial restrictions of mass gatherings and business operations to preserve public health do not constitute a regulatory taking requiring compensation. Under New Mexico law, even where a regulation imposes a restriction on private property, it will not constitute a taking where it is reasonably related to a proper purpose and does not unreasonably deprive an owner of substantially all of the use of their property. The PHOs are reasonable, indeed necessary, efforts to save New Mexicans' lives and preserve medical resources. And their restrictions on mass gatherings and businesses are partial limitations on the use of property which will expire as the pandemic abates.

A. Exercises of the Police Power to Preserve Public Health Are Not Entitled to Just Compensation Under Article II, Section 20.

1. The PHO's Restrictions to Protect Public Health Are a Paradigmatic Example of the Police Power.

The protection of public health is the paramount concern of the State's police power. This power is recognized in the New Mexico Constitution as "supreme over all corporations as well as individuals." N.M. Const., art. XI, § 14. Recently, the Court recognized the police power as "the 'broadest power possessed by governments,' to protect public health and welfare." *Reeb*, 2020-NMSC-___, ¶ 14 (quoting *State ex rel. City of Albuquerque v. Lavender*, 1961-

NMSC-096, ¶ 24, 69 N.M. 220, 365 P.2d 652). And the Court has long recognized that "[s]*alus populi est suprema lex* represents the highest power possessed by the State" to which "all other guaranties, public or private must yield." *Gomez v. City of Las Vegas*, 1956-NMSC-021, ¶ 22, 61 N.M. 27, 293 P.2d 984. That is because efforts to protect the public health, or *salus populi*, are "the voice of the sovereign speaking for the safety and welfare of the whole people." *Id.*; *see also State ex rel. Hughes v. Cleveland*, 1943-NMSC-029, ¶ 34, 47 N.M. 230, 141 P.2d 192 (public health laws represent exercise of police power and are "the broadest power possessed by governments").

New Mexico is not alone in viewing public health protections as the heart of the police power. The United States Supreme Court "has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description.'" *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)); *see also Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power."). And the Supreme Court of Pennsylvania, in a challenge to that state's regulations to protect the public from COVID-19, observed that "[t]he protection of the lives

and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892 (2020), *cert. den.*, ___ U.S. ___, 2020 WL 5882242 (Oct. 5, 2020).

The restrictions on mass gatherings and business operations imposed by the PHOs are prototypical examples of valid, reasonable police powers designed to protect the public health. As discussed above, SARS-Cov-2 and its associated illness, COVID-19, is a highly contagious virus spread by people sharing the same space, particularly indoors. *See* Harvard Medical School, *supra* note 6. Preventing person-to-person transmission of the virus is particularly challenging because people are often infectious before they have symptoms of the disease, and many others may never show any symptoms at all. *See id.*; McCrimmon, *supra* note 7. Given these epidemiological facts, the PHOs seek to limit the spread of COVID-19 by reducing the number of people in particular spaces and limiting person-to-person interaction and non-essential outings. And the State's ultimate goal is compelling: to prevent the spread of a deadly virus that has already caused the death of over 1,700 New Mexicans and threatens to overwhelm health care resources if left unchecked. As a result, courts have recognized New Mexico's PHOs, and others like them, as valid exercises of the police power. *See, e.g.*, *Legacy Church, Inc. v. Kunkel*,

455 F. Supp. 3d 1100, 1146 (D.N.M. 2020); *Friends of Danny DeVito*, 227 A.3d at 895–96 (Pennsylvania's COVID-19 executive order "constitutes a classic example of the use of the police power").

The Legislature's explicit authorization to restrict mass gatherings and business operations in response to a public health emergency underscores that such actions are a valid exercise of the police power. "The Legislature is the proper branch of government to determine what should be proscribed under the police power." *Alber v. Nolle*, 1982-NMCA-085, ¶ 24, 98 N.M. 100, 645 P.2d 456; *see also Reeb*, 2020-NMSC-___, ¶ 14 (stating that "the New Mexico Legislature possesses the police power"). The Legislature has exercised its authority under the police power to allow the Department of Health to "close any public place and forbid gatherings of people when necessary for the protection of the public health." NMSA 1978, § 24-1-3(E) (2017). The PHOs are the exercise of this express legislative authority to "close any public place and forbid gatherings" and thus not only within the definition of police power provided in legal precedent, but the specific delegation of police power provided by the Legislature.

2. Valid Exercises of the Police Power Cannot Support a Takings Claim.

Because the PHOs are valid exercises of the State's police power, they cannot support a claim for just compensation under Article II, Section 20. It is black-letter law in New Mexico that "injury that results from the proper exercise of the police power is not compensable." *State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, ¶ 9, 83 N.M. 755, 497 P.2d 966. If this were otherwise, the State would be severely hamstrung in all of its efforts to protect public health and safety that could affect people's property use. Even fire safety laws, such as sprinkler requirements, or food safety laws that impose hygiene standards could restrict the use or reduce the value of property and trigger a takings claim. As a consequence, the State would need to second-guess each action and freeze its emergency responses to consider whether the actions it takes to protect the lives and health of its citizens might be too costly. *See Oregon Rest. & Lodging Ass'n v. Brown*, No. 3:20-CV-02017-YY, 2020 WL 6905319, at *6 (D. Or. Nov. 24, 2020) (recognizing COVID-19 restrictions as takings "would exceed the scope of the Takings Clause and interfere with the state's ability to protect the public health"); *TJM 64, Inc. v. Harris*, No. 2:20-CV-02498-JPM-TMP, 2020 WL 4352756, at *7 (W.D. Tenn. July 29, 2020) (labeling state's order a taking "would require the state to compensate *every* individual or property owner whose

property use was restricted for the purpose of protecting public health. This would severely limit the state's especially broad police power in responding to a health emergency.").

This Court's cases illustrate the principle that valid exercises of the police power are not takings. In *Mitchell v. City of Roswell*, the Court considered an ordinance that prohibited the keeping of livestock within parts of the city. 1941-NMSC-007, ¶ 2, 45 N.M. 92, 111 P.2d 41. The city was concerned that allowing people to keep livestock in residential and business areas would create "an unsanitary condition not conducive to the suppression of diseases." *Id.* Assessing the constitutionality of the ordinance, the Court explained that "[a]ll property and property rights are subject to the fair exercise of the police power" and that "a reasonable regulation enacted for the benefit of the public health, convenience, safety or general welfare is not an unconstitutional taking of property[.]" *Id.*, ¶ 11 (citations omitted). Here, the governmental interest in protecting public health is even more acute than in *Mitchell*, because the State is not prohibiting unsanitary conditions that may cause future disease, but attempting to battle an ongoing public health emergency.

The Court reiterated the principle that exercises of the police power are not takings in *State v. 44 Gunny Sacks of Grain*. There, a man had fed grain to

his hogs that was contaminated with mercury. The Department of Health seized and embargoed remaining sacks of the contaminated grain, and was ordered by a trial court to compensate the man from whom it had seized the grain. 1972-NMSC-033, ¶¶ 1–3, 83 N.M. 755, 497 P.2d 966. Reversing, this Court held that the seizure and destruction of "unfit or impure foods is a reasonable exercise of the right and duty of the State to protect the public health and is predicated upon the police power." *Id.*, ¶ 9. And because "[i]njury which results from the proper exercise of the police power is not compensable," "[i]t therefore follows that the State is not required to make compensation[.]" *Id.*, ¶¶ 10–11 (citations omitted).

New Mexico's courts have repeatedly held the same: that valid exercises of the police power are not takings entitled to just compensation. *See New Mexico Bd. of Examiners in Optometry v. Roberts*, 1962-NMSC-053, ¶ 20, 70 N.M. 90, 370 P.2d 811, *aff'd sub nom. Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963) ("[P]roperty and property rights are held subject to the fair exercise of the police power and a reasonable regulation enacted for the benefit of public health is not [an] unreasonable 'taking of property.'" (citation omitted)); *Bd. of County Comm'rs of Lincoln Cty. v. Harris*, 1961-NMSC-165, ¶ 10, 69 N.M. 315, 366 P.2d 710 ("[I]njury which is the result of the

proper imposition of regulations under the police power is not compensable."); *Garcia v. Vill. of Tijeras*, 1988-NMCA-090, ¶ 39, 108 N.M. 116, 767 P.3d 355 ("It is well established that property and property rights are held subject to the proper exercise of the police power" and reasonable regulation "is not an unconstitutional taking" (alterations, internal quotation marks, and citations omitted)). These cases reflect that "the police power of the state is paramount, and that in the proper exercise thereof there may be a limitation in the use of or complete destruction of private property in order to advance public welfare without the necessity of compensation to the owner." *State ex rel. State Highway Comm'n v. Town of Grants*, 1960-NMSC-004, ¶ 11, 66 N.M. 355, 348 P.2d 274.

Cases interpreting the United States Constitution also have held that the exercise of the police power that affects property interests is not a taking of property for public use that requires compensation. As early as 1887, the United States Supreme Court recognized that prohibitions "upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health . . . of the community, cannot, in any just sense, be deemed a taking[.]" *Mugler v. Kansas*, 123 U.S. 623, 668 (1887). One hundred years later, the Court reaffirmed this rule, holding that "all property . . . is held under the implied

obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987). Therefore, the Court has concluded that actions including the demolition of oil terminals during war, the removal of diseased trees, and the destruction of a building to stop a fire from spreading are not takings. *United States v. Caltex*, 344 U.S. 149 (1952) (oil terminals); *Miller v. Schoene*, 276 U.S. 272 (1928) (diseased trees); *Bowditch v. City of Boston*, 101 U.S. 16 (1880) (building in fire); *see also Blackburn v. Dare Cty.*, No. 2:20-CV-27-FL, 2020 WL 5535530, at *6–*7 (E.D.N.C. Sept. 15, 2020) (describing long history "that regulations that protect public health or prevent the spread of disease are not of such a character to work a taking" and finding emergency measures to fight COVID-19 "more compelling" than some of these historical examples).

Exercising the same governmental authority to protect the health of their people, every other state has issued a declaration of emergency and nearly every other state has imposed emergency public health orders.[17] To the State

[17] *See Status of State COVID-19 Emergency Orders*, Nat'l Governors Ass'n (Dec. 3, 2020), https://www.nga.org/state-covid-19-emergency-orders/.

Petitioners' knowledge based on a search and review of publicly available opinions, courts universally have held that the restrictions imposed in COVID-19 emergency public health orders are not takings for which a property owner is entitled to compensation. In the most prominent of these cases, the Pennsylvania Supreme Court held that the governor's closure of all non-life-sustaining businesses to reduce the spread of COVID-19 was not a taking because it "undoubtedly constitutes a classic example of the police power" and a "stop-gap measure" intended "to protect the lives and health of millions of Pennsylvania citizens." *Friends of Danny DeVito*, 227 A.3d at 895–96. Numerous courts have held similarly, rejecting takings claims based on COVID-19 public health orders.[18] Following this wealth of authority, New

[18] *See, e.g., AJE Enter. LLC v. Justice*, No. 1:20-CV-229, 2020 WL 6940381, at *7 (N.D.W. Va. Oct. 27, 2020) ("While the emergency public health orders may have impacted the revenues of plaintiffs' businesses, that impact is insufficient to establish a taking when considering the important public health protections provided by the regulation."); *TJM 64, Inc. v. Harris*, No. 2:20-CV-02498-JPM-TMP, 2020 WL 4352756, at *7 (W.D. Tenn. July 29, 2020) (COVID-19 closure orders do not take property for public use but are exercise of police power and do not require just compensation); *PCG-SP Venture I LLC v. Newsom*, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020) ("Defendants' Orders are quintessential examples of regulations that adjust the benefits and burdens of economic life to promote the common good" and thus "Plaintiff's regulatory takings claim is not likely to prevail" (internal quotation marks and citation omitted)); *Lawrence v. Colorado*, No. 1:20-cv-00862-DDD-SKC, 2020 WL 2737811, at *10 (D. Colo. Apr. 19, 2020) ("[The Defendants] are quite likely correct that temporary moratoria on

Mexico's PHOs that rest at the center of the State's police power to protect the lives and health of the public from the COVID-19 pandemic are not takings subject to just compensation.

B. The PHOs Cannot Support a Regulatory Takings Claim Because They Are Temporary, Partial Restrictions Reasonably Related to a Proper Purpose.

Even if the State's exercise of its police power to issue the PHOs restricting mass gatherings and business operations could support a takings claim, the temporary, partial restrictions in the PHOs do not meet the requirements for a regulatory taking. For most businesses, the PHOs contain only partial restrictions on their operations—notably, limits on the number of people that may be present. And while some groups of businesses, such as "close-contact recreational facilities," have been required to cease operating as such, these restrictions are temporary[19] and limited to the duration of the COVID-19 public health emergency. And the PHOs serve the proper purpose of slowing the contagion of a deadly virus. These partial, temporary restrictions

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various business activities . . . are not compensable takings[.]").

[19] *See* Current Public Health Order, *supra* note 15, at 13, ¶ 4 (order expires December 30, 2020).

designed to quell a dangerous pandemic that has already cost more than 1,700 New Mexican lives are not regulatory takings entitled to compensation.

At the outset, because the PHOs do not physically take property, any takings claim would need to meet the test for a regulatory taking. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992) ("[T]he government affects a physical taking only where it requires the landowner to submit to the physical occupation of his land."). By contrast, "[a] regulatory taking . . . occurs when the government regulates the use of land, but does not condemn it, i.e., take title to the property." *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 18, 302 P.3d 405.

Not all regulation of property is a regulatory taking. "The general rule is that a regulation which imposes a reasonable restriction on the use of private property will not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property." *Temple Baptist Church, Inc. v. City of Albuquerque*, 1982-NMSC-055, ¶ 27, 98 N.M. 138, 646 P.2d 565; *see also Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 15, 100 N.M. 342, 670 P.2d 953 ("As long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the

property owner of all or substantially all of the beneficial use of his property, it does not constitute a taking of private property pursuant to the state's police power.").[20] Significantly, this test excludes as takings the regulation of property to prohibit activities harmful to public health. "[I]f a regulation simply prohibits the use of property for purposes declared to be injurious to the health, morals or safety of the community, the prohibition cannot be deemed to be a 'taking' of property for the public benefit." *Temple Baptist Church*, 1982-NMSC-055, ¶ 27 (citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)).

The PHOs meet the two-part test in *Temple Baptist Church* for regulation that does not constitute a taking. First, the PHOs are more than "reasonably

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[20] New Mexico's test for regulatory takings differs from the three-part inquiry for regulatory takings claims under the United States Constitution, set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *See Premier Tr. Of Nevada, Inc. as Tr. Of Murtagh Nevada Tr. v. City of Albuquerque*, No. A-1-CA-34784, 2020-NMCA-___, ¶¶ 20–22, 2020 WL 6111475 (Oct. 1, 2020) (stating that New Mexico employs its own regulatory takings test distinct from *Penn Central* and that the test announced in *Temple Baptist Church* "continues to be the regulatory takings test in New Mexico"). Nonetheless, even under the ad-hoc *Penn Central* analysis courts repeatedly have rejected takings claims based on COVID-19 public health orders. *See, e.g., Bimber's Delwood, Inc. v. James,* No. 20-CV-1043S, 2020 U.S. Dist. LEXIS 195823, at **45-46 (W.D.N.Y. Oct. 21, 2020) (analyzing *Penn Central* factors and finding that they weigh against finding a regulatory taking); *Luke's Catering Serv., LLC v. Cuomo*, No. 20-CV-1086S, 2020 WL 5425008, at *12 (W.D.N.Y. Sept. 10, 2020) (same); *Leb. Valley Auto Racing Corp. v. Cuomo*, No. 1:20-CV-0804 (LEK/TWD), 2020 U.S. Dist. LEXIS 143223, at *21 (N.D.N.Y. Aug. 11, 2020) (same).

related to a proper purpose"; they are necessary actions to slow a highly contagious, highly dangerous disease that threatens to overwhelm New Mexico's medical resources. As described in greater detail above, these efforts to protect the public health and lives are valid, reasonable exercises of the State's police power. *See supra* Part I(A). For the same reasons, they are reasonably related to a proper purpose.

Second, the PHOs do not unreasonably deprive property owners of all, or substantially all, of the beneficial use of their property. In fact, in many of the Real Parties' cases, the plaintiffs challenge the regulation of business interests, not property, which does not constitute a taking at all. *See Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) ("business in the sense of the *activity of doing business*, or the *activity of making a profit* is not property"); *Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 6777590, at *5 (D. Md. Nov. 18, 2020) (Takings Clause does not protect "the liberty interest to engage in business activity").

Assuming that an actual property interest is affected in some instances by the PHOs, the PHOs do not deprive the property owner of all, or substantially all, of the beneficial use of the property because their restrictions are partial and temporary. For instance, restrictions on the number of people

who may be present in a business only serve as a partial limitation on how a property may be used. Likewise, requirements that restaurants may only serve patrons outdoors, or through takeout, only limit a property's use, and do not eliminate substantially all of its beneficial use. Even the most strictly regulated businesses, such as the "close-contact recreational facilities" that include bars, arcades, and adult entertainment venues,[21] are not properties that have lost substantially all beneficial use. While such businesses may be (temporarily) closed, the underlying property retains value and still may be used for other, less regulated (and safer) activities or businesses.

The PHOs are only partial restrictions on the beneficial use of property in another dimension: they are temporary. By their terms, the PHOs are promulgated pursuant to the declaration of a public health emergency and the Department of Health's powers during such emergencies.[22] The PHOs contain expiration dates,[23] and even during their duration now adjust restrictions based

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[21] Current Public Health Order, *supra* note 15, at 5, ¶ 5.

[22] *See id.* at 2.

[23] *See id.* at 13, ¶ 4 ("This order shall take effect at 12:00 p.m. on December 2, 2020 and remain in effect until December 30, 2020.").

on the prevalence of COVID-19 in a county.[24] Furthermore, the rollout of vaccines that promise to abate the public health emergency is already underway.[25] *See Friends of Danny DeVito*, 227 A.3d at 896 ("While the duration of COVID-19 as a natural disaster is currently unknown," a vaccine and other developments "are all viewed as the basis for ending the COVID-19 disaster."). The PHOs' temporary limitations on certain business activities during the public health emergency cannot support a regulatory taking claim. *Cf. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334–35 (2002) (nearly three-year moratorium on development did not deprive property of all value and thus did not create a categorical regulatory taking); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 156–61 (1958) (order requiring "nonessential" gold mines to cease operations temporarily was not taking). Therefore, even if the exercise of the State's police power did not exempt the PHOs from the duty to provide just compensation under Article II, Section 20,

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[24] *See id.* at 6–11.

[25] *See* Akshay Syal & Sara G. Miller, *First COVID Vaccines to Be Offered to Health Workers, Nursing Homes, CDC Panel Says*, NBC News (Dec. 1, 2020), https://www.nbcnews.com/health/health-news/advisory-panel-meets-decide-who-should-get-first-covid-vaccines-n1249569.

the partial and temporary nature of the PHOs' regulation of property cannot support a regulatory taking claim.

II. The PHOs Do Not Support Claims for Compensation Under Section 12-10A-15(A) of PHERA.

As with constitutional claims for just compensation, the PHOs cannot support statutory compensation claims under the Public Health Emergency Response Act. In the underlying actions, the Real Parties seek compensation under Section 12-10A-15(A) for alleged damages to their various business interests as a result of the PHOs' restrictions on mass gatherings and business operations. In making these claims, the Real Parties rely on a literal reading of the catchall phrase "any other property" in Section 12-10A-15(A):

> 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 [42A-1-1 to 42A-1-33 NMSA 1978]; 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.

(Emphasis added.)[26] The Real Parties contend that the phrase "any other

[26] Section 12-10A-15(A) potentially provides for substantially greater

property" applies to their business interests and that Section 12-10A-15(A) therefore requires compensation for the losses they allegedly have suffered during the course of the public health emergency.

Like their constitutional takings claims, the Real Parties' claims under Section 12-10A-15(A) are not compensable. These claims rely on the broadest-possible reading of Section 12-10A-15(A), a reading that would be contrary to established principles of statutory construction and that would result in an absurdity by thwarting the purpose and efficacy of PHERA. To allow the Real Parties' claims for just compensation to proceed would expose the State to unprecedented liability and would severely undermine any efforts to slow the spread of a contagious, deadly disease during a public health emergency.

A. Under the Rule of *Ejusdem Generis*, Just Compensation Under Section 12-10A-15(A) Is Limited to Health-Care Related Property.

In the individual lawsuits that led to this proceeding, none of the Real Parties is seeking compensation under PHERA for "health care supplies [or] health facilities" that have been taken or appropriated by the State. Instead,

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compensation than that available pursuant to a constitutional takings claim, as it includes lost revenues. *See Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 19, 146 N.M. 1, 206 P.3d 112 (holding that the proper measure of compensation for temporary takings under the New Mexico constitution is the fair rental value of the property).

their claims uniformly rely on the phrase "any other property" that serves as a catch-all to describe property that is compensable under Section 12-10A-15(A). Under the well-established rule of *ejusdem generis*, the meaning of the general language "any other property" is limited by the specific terms that precede it in the statute. Properly construed, Section 12-10A-15(A) requires compensation only for property that is used for the provision of health care pursuant to the special powers provided by PHERA during a public health emergency. *See* NMSA 1978, § 12-10A-6 (2012).

When a statute includes general words or phrases that are part of a list or series, courts have long-applied the rule of *ejusdem generis* to understand the "outer limits" of the legislature's intended meaning of the general words. *See, e.g.*, *State v. Office of Pub. Defender ex rel. Muqqdin* (*Muqqdin*), 2012-NMSC-029, ¶ 30, 285 P.3d 622 ("[*E*]*jusdem generis* is an important rule of statutory construction to be used when interpreting the outer limits of prohibited space protected by the burglary statute."); *Territory v. Jones*, 1908-NMSC-030, ¶ 12, 114 N.M. 579, 99 P. 338 ("It is a well settled rule of law that where general words of prohibition follow an enumeration of particular games or devices which are prohibited, such general words must be construed *ejusdem generis* with the games or devices which are specifically named."); *see also* 3B Norman J. Singer

and J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 73:2 (8th ed.) ("Courts construing public health statutes employ the usual maxims of construction. Ejusdem generis applies where general language is presumed to include only subjects of the class similar to those enumerated."). Demonstrating the rule's widespread acceptance, the Legislature has codified *ejusdem generis* in the Uniform Statute and Rule Construction Act as an aid to statutory construction. *See* NMSA 1978, §§ 12-2A-1 to - 20 (1997);[27] *see also Muqqdin*, 2012-NMSC-029, ¶ 31 (directing courts as a result of the adoption of the Uniform Statute and Rule Construction Act to "utilize [*ejusdem generis*] with other, similar aides to focus more precisely on the true intent and meaning of burglary and its elements").

Under the rule, "where general words follow an enumeration of persons or things of a particular and specific meaning, *the general words are not construed in their widest extent* but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned."

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[27] The provisions of the Uniform Statute and Rule Construction Act, which took effect on July 1, 1997, apply "to a statute enacted on or after the effective date of that act unless the statute or rule expressly provides otherwise, the context of its language requires otherwise or the application of that act to the statute or rule would be infeasible." Section 12-2A-1(B). The aids to construction codified in Section 12-2A-20(A) therefore apply to Section 12-10A-15(A), which was enacted as part of PHERA in 2003.

Muqqdin, 2012-NMSC-029, ¶ 29 (internal quotation marks and citation omitted) (emphasis added); *see also* § 12-2A-20(A) (providing that, in addition to a statute's text and context, "the following aids to construction may be considered in ascertaining the meaning of the text: (1) the meaning of a word or phrase may be limited by the series of words or phrases of which it is a part; and (2) the meaning of a general word or phrase following two or more specific words or phrases may be limited to the category established by the specific words or phrases").

Applied to Section 12-10A-15(A), the phrase "health care supplies, a health facility or any other property" is a paradigmatic example of "general words [that] follow an enumeration of persons or things of a particular and specific meaning." *Muqqdin*, 2012-NMSC-029, ¶ 29. Both of the phrases that precede "any other property" have particular and specific meanings under PHERA. *See* § 12-10A-3(D) (defining "health care supplies"); § 12-10A-3(E) (defining "health facility"). Accordingly, "the general words ['any other property'] are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *Muqqdin*, 2012-NMSC-029, ¶ 29. The phrase "any other property" is "limited by

the category established by the specific words or phrases." Section 12-2A-20(A)(2).

Thus, to understand the Legislature's intended meaning of "any other property" as used in Section 12-10A-15(A), the Court should identify the kind, class, or category of things established by the preceding, specific phrases "health care supplies" and "health facilities." PHERA defines "health care supplies" as "medication, durable medical equipment, instruments, linens or any other material that the state may need to use in a public health emergency, including supplies for preparedness, mitigation and recovery." Section 12-10A-3(D). Similarly, PHERA defines a "health facility" as,

> (1) a facility licensed by the state pursuant to the provisions of the Public Health Act;
> (2) a nonfederal facility or building, whether public or private, for-profit or nonprofit, that is used, operated or designed to provide health services, medical treatment, nursing services, rehabilitative services or preventive care;
> (3) a federal facility, when the appropriate federal entity provides its consent; or
> (4) the following properties when they are used for, or in connection with, health-related activities:
> (a) laboratories;
> (b) research facilities;
> (c) pharmacies;
> (d) laundry facilities;
> (e) health personnel training and lodging facilities;
> (f) patient, guest and health personnel food service facilities; and

> (g) offices or office buildings used by persons engaged in health care professions or services;

Section 12-10A-3(E). In the broadest sense, these two terms describe specific types of physical property, both real and personal, that are used in providing health care or health care services under the special powers permitted by Section 12-10A-6. *See also* NMSA 1978, § 12-2A-3(I) (1997) ("In the statutes and rules of New Mexico . . . 'property' means real and personal property[.]"). Accordingly, the phrase "any other property" was intended to describe any *other* physical property used in providing health care or health care services.

B. A Limited Construction of Section 12-10A-15(A) Also Comports with Other Rules of Statutory Construction.

This reading of PHERA also conforms with other established rules of statutory construction. For example, a literal construction of the general phrase "any other property" would swallow the specific terms "health care supplies" and "health facilities" and render them superfluous. *See, e.g.*, *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39 ("A statute must be construed so that no part of the statute is rendered surplusage or superfluous."); *see also* NMSA 1978, § 12-2A-18(A)(2) (1997) ("A statute or rule is construed, if possible, to . . . give effect to its entire text[.]"); *cf. Holguin v. Fulco Oil Servs. LLC*, 2010-NMCA-091, ¶ 23, 149 N.M. 98, 245 P.3d 42 ("If the

Legislature intended for the statute to apply to all services rendered in connection with a well, there would be no need to include the specific list of activities in subsection B.").

A properly limited construction of "any other property," read in context with the rest of the sentence, is consistent with the rule that a court "will not be bound by a literal interpretation of the words if such strict interpretation would defeat the intended object of the legislature." *State v. Nance*, 1966-NMSC-207, ¶ 15, 77 N.M. 39, 419 P.2d 242; *see also, e.g.*, *State ex rel. Helman v. Gallegos*, 1994-NMSC-23, ¶ 23, 117 N.M. 346, 871 P.2d 1352 (warning of the "beguiling simplicity" of the plain meaning rule, which "may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning"). To determine legislative intent, "[a]ll of the provisions of a statute, together with other statutes in pari materia, must be read together." *State v. Davis*. 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064. "The rule that statutes in pari materia should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature." *Id.*

Section 12-10A-15(A) was enacted in 2003 as part of PHERA and thus must be read together with the Act as a whole. PHERA gives the Secretary emergency powers to "utilize, secure or evacuate health care facilities for public use" and to "control, restrict and regulate the allocation, sale, dispensing or distribution of health care supplies." Section 12-10A-6(A), (B). Section 12-10A-15(A) is best read together with the rest of PHERA as providing compensation for the exercise of these powers to take or appropriate "health care supplies, health facilities or any other property" under Section 12-10A-6. *See also* § 12-10A-6(C) (authorizing the state medical investigator to "implement and enforce measures to provide for the safe disposal of human remains that may be reasonable and necessary to respond to a public health emergency,").

More broadly, the Court held recently that PHERA was "enacted for the protection of public health during an emergency." *Reeb*, 2020-NMSC-___, ¶ 27. As such, PHERA must be construed "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." *Id.* The Legislature's purposes in enacting the PHERA would be thwarted by a literal reading of "any other property" in Section 12-10A-15(A) that would obligate the State to pay compensation—including lost revenues, a substantial measure of compensation unavailable for

constitutional takings claims—for indirect consequences of the regulation of intangible property interests unrelated to the provision of health care or health care services. Such a sweeping reading would hamstring the Secretary of Health's ability to respond to a public health emergency and thereby "defeat the intended object of the Legislature." *Nance*, 1966-NMSC-207, ¶ 15.

This is especially true for a public health emergency involving a highly infectious, deadly disease like COVID-19. The Court has taken judicial notice "that the COVID-19 pandemic was an emergency as of March 11, 2020, and continues to be so, not only in New Mexico, but in the United States generally." *Reeb*, 2020-NMSC-___, ¶ 27. Accordingly, the Court held that "the Secretary was authorized (under the PHERA and the [Public Health Act] concurrently) to issue emergency orders forbidding gatherings of people to 'control and abate' the transmission of COVID-19 in locales such as restaurants." *Id.* ¶ 30. To now hold that the Secretary's exercise of that very authority may have exposed the State to potentially catastrophic liability under Section 12-10A-15(A) would effectively prevent her or her successors from ever exercising that authority again. Put simply, a literal reading of Section 12-10A-15(A) would force the Secretary to choose between either bankrupting the State or ignoring a serious threat to the health and safety of New Mexicans during a public health

emergency. The Legislature cannot have intended to create such a no-win situation by requiring compensation for literally "any other property" that is affected by the State's actions during a public health emergency. The Legislature would not have hidden an enormous liability for all regulation of property during a public health emergency in the catch-all language of a narrower compensation scheme. *See Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.").

As a final consideration when interpreting Section 12-10A-15(A), the Court recognized in *Reeb* that "the public and social purposes served by [public health] legislation greatly exceed the inconvenience and hardship imposed upon an individual, and therefore the former is given greater emphasis in the problem of interpretation." *Reeb*, 2020-NMSC-___, ¶ 32. Here, absent clear language imposing express liability on the State, any property rights of the individual that may be affected by the Secretary's efforts must yield to protecting the health and safety of the public. The Court should construe Section 12-10A-15(A) to effectuate the purpose of PHERA, not to create a Catch-

22 for the Secretary when carrying out her duties to protect the public during a public health emergency.

If allowed to proceed, the Real Parties' claims for compensation under Section 12-10A-15(A) would severely limit—if not effectively eliminate—the Secretary's ability to protect the public from the spread of a contagious, deadly disease like COVID-19. That result would frustrate the Legislature's intent to vest the Secretary with broad powers to protect the public during a public health emergency. Under well-established rules of statutory construction that take full account of legislative intent, Section 12-10A-15(A) limits compensation to physical property that is related to the provision of health care or health care services.

C. The Exhaustion Requirement in Section 12-10A-15 Must Be Enforced.

Even if the Court were to conclude that PHERA requires compensation for the taking of property other than that used to provide health care pursuant to the Act, the requirement to exhaust administrative remedies set forth in Section 12-10A-15(B) is a prerequisite to seeking compensation under PHERA. Section 12-10A-15(B) requires the Attorney General to "make a preliminary determination of whether or not compensation is due to an owner of health care supplies, a health facility or any other property." Subsection (B) further

provides that the owner of such property may appeal the Attorney General's initial determination "to a hearing officer appointed by the attorney general" in a proceeding that results in a record, a summary of the evidence, and a written explanation of the Attorney General's decision. Section 12-10A-15(C) provides that the Attorney General's decision "shall be subject to an appeal to the district court, pursuant to the provisions of Section 39-3-1.1 NMSA 1978." And critically, Section 39-3-1.1 applies only to an appeal from a "final decision" of an agency, defined as "an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, *once all administrative remedies available within the agency have been exhausted*." *See* NMSA 1978, § 39-3-1.1(H)(2) (1999) (emphasis added).

The failure to exhaust administrative remedies under Section 12-10A-15(B) thus forecloses any right to judicial relief under Section 12-10A-15(A). Where a plaintiff has not complied with administrative exhaustion requirements, a court must dismiss the case for lack of jurisdiction. *See In re Estate of McElveny*, 2017-NMSC-024, ¶ 23, 399 P.3d 919 ("If a statute explicitly requires a party to exhaust particular remedies as a prerequisite to judicial review . . . the statutorily mandated exhaustion requirements are jurisdictional." (internal quotation marks and citation omitted)); *see also State*

ex rel. Norvell v. Ariz. Pub. Serv. Co., 1973-NMSC-051, ¶ 31, 85 N.M. 165, 510 P.2d 98 ("'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." (quoting *U.S. v. W. Pac. RR Co.*, 352 U.S. 59 (1956)). Therefore, if this Court interprets the PHERA as the Real Parties propose, the multiple suits must be dismissed, as the district courts lack jurisdiction over PHERA compensation claims that have not first been pursued through the administrative claims process.

CONCLUSION

Therefore, the State Petitioners respectfully request that the Court hold that the State's COVID-19 Public Health Orders cannot support a takings claim under Article II, Section 20 of the New Mexico Constitution and Section 12-10A-15 of PHERA.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-318(G), I certify that this contains 8,949 words in the body of the brief, according to a count by Microsoft Word 2016.

/s/Nicholas M. Sydow
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *State Petitioners' Brief in Chief* to be served by email through the Court's electronic filing system to all counsel of record on December 7, 2020.

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