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.

STATE PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Real Parties in Interest do not challenge the fundamental legal principles that establish why the State's COVID-19 Public Health Orders cannot support a claim for compensation. When the State regulates the use of property to prevent it from being used in ways harmful to public health, that exercise of the police power is not a compensable taking under the New Mexico Constitution. Far from being at odds with property rights and constitutional tenets, this police power exception derives from the long-standing principle that property rights contain an inherent limitation not to use property in a manner that endangers others.

Certainly, the State—including the Governor and its officials—are sympathetic to the economic hardship of New Mexicans during the pandemic, including hardships imposed by the Public Health Orders. In fact, the State has designed and regularly updated the Orders to adjust to the risk of activity given the latest scientific knowledge regarding COVID-19 and measurements of the virus's prevalence in communities. [*See* BIC at 7–9.] Recently, the public health crisis has been at an apex, with 2,594 New Mexicans having died from COVID-19, an increase from 1,749 in the mere 30 days since the filing of the

Brief-in-Chief and reflecting the daily tragedy the State faces.[1] At the same time, the State and the Governor have worked to provide economic relief for New Mexicans affected by the pandemic and the State's public health response.[2] But these economic relief policies are discretionary efforts to assist the public within the State's fiscal means. There is no constitutional obligation to compensate each property owner who claims damages from the State's public health regulations during a pandemic.

Even if the Public Health Orders did not fall within the category of non-compensable, police power actions, they still do not fall within the definition of a regulatory taking under New Mexico law. The Real Parties in Interest contend that whether a regulatory taking exists is too fact-specific to be resolved by the Court in this matter. Yet, while regulatory takings claims can often be fact-intensive, common features render claims based on the Public Health Orders suitable to categorical resolution. The Orders are definitionally

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[1] *Coronavirus Disease 2019 in New Mexico*, N.M. Dep't of Health, https://cv.nmhealth.org/ (last visited Jan. 6, 2021).

[2] "Gov. Lujan Grisham Announces Special Session for State Relief for N.M. Businesses, Unemployed, More," Nov. 23, 2020, https://www.newmexico.gov/2020/11/23/gov-lujan-grisham-announces-special-session-for-state-relief-for-n-m-businesses-unemployed-more/ (last visited Jan. 6, 2021).

temporary and partial restrictions on the use of property, and thus do not meet New Mexico's test for a regulatory taking.

Similarly, the Public Health Orders cannot support a claim for compensation under PHERA. The Real Parties in Interest's position that the phrase "any other property" in the statute entitles them to compensation for the Orders' restrictions is at odds with a suite of statutory construction rules, PHERA's purpose, and this Court's opinion in *Lujan Grisham v. Reeb*, No. S-1-SC-38336, 2020-NMSC-___, ___ P.3d ___ (Nov. 5, 2020). Rather, PHERA's compensation provision is limited to property seized or commandeered by the State to provide medical care—an action the State has not taken and that the Real Parties in Interest do not allege.

ARGUMENT

I. The Real Parties in Interest Do Not Refute That the Public Health Orders Cannot Support Constitutional Claims for Just Compensation Under Well-Established New Mexico Law.

Whether viewed either through the police power exclusion or New Mexico's test for regulatory takings, the Public Health Orders ("PHOs") do not support a claim for compensation under Article II, Section 20 of the New Mexico Constitution.[3] The Real Parties in Interest ("RPIs") offer no authority to

[3] Although the Real Parties in Interest cite to the Fifth Amendment of the

refute that the proper use of the State's police power to protect public health is not a taking. Nor do the RPIs challenge the State's analysis of the factors for a regulatory taking, and that because the PHOs are temporary, partial restrictions on the use of property, they are not compensable.

A. The Real Parties' Authority Regarding Property Rights in Other Contexts and from Other Jurisdictions Does Not Refute New Mexico's Clear Exemption for Police Power Actions from Takings Claims.

It is black-letter law in New Mexico that the proper use of the police power to protect public health does not constitute a taking. [BIC at 16–19.] Instead of offering contrary New Mexico authority, RPIs reference a mélange of non-controlling, off-point authority concerning property rights. For example, the RPIs quote a concurrence by Justice Gorsuch and a dissent by Justice Alito regarding the First Amendment and relative restrictions in public health orders on houses of worship as compared to other establishments. [AB at 2, 12–13.] The RPIs also quote passages by the Founding Fathers and William Blackstone

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United States Constitution and federal law concerning takings, this proceeding solely concerns New Mexico's Constitution. [*See* Nov. 20, 2020, Order (Parties "shall file briefs . . . that address whether the [PHOs] may support a claim for just compensation under Article II, Section 20 of the New Mexico Constitution or the Public Health Emergency Response Act."). The Real Parties in Interest's claims in the underlying actions also are limited to the New Mexico Constitution.

regarding property rights that do not address the scope of police powers, let alone New Mexico law. [AB at 4–7.]

In fact, this authority is wholly compatible with New Mexico's exclusion of police power actions from compensatory takings. The long-standing rule that police power actions are not takings reflects that property rights contain inherent limitations that the property shall not be used in a manner that may injure the public. Thus, regulations that restrict the use of property in ways that endanger public health do not diminish existing property rights.

This principle underlies and is reflected in New Mexico and federal case law discussing the police power exception from takings claims. As the Court explained in *Mitchell v. City of Roswell*, "All property and property rights are held subject to the fair exercise of the police power; and a reasonable regulation enacted for the benefit of the public health . . . is not an unconstitutional taking of property . . . ." 1941-NMSC-007, ¶ 11, 45 N.M. 92, 111 P.2d 41; *see also N.M. Bd. of Examiners in Optometry v. Roberts*, 1962-NMSC-053, ¶ 20, 70 N.M. 90, 370 P.2d 811 (same), *aff'd sub nom. Head v. N.M. Bd. of Examiners in Optometry*, 374 U.S. 424 (1963). The United States Supreme Court has explained the rationale behind the police power exclusion in similar terms: "The special status of this type of state action can also be understood on the simple theory that since no

individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything . . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.20 (1987).[4] "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 491–92 (quoting *Mugler v. Kansas*, 123 U.S. 623, 664 (1887)).

There is no suggestion in New Mexico law, contrary to the RPIs' argument, that the exclusion of police power actions turns on the duration of a regulation. [*See* AB at 7–8.] Rather, even the total, permanent destruction of property that endangers public health has been deemed a non-compensable exercise of the police power. *See State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, 83 N.M. 755, 497 P.2d 966 (discussed in BIC at 17–18). By contrast, the PHOs are only temporary, partial limitations on how property may be used. [*See* BIC at 25–27.]

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[4] In the Court's earlier decision concerning takings and restrictions on subsurface coal mining cited by the RPIs, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) [*see* AB at 7], it concluded that a takings claim could proceed because the law in question "served only private interests, not health or safety" and thus "could not be 'sustained as an exercise of the police power." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 484 (quoting *Mahon*, 260 U.S. at 414).

Perhaps acknowledging that valid police power actions to protect public health are not takings, the RPIs seek to raise questions as to the validity of the PHOs as legitimate measures to protect public health. However, instead of developing any argument as to why the PHOs are invalid, the RPIs simply point to the existence of some outstanding litigation challenging the orders [AB at 10–12], notwithstanding the repeated rulings by this Court and others upholding the PHOs against statutory and constitutional challenges. [*See* BIC at 9–10.] Further, while the RPIs suggest that the developing scientific understanding of COVID-19 and a lessened crisis have undermined the need for the State's police powers [AB at 10–11], this argument lacks any authority that the danger of the public health crisis has waned or that restrictions on mass gatherings are unnecessary. To the contrary, the contagious nature of COVID-19 and its prevalence in New Mexico necessitate protective public health measures. [*See* BIC at 4–6 (discussing medical knowledge)]; *Lujan Grisham v. Reeb*, 2020-NMSC-___, ¶ 42 ("Businesses have been ordered to restrict operations due to the general risk of transmission of COVID-19, an infectious and serious—in some cases, deadly—disease, in circumstances where large groups of people are in close proximity to one another."). Nor is the State "ignor[ing] data." [AB at 11.]. Rather, the State has implemented data-

driven, carefully tailored public health orders. [BIC at 8–9]; *accord Cavalry Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting) (stating that as medical and scientific evidence becomes available, States should more carefully craft public health policies) (*quoted in* AB at 13).

The RPIs next argue that the addition of the phrase "or damaged" to the takings clause in New Mexico's Constitution compared with its federal counterpart, necessitates a broader scope of compensation. [AB at 9–10.] First, any broader scope of compensation does not apply to police power actions that are not takings in the first instance. *See supra* pp. 4–6. In fact, property can be destroyed—let alone, damaged—under the police power without compensation. *See 44 Gunny Sacks of Grain*, 1972-NMSC-033. Second, identical language regarding "damage" in other state constitutions has been interpreted as being limited to physical damages, as opposed to regulations like the PHOs. *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990) ("'[D]amage' requires a definite physical injury cognizable to the senses with a perceptible effect on the present market value[.]" (internal quotation marks and citation omitted)).

As well, the authority the RPIs rely on for compensatory damages stemming from unreasonably long restrictions on access to property is specific

to the construction context. [AB at 9–10.] Indeed, these cases expressly distinguish themselves from police power cases, which they acknowledge, do not require compensation. *See Hill v. State Highway Comm'n*, 1973-NMSC-114, ¶ 5, 85 N.M. 689, 516 P.2d 199 (discussing "line between non-compensable damages through the exercise of the police power, and damage for which payment must be made for a taking under eminent domain" and concluding that road construction fell within latter category). On the other hand, non-construction, regulatory takings claims are analyzed under the test from *Temple Baptist Church*, in which a regulation that is "reasonably related to a proper purpose" and that does not unreasonably deprive the property owner of substantially all the beneficial use of property, is not a taking. *Temple Baptist Church*, 1982-NMSC-055, ¶ 27.

Finally, the RPIs argue that under two United States Supreme Court cases, *Lucas v. South Carolina Coastal Council* and *Arkansas Game & Fish Commission v. United States*, the PHOs could constitute takings. [AB at 13–14.] Obviously, these cases do not directly bear on the New Mexico Constitution. More importantly, they concern two classes of takings—categorical regulatory takings and temporary physical takings—that are not at issue.

In *Lucas v. South Carolina Coastal Council*, the Court considered a law that totally prohibited the development of a coastal property. 505 U.S. 1003 (1992). The Court's holding "in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002). It has no application to the PHOs, which are partial, temporary restrictions on the use of property. Indeed, courts repeatedly have rejected attempts to apply *Lucas*'s rule for categorical regulatory takings to COVID-19 public health orders. *See, e.g., Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 895 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020) (finding *Tahoe-Sierra*, not *Lucas*, applicable); *PCG-SP Venture I LLC v. Newsom*, No. EDCV201138JGBKKX, 2020 WL 4344631, at *9–10 (C.D. Cal. June 23, 2020) (*Lucas* is "relatively narrow" and "relatively rare" and did not govern restrictions on hotel operations when property could be used in other ways and restrictions were temporary); *Baptiste v. Kennealy*, No. 1:20-CV-11335-MLW, 2020 WL 5751572, at *20 (D. Mass. Sept. 25, 2020) (*Lucas* categorical regulatory takings require denial of all economic use of land, and "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon

as the prohibition is lifted" (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 332 (internal quotation marks omitted))).

Arkansas Game & Fish Commission v. United States holds "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. 23, 38 (2012). The case does not address the police power's interactions with the Takings Clause. Nor does it address the regulation of property, including for public health purposes. Finally, RPIs' quotation of *Penn Central Transportation Co. v. City of New York* [AB at 14–15] is unidentified as that case's dissent. 438 U.S. 104, 149–50 (1978) (Rehnquist, J., dissenting). The majority recognized that "in instances in which . . . the health, safety, morals, or general welfare would be promoted by prohibiting particular uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests." *Id.* at 125 (internal quotation marks and citation omitted). New Mexico law recognizing that the State may regulate the use of property in ways that endanger public health, including with the PHOs, is in keeping with United States Supreme Court precedent and the principles behind property law and the Takings Clause. Therefore, even if the authority the RPIs rely upon had bearing on the legal question before the Court—rather than the directly-

applicable New Mexico precedent regarding the police power—it would still confirm that the Public Health Orders cannot support a takings claim under Article II, Section 20.

B. The Real Parties Do Not Refute the Two *Temple Baptist Church* Factors That Establish the Public Health Orders Cannot Be Regulatory Takings.

Under New Mexico's test for regulatory takings, a restriction on the use of property does not constitute a taking where it 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." [BIC at 23–24 (quoting *Temple Baptist Church*, 1982-NMSC-055, ¶ 27).] The RPIs do not offer any direct refutation or analysis of either factor of this test, which the PHOs categorically meet. [*See* BIC at 24–28 (discussing factors)] Instead, the RPIs mischaracterize the PHOs as ordering people "to take some direct action with the citizens' property" [AB at 1] and as the State deciding to "lock up her citizens inside their home and to seize control of their business[es]." [AB at 4] Neither description accurately describes the partial, temporary public health restrictions in the PHOs that meet *Temple Baptist Church*'s test for regulation that is not a taking. [*See* BIC at 24–28]

The RPIs do argue, quoting *Lujan Grisham v. Reeb*, that the regulatory takings analysis under *Penn Central* is too fact-intensive to undertake at this juncture. [AB at 7–8 (quoting 2020-NMSC-___, ¶ 11)] First, *Penn Central* does not provide the test for regulatory takings in New Mexico; rather, it is governed by *Temple Baptist Church*. [BIC at 24, n.20 (discussing differences between New Mexico and federal tests)]; *Premier Tr. of Nevada, Inc. as Tr. of Murtagh Nevada Tr. v. City of Albuquerque*, No. A-1-CA-34784, 2020-NMCA-___, ¶ 21, ___ P.3d ___ (Oct. 1, 2020) (observing that "our Supreme Court has made plain—repeatedly since *Penn Central*—the regulatory takings test applicable in New Mexico" is the two-part test from *Temple Baptist Church*).[5]

More importantly, even if regulatory takings cases ordinarily are fact-dependent, a categorical determination can be made that the PHOs are not regulatory takings under New Mexico law. As discussed in the Brief-in-Chief, the Orders are "reasonably related to the proper purpose" of slowing the contagion of a deadly virus that has already resulted in the loss of more than

[5] As cited in the Brief-in-Chief, even if the more ad-hoc, factor-based *Penn Central* test did apply, the PHOs would not be compensable takings, as courts have repeatedly held with respect to other public health orders. [BIC at 24, n.20.] That is because the third *Penn Central* factor, the character of the governmental action, decisively weighs against finding a taking. *See, e.g., Leb. Valley Auto Racing Corp. v. Cuomo*, No. 1:20-CV-804 (LEK/TWD), ___ F. Supp. 3d ___, 2020 WL 4596921, at *9 (N.D.N.Y. Aug. 11, 2020).

2,500 New Mexican lives and stretched hospital resources to their limit. [BIC at 24–25; *supra at* 1.] And the PHOs do not deprive property owners of all or substantially all of the use of their property, because properties may be used for non-regulated purposes and the PHOs will expire. [BIC at 25–28] Rather, the PHOs are partial, temporary restrictions on the operation of physical property in a manner that is hazardous to public health. As a categorical legal analysis, the Court can determine that such restrictions are not compensable takings.

II. The Real Parties in Interest's Interpretation of PHERA Is Inconsistent With Statutory Construction Rules and the Court's Precedent.

As argued in the Brief-in-Chief, statutory construction rules compel an interpretation of Section 12-10A-15(A) of PHERA that limits just compensation to property taken by the State and used to provide health care pursuant to the emergency powers in Section 12-10A-6. [BIC at 29–39] Given this proper interpretation, the PHOs cannot support a claim for just compensation, because they do not seize or commandeer any property used to provide health care. [BIC at 28–30.]

The RPIs do not directly address the application of statutory construction rules to Section 12-10A-15(A)'s language, but instead offer a series of other arguments in support of a broad reading of "any other property." Initially, the

RPIs argue that because the Court interpreted the State's authority under PHERA broadly in *Lujan Grisham v. Reeb*, PHERA's compensation provision must also be broad. [AB at 15–16] However, the State's interpretation of 12-10A-15(A) is entirely in keeping with *Reeb*. The Court there expressly recognized that the State's powers are broader than the statute's narrower, due process protections—including compensation—which are limited to the most extreme actions permitted by PHERA. That is, "the most intrusive measures (e.g., isolation, quarantine, and seizure of goods or property) are given explicit due process protections within the PHERA itself" even though the Act provides a basis for regulatory authority "less intrusive or restrictive than the special powers and isolation and quarantine measures described in the Act." 2020-NMSC-___, ¶ 32 (internal quotation marks and brackets omitted). Only when the State takes the more extreme measure of seizing property to provide health care is the compensation procedure in Section 12-10A-15(A) implicated. Additionally, the State's interpretation of Section 12-10A-15(A) comports with *Reeb*'s admonition that 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," a purpose that sweeping liability for public health regulations would undermine. *Id.*, ¶ 27; *see also* BIC at 36–38.

The RPIs next argue that the State's interpretation cannot accommodate a hypothetical where the State's seizure of refrigerated facilities to store and transport vaccines would be compensable under PHERA. [AB at 17–18.] Although this would be a harder case—that has not arisen—it is compatible with the State's interpretation. If refrigerated equipment were seized by the State and used to provide medical care under the State's powers in Section 12-10A-6, this scenario potentially could support a PHERA claim for compensation. In comparison, the RPIs' claims for compensation based on the regulation of businesses are not similar to the commandeering of hospitals and seizure of medical supplies identified in Section 12-10A-15(A). The RPIs' assertion that these businesses "must have been part of the broad contemplation of the Legislature for just compensation" and that "[a]ny other reading is plainly incongruent with basic common sense" is not grounded in any interpretation of PHERA's limited language. [AB at 16.]

Finally, while the RPIs do not dispute that PHERA's administrative exhaustion requirement is jurisdictional, [BIC at 39–40] they contend that such exhaustion would be futile given the Attorney General's interpretation of PHERA in this litigation[6] and the absence of an existing administrative process.

[6] Incidentally, the RPIs misstate the State's interpretation of PHERA in this

[AB at 19.] This argument improperly conflates the Attorney General's litigation position with any adjudicatory role the Attorney General's Office would play in a PHERA proceeding. *See* NMSA 1978, § 8-5-2 (1975) (identifying Attorney General's suite of statutory duties). The Attorney General can exercise these different roles, as counsel for the State and an adjudicator of administrative claims, through different parts of his Office without conflict.

Nor does the fact that an administrative claims process under PHERA not yet exist make the exhaustion of administrative remedies futile. Because the State has not seized property to provide health care, including in the PHOs, there has not been a need to establish an administrative claims process. However, if the Attorney General were to receive such a claim, the Attorney General's Office could establish an administrative review process to consider and rule upon the claim. To date, no such claims have been filed. Therefore, even if PHERA's compensation provision did encompass claims based on the regulation of businesses—as opposed to the seizure of property to provide medical care—the RPIs would first have to file administrative claims for relief.

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litigation. [AB at 19.] The State's position is not that "no business other than one that provides health care supplies or a health care facility [is] eligible for just compensation," but that compensation requires a seizure of property used to provide health care under Section 12-10A-6. [BIC at 30]

CONCLUSION

For these reasons, 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(A) of PHERA.

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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 3,846 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 January 6, 2021.

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