

**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, and MICHELLE  
LUJAN GRISHAM, in her official  
Capacity as the Governor of New  
Mexico,

Petitioners;

v.

Hon. MATTHEW WILSON,  
First Judicial District Court Judge,

D-101-CV-2020-01832

Hon. ERIN B. O'CONNELL,  
Second Judicial District Court Judge,

D-202-CV-2020-04797

Hon. BEATRICE J. BRICKHOUSE,  
Second Judicial District Court Judge,

D-202-CV-2020-04803

Hon. MARCI BEYER,  
Third Judicial District Court Judge,

D-307-CV-2020-01528

Hon. JARED G. KALLUNKI,  
Fifth Judicial District Court Judge,

D-504-CV-2020-00514;  
D-504-CV-2020-00505;  
D-504-CV-2020-00523

Hon. THOMAS E. LILLEY,  
Fifth Judicial District Court Judge,

D-504-CV-2020-00538;  
D-504-CV-2020-00583

Hon. MATTHEW G. REYNOLDS,  
Seventh Judicial District Court Judge,

D-721-CV-2020-00104

Hon. MATTHEW E. CHANDLER,  
Ninth Judicial District Court Judge,

D-905-CV-2020-00339

Hon. DAVID P. REEB,  
Ninth Judicial District Court Judge,

D-911-CV-2020-00108

Hon. CURTIS R. GURLEY,  
Eleventh Judicial District Court Judge,

D-1116-CV-2020-00863

and

Hon. ELLEN R. JESSEN,  
Twelfth Judicial District Court Judge,

D-1226-CV-2020-00164

Respondents,

and

PEREZ ENTERPRISES, LLC, ELITE FITNESS  
& TANNING, LLC, COWBOY CAFÉ, LLC,  
MAD MAC, LLC, HM PROPERTIES, LLC,  
CAMPE2, 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.

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**REPLY IN SUPPORT OF VERIFIED PETITION  
FOR WRIT OF SUPERINTENDING CONTROL  
AND EMERGENCY REQUEST FOR STAY**

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Kathyleen Kunkel*

Petitioners the State of New Mexico, Governor Michelle Lujan Grisham, and Secretary of Health Kathyleen Kunkel respectfully submit this reply to address two issues raised in the Response submitted by the Real Parties in Interest (“RPIs”).

First, the RPIs’ argument that their taking claims involve fact-specific issues overlooks the common question of law that precedes any factual inquiries: whether the State’s emergency public health orders can support a taking claim at all. This is a foundational question of law on which the RPIs’ claims all rest and that should be resolved before engaging in dozens of likely unnecessary factual inquiries around the State. Second, because this common question is a purely legal issue that will almost certainly reach the Court, the RPIs’ argument that the issue will benefit from factual development and the percolation of cases through the normal appellate process is inapt. Allowing the preliminary question of whether the emergency public health orders can support a taking claim to be resolved inconsistently around the State will only foster confusion, burdensome follow-on litigation for the State and its courts, and delay the resolution of a legal issue that will be resolved by the Court regardless.

**I. The Verified Petition Seeks Efficient Resolution of Purely Legal Issues.**

Petitioners seek an efficient, orderly process to address the identical legal questions that must be answered at the outset of every case potentially affected by the Verified Petition. Whether the PHEOs may support a claim for just compensation

under Article II, § 20 or the PHERA are purely legal questions that can be answered without factual development. To borrow the RPIs' words, Petitioners seek "solely [to test] the *legal sufficiency* of the complaint[s], not the factual allegations of the pleadings." [RB 5] Indeed, the RPIs' complaints invite the consolidated approach requested by Petitioners, given that each is a copy-and-paste of substantially the same allegations and legal claims, with only slight variations for each RPI. Put simply, the unity of allegations and claims in the RPIs' complaints supports a unified procedure to test the legal theories that underlie those claims.

The Response cites a pair of non-binding cases from the Court of Federal Claims for the proposition that determining whether a regulatory taking has occurred requires a factual inquiry. [RB 4] But the Response fails to recognize that in those cases, there was no suggestion that the government was acting pursuant to its emergency police powers when the alleged takings occurred. *See Sys. Fuels, Inc. v. U.S.*, 65 Fed. Cl. 163, 172-73 (2005) (holding that when a property right derives from a contract, "[i]t is appropriate to proceed with both [the takings and contract] claims until the contract claim reaches fruition"); *Gardens v. U.S.*, No. 93-655C, 2014 WL 4401529, at \*4 (Sept. 5, 2014) (unpublished) (granting the plaintiffs' request for an extended deposition because "[r]egulatory takings claims are fact intensive cases"). Even assuming that regulatory taking claims involve a factual inquiry at some stage, such claims uniformly fail a matter of law if the exercise of

the State's police power cannot constitute a taking.

The other cases cited in the Response similarly fail to consider whether a temporary, partial restriction on business interests due to a state's exercise of its emergency police powers can support a taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006, 1019 (1992) (holding that a statute barring construction of "any permanent habitable structures" on the landowner's beachfront property could support a categorical taking); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978) (considering whether a regulation restricting the development of historical landmarks could support a taking); *see also Ark. Game & Fish Comm'n v. U.S.*, 568 U.S. 23, 39 (2012) (holding "that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection"). And to the extent these cases have some bearing on the inquiry as to whether a taking claim may be based on temporary, emergency police powers they only underscore the point that this is a pure question of law that can be resolved by the Court in the first instance. This is a question that turns on interpreting legal precedent and constitutional principles, not the factual allegations of each RPI.

The Pennsylvania Supreme Court's recent opinion in *Friends of Danny de Vito v. Wolf* illustrates this point. *See* 227 A.3d 872 (Pa. 2020). That court held as a matter of law that Pennsylvania's public health order requiring the closure of all non-life-sustaining businesses to reduce the spread of COVID-19 was "a classic example

of the use of the police power” and therefore could not support a taking under the Fifth Amendment or the Pennsylvania Constitution. *Id.* at 895-96. The court reached that conclusion because the business owners’ loss of the use of their property was temporary and because the reason for the restrictions was “a stop-gap measure,” intended “to protect the lives and health of millions of Pennsylvania citizens.” *Id.*; *see also id.* at 896 (“While the duration of COVID-19 as a natural disaster is currently unknown, the development of a vaccine to prevent future outbreaks, the development of an immunity in individuals previously infected and the availability of widespread testing and contact tracing are all viewed as the basis for ending the COVID-19 disaster.”).

Given that New Mexico’s PHEOs have repeatedly been upheld as valid, reasonable exercises of the State’s police power,<sup>1</sup> *Friends of Danny de Vito*

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<sup>1</sup> *See, e.g., Lujan Grisham v. Romero*, No. S-1-SC-38396 (N.M. Sup. Ct. Aug. 26, 2020) (ordering the district court to vacate its temporary restraining order and dismiss the application for TRO and preliminary injunction challenging the State’s authority to restrict or close businesses to protect public health and challenging the State’s temporary closure of indoor dining in restaurants and breweries as arbitrary and capricious); *Lujan Grisham v. Reeb*, No. S-1-SC-38336 (N.M. Sup. Ct. Aug. 4, 2020) (ordering the district court to resolve in the Governor’s favor a challenge to the issuance of civil administrative penalties under the PHERA for violations of restrictions on mass gatherings and business operations contained in emergency PHEOs); *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 PHEOs and from issuing directives and orders that contradict the PHEOs); Memorandum Opinion and Order, *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327, 2020 WL 3963764 (D.N.M. July 13, 2020) (upholding the PHEOs as they relate to restrictions on religious gatherings).

demonstrates, at minimum, that the issues raised in the Verified Petition are capable of resolution without the need for factual development.

## **II. The Potential for Inconsistent Rulings Supports Extraordinary Relief.**

Granting any of the forms of relief requested in the Verified Petition would serve the interest of judicial efficiency and would avoid the likelihood of inconsistent rulings on a question of great public importance. If the RPIs' theory that the emergency public health orders support taking claims were correct, the fiscal implications of the Lawsuits for the State would be immense. The legal questions raised in the Verified Petition therefore should be considered at the earliest opportunity to enable the legislative and executive branches to plan accordingly, including adapting public health responses to accommodate this potential liability. Moreover, the existence of at least twenty cases that are now proceeding across the state<sup>2</sup> all-but guarantees that inconsistent rulings will result and that the very questions raised in the Verified Petition will, inevitably, come before the Court in the future. The interests of all parties involved, as well as the interests of the judiciary

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<sup>2</sup> Petitioners notified the Court via letter on October 22, 2020 of the existence of six additional cases that should be subject to the relief requested in the *Verified Petition*. Like the original fourteen cases identified in the *Verified Petition*, these additional cases raise claims or counterclaims for just compensation, allegedly as a result of the PHEOs. The RPIs reference up to two more cases in the Response [**RB 5 n.1**], again underscoring the need for uniform resolution of the legal questions raised by Petitioners. To the extent that the RPIs or their counsel are concerned that a party or Real Party in Interest is missing from this proceeding, they may move for impleader or intervention as permitted under the Rules of Appellate Procedure.



and the public at large, would be served by granting the relief requested in the Verified Petition, before time and resources are spent on duplicative litigation over the same legal issues in courts across the state.

Further, because the Petition asks the Court to resolve a preliminary question of law, the ordinary principles that counsel in favor of regular appellate review do not apply. This is not an issue where a legal rule differs based on the factual contexts to which it applies, or where the percolation of factual developments in the district courts will assist this Court's review. To the contrary, ensuring early review of this preliminary legal question will avoid confusion and conflicting authority about the State's ability to protect the public health without incurring great liability.

As a final point, to suggest that Petitioners seek consolidated relief as a means of “judge shopping” is disingenuous at best.<sup>3</sup> [RB 10] The suggestion also overlooks that Petitioners have requested multiple forms of relief in the alternative, which are detailed in the Verified Petition's Prayer for Relief. [Pet. 15-16] Any form of relief requested by Petitioners would ensure the orderly, efficient resolution of a question of great public importance, irrespective of the eventual outcome on the merits.

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<sup>3</sup> In fact, in an August interview with the Albuquerque Journal, Counsel for the RPIs “acknowledged the cases were filed in state District Court in Roswell, Farmington, and Truth or Consequences—and not in Albuquerque or Santa Fe—because the plaintiffs are hoping that the lawsuits are assigned to more ‘conservative’ judges when it comes to property rights issues.” Dan Boyd, *Compensation for Pandemic Losses Sought*, Alb. Journ., <https://www.abqjournal.com/1485078/compensation-for-pandemic-losses-sought.html> (Aug. 10, 2020) (last visited on Oct. 30, 2020).

Petitioners therefore request that the Court grant the relief requested in the Verified Petition—including an order immediately staying all related proceedings in the district courts until the Court has rendered its decision on the Verified Petition—and order such further relief as the Court deems necessary and appropriate.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Reply* was served on all parties and counsel of record via the Odyssey File and Serve Electronic Filing System on November 2, 2020.

*/s/ Neil Bell*  
Neil Bell