


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**MICHELLE LUJAN GRISHAM,
Governor of New Mexico;
MARK R. SHEA, Secretary of the
New Mexico Department of Public Safety; and
KATHYLEEN KUNKEL, Secretary of the
New Mexico Department of Health,**

Petitioners,

v.

S. Ct. No. S-1-SC-38336

THE HONORABLE DAVID P. REEB,

Respondent,

and

**SID STREBECK; SSET LLC d/b/a K-BOB's STEAKHOUSE;
JIM BURLESON; TERRI CHRISMAN; FRONTIER AUTO, INC.;
KATHY DIAZ; CHRISTOPHER & MICHELLE KEMP;
BODY & SOL FITNESS, LLC; KEMP'S INVESTMENTS, LLC;
SHELLY QUARTIERI; COLFAX TAVERN & DINER, LLC;
JOY THOMPSON;
and J. JONES MASSAGE,**

Real Parties in Interest.

**EMERGENCY VERIFIED PETITION FOR SUPERINTENDING
CONTROL AND REQUEST FOR STAY**

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Petitioners Governor of New Mexico Michelle Lujan Grisham, New Mexico Secretary of Health Kathyleen M. Kunkel, and New Mexico Secretary of Public Safety Mark R. Shea, pursuant to Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA, hereby petition this Court to exercise its power of superintending control to resolve the controlling legal issues in this case: (1) whether the State may issue civil administrative penalties under the Public Health Emergency Response Act for violations of restrictions on mass gatherings and business operations contained in emergency public health orders; and (2) whether temporary business closures and restrictions as a public health measure constitute a “taking” requiring monetary payments to business owners.

I. Introduction.

This proceeding presents the Court with an opportunity to establish the State’s authority to enforce certain public health measures enacted pursuant to the Public Health Emergency Response Act, NMSA 1978, §§ 12-10-1 to -19 (2003, as amended through 2015) (“PHERA”) and to clarify that temporary business closures to protect public health are not compensable takings. By weighing in on these two legal questions, the Court can provide timely guidance to courts and litigants throughout the State on these pressing matters of statewide importance. That instruction will resolve any ambiguity or confusion with respect to emergency statewide public health measures. Accordingly, Petitioners respectfully ask that the

Court grant this Petition and decide those questions and stay the underlying proceedings brought by the Real Parties in Interest.

II. Background.

A. The COVID-19 pandemic.

These facts are, unfortunately, all too familiar to this Court. Since its emergence a few months ago, the novel coronavirus disease 2019 (“COVID-19”) has spread exponentially across the globe, throughout the United States, and here in New Mexico. The confirmed number of infections in the United States provides a good illustration of this. As of February 11, 2020, the United States Centers for Disease Control and Prevention (“CDC”) recorded 12 confirmed cases in the United States.¹ A month later, on March 11, 2020, the CDC recorded 1,215 confirmed cases in the United States. One month after that, on April 11, 2020, the CDC recorded 525,704 confirmed cases and at least 20,486 deaths related to COVID-19. As of May 27, 2020, approximately six weeks later, the CDC counted more than 1.6 million confirmed cases and more than 99,000 deaths. Globally, as of May 27, 2020, the number of confirmed cases has risen to well over 5.4 million, with approximately

¹ The confirmed cases and deaths reported by the CDC are updated daily on the CDC’s website at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

350,000 related deaths.² Approximately eleven weeks since the first confirmed cases of COVID-19 in New Mexico, there are now 7,252 confirmed cases here and 329 related deaths.³ COVID-19's rapid spread is attributable to certain characteristics of the virus that causes it and the ease with which that virus can be transmitted.

COVID-19 is a respiratory illness that causes severe complications in some patients, including pneumonia in both lungs, organ failure, and death.⁴ Like most respiratory illnesses, COVID-19 is spread most easily through close person-to-person contact. It can also be spread through trace droplets on surfaces, with research indicating that the COVID-19 virus may survive in a viable form on certain surfaces for multiple days.⁵ Although the lack of widespread testing makes it

² World Health Organization, "Coronavirus disease 2019 (COVID-19) Situation Report–128," available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200527-covid-19-sitrep-128.pdf?sfvrsn=11720c0a_2.

³ These numbers are provided as of May 27, 2020 and are updated daily by the New Mexico Department of Health and available at <https://cv.nmhealth.org/>.

⁴ CDC, "https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf," available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

⁵ Neeltje van Doremalen et al., "Correspondence: Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1," *The New England Journal of Medicine* (March 17, 2020), available at <https://www.nejm.org/doi/10.1056/NEJMc2004973>.

impossible to measure precisely, a portion of COVID-19 cases result in mild symptoms or no symptoms.⁶ Additionally, even in cases that are symptomatic, the average time from exposure to symptom onset is five to six days, with symptoms sometimes not appearing until as long as thirteen days after infection.⁷ This means that individuals who have been infected and have the potential to infect others usually do not know they are infected for at least several days (and may never know, if they remain asymptomatic). The COVID-19 virus is new to human immune systems and there is not yet a vaccine to halt its spread on the horizon.

The ease and rapidity with which COVID-19 spreads and its severe and sometimes fatal symptoms in a certain percentage of the population create a potential for mass deaths and a severely overloaded health care system. Because many individuals who have COVID-19 do not know that they have been infected, the only effective way to combat the spread of COVID-19 and to mitigate its impacts is to limit person-to-person contact and to close down public spaces and gatherings to the greatest extent possible. Although social distancing guidelines generally people to stay six or more feet apart, even that degree of distancing does not guarantee that an individual will not contract COVID-19 because of its persistence on surfaces and in

⁶ Harvard Medical School, “COVID-19 basics: Symptoms, spread and other essential information about the new coronavirus and COVID-19, available at <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics>.

⁷ Id.

the air. This means that every foray by a person into a public space with other people carries some risk of transmission. For instance, a recent study has shown that the act of speaking can emit thousands of potentially infectious droplets which can linger in an enclosed space for between 8 and 14 minutes and greatly increase the risk of transmission within that space.⁸

B. New Mexico’s Emergency Public Health Orders.

Recognizing that COVID-19 may spread exponentially through public spaces, the Secretary of Health has entered a series of public health emergency orders (“PHEOs”) encouraging New Mexicans to stay in their homes to the greatest extent possible and to practice all possible precautions when they are required to enter public spaces. See Exhibits 1-11 to this Petition (PHEOs). Consistent with the strategies employed by the vast majority of other states and countries, the PHEOs prohibit most public and private gatherings of any significant size and curtail or even prohibit the operations of many businesses.

By way of example, the PHEO issued on April 11, see Exhibit 6, prohibited “mass gatherings,” which it defined as “any public or private gatherings that bring[] together five (5) or more individuals in a single room or connected space, confined

⁸ Valentyn Stadnytski et al., “The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission,” Proceedings of the National Academy of Sciences of the United States of America (May 13, 2020), available at <https://www.pnas.org/content/pnas/early/2020/05/12/2006874117.full.pdf>.

outdoor space or an open outdoor space where individuals are within six (6) feet of each other.” Exhibit 6, p. 5. That restriction did not apply to the presence of five (5) or more people in their normal residence and it also did not apply to government operations and “necessary operations of essential businesses.” *Id.* The PHEO required all other workplaces, retail spaces, and other public spaces of other businesses to close. *Id.*, p. 6. Even the “essential businesses” that were allowed to remain open under that PHEO, could only do so “provided they minimize[d] their operations and staff to the greatest extent possible,” adhered to strict social distancing protocols, and complied with heightened sanitation requirements. *Id.*, pp. 5-6. The intent underlying the PHEO is printed in bold on its opening page: “**all New Mexicans should be staying in their homes for all but the most essential activities and services.**” *Id.*, p. 1 (emphasis in original).

The PHEO issued on April 11 imposed a number of restrictions on particular businesses that were designed to minimize the risks of prolonged or close contact between strangers while still allowing for certain businesses operations that posed a smaller risk to public health. For instance, restaurants were permitted to operate “only for delivery or carry out.” *Id.*, p. 5. Automobile dealers could sell cars through remote means but could not open their showrooms. *Id.*, p. 4. Certain “retail spaces” were permitted to operate, but only with the number customers equal to or less than 20% of their building’s occupancy limit. *Id.*, p. 6. Hotels and other places of lodging

were permitted to operate at 25% of their maximum occupancy, with certain limited exceptions. Id., p. 6. Other businesses where close contact is unavoidable, such as massage studios and barbershops, remained closed entirely.

The operative restrictions and social distancing measures imposed by the PHEOs is not a silver bullet; they can only mitigate the inevitable spread of the virus. Any person-to-person contact (even if people are six feet away) and any trip into a public space (even if the space is regularly cleaned) carries a risk of infection, particularly in places where large groups of people congregate in an enclosed space or where close personal contact must occur. The PHEOs permitted essential businesses to remain open with protocols and restrictions to reduce the risk of infection based on the recognition that people will need to venture into public spaces to some degree to get life-sustaining items like food and medication, to continue certain services and businesses that are crucial to the infrastructure and economy of the State, and to allow for modified operations of other businesses that pose less risks to public health.

The closures and restrictions imposed by the PHEOs reached their apex between late March and late April, and the State is now gradually easing them. The PHEO issued on May 27, for example, permits restaurants to provide dine-in service in outdoor seating areas at 50% of capacity, with six feet between tables, and with no more than six patrons at a table. Exhibit 10, p. 5. Horse racing facilities may

operate without spectators. Id., p. 7. Certain outdoor recreational spaces are permitted to operate under certain precautions. Id. Most businesses designated as “non-essential” may operate with capacity limitations and under certain precautions. Id., p. 6. Other businesses designated as “close-contact businesses” and “recreational facilities” must remain closed. Id. The easing of restrictions is tenuous—it depends upon a continuing improvement in public health conditions and in the success of various measures designed to contain the spread of the virus. The imposition of civil penalties on individuals and businesses for violating public health restrictions remains a vital tool for ensuring compliance with those restrictions.

C. The lawsuit filed by the Real Parties in Interest in this proceeding.

Against this factual backdrop, the Real Parties in Interest seek to undermine the State’s ability to meaningfully enforce valid public health orders. On May 20, 2020, the Real Parties in Interest filed a Complaint for Declaratory and Injunctive Relief (“Complaint”) in the Ninth Judicial District Court (Case No. D-905-CV-2020-00233). See Complaint, attached as Exhibit 12 to this Petition. Their filing asserts (erroneously) that the Petitioners are barred from imposing statutory penalties under the PHERA for violations of emergency health orders enacted in response to the COVID-19 pandemic. The Real Parties in Interest contend that they may violate a PHEO repeatedly, and with impunity, and are only subject to a maximum fine of \$100 per day. Id., ¶¶ 1, 22-24. Based on these contentions, the Real Parties in

Interest seek “a preliminary and, ultimately, permanent injunction against the Defendants from threatening, or causing or directing others to threaten, the imposition of penalties under § 12-10A-19 for violations of the DOH’s Secretary’s orders.” Complaint, ¶ 49. In the alternative, the Complaint requests a declaration that Section 12-10A-15 of PHERA “is applicable to the restrictions imposed by the orders” and therefore any businesses restricted or closed under a PHEO would be entitled to receive just compensation. Complaint, ¶ 52.

III. Discussion.

A. The Court should exercise its power of superintending control.

Article VI, Section 3 of the New Mexico Constitution grants this Court “superintending control over all inferior courts” and the authority to issue “writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same.” This Court has long recognized that the power of superintending control permits it “to control the course of ordinary litigation in inferior courts”. State ex rel. Torrez v. Whitaker, 2018-NMSC-005, ¶ 30, 410 P.3d 201 (quoting State v. Roy, 1936-NMSC-048, ¶ 89, 40 N.M. 397, 60 P.2d 646). While the Court has recognized that its jurisdiction under this power is “bounded only by the exigencies which call for its exercise,” Roy, 1936-NMSC-048, ¶ 94, a writ of superintending control is most often issued where the public interest would be served through expeditious resolution of a legal question or where it is appropriate

to provide guidance to lower courts on the application of the law. State ex rel. Torrez, 2018-NMSC-005, ¶¶ 30-31; State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, ¶ 8, 120 N.M. 619, 904 P.2d 1044.

Consistent with these general principles, the Court has previously granted a writ of superintending control to address a legal issue at the soonest possible moment where a case presented a matter of first impression “with serious public safety implications.” State ex rel. Torrez, 2018-NMSC-005, ¶ 31. The Court has also granted a writ of superintending control to expeditiously resolve the dispositive issues in a case when a district court’s order threatened the Law Office of the Public Defender’s “ability to perform its duties” and thereby “jeopardize[d] the administration of criminal justice in New Mexico.” Kerr v. Parsons, 2016-NMSC-028, ¶ 17, 378 P.3d 1. The Court has exercised this power to expeditiously review the constitutionality of denying marriage licenses to same-gender couples where differing interpretations of the law by courts and county clerks throughout the State had the potential to create “chaos” in the absence of a definitive resolution. Griego v. Oliver, 2014-NMSC-003, ¶ 14, 316 P.3d 865. Finally, the Court has exercised this extraordinary power to “provide a prompt and final resolution” to legal questions “of great public importance,” such as whether double jeopardy bars a subsequent criminal prosecution for DWI after an administrative license revocation proceeding. State ex rel. Schwartz, 1995-NMSC-069, ¶ 9.

The circumstances of this proceeding make superintending control appropriate. Petitioners’ ability to enforce a meaningful penalty for violations of the PHEO is a novel legal issue with significant public safety and health implications for all New Mexicans. This issue—which would likely to make its way to this Court eventually—calls out for an immediate and definitive resolution to prevent confusion as to the Petitioners’ ability to enforce the PHERA in the interim. Furthermore, since the Real Parties in Interest have not been assessed with the penalty that they challenge, and are therefore effectively bringing a pre-enforcement challenge, their lawsuit against Petitioners presents a suitable vehicle to resolve the legal issues they have raised as a matter of law.

The Court should exercise its power of superintending control to promptly clarify important legal issues and provide guidance to district courts.

B. The Secretaries of Health and Public Safety may assess penalties under Section 12-10A-19 for violations of a PHEO.

This Court’s “principal goal in interpreting statutes is to give effect to the Legislature’s intent.” Morris v. Brandenburg, 2016-NMSC-027, ¶ 14, 376 P.3d 836 (internal quotation marks and citation omitted). The plain language of a statute is the primary indicator of that intent. Baker v. Hedstrom, 2013-NMSC-043, ¶ 11, 309 P.3d 1047. However, if the meaning of statutory language is doubtful or ambiguous, this Court “will construe the statute according to its obvious spirit or reason.” Id. (internal quotation marks and citation omitted). In assessing the meaning of a

statute, the Court may also consider its history, the overall structure of the statute, and its function in the comprehensive legislative scheme, among other things. Faber v. King, 2015-NMSC-015, ¶ 9, 348 P.3d 173. This Court should also be mindful that public health measures are a traditional exercise of the State’s inherent police power, which is the “broadest power possessed by governments and rests fundamentally on the ancient maxim ‘salus populi est suprema lex.’” State ex rel. Hughes v. Cleveland, 1943-NMSC-029, ¶ 34, 47 N.M. 230, 141 P.2d 192. Accordingly, the powers delegated by the Legislature under statutes like the PHERA must be liberally construed to ensure that state agencies have the necessary tools to accomplish the statute’s goal of protecting public health. See N.M. Att’y Gen. Op. 76-37 (1976) (“Generally, public health statutes delegating to administrative agencies the authority to . . . enforce health measures are given a liberal construction, provided such action tends to accomplish its purpose.”); cf. Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 47, 134 N.M. 77, 73 P.3d 215 (“Ordinances enacted under the police power of a municipality for the protection of the public health and safety, . . . should be liberally construed.”) (alteration in original) (quoting Strader v. Pecos Constr. Co., 1963-NMSC-010, ¶ 12, 71 N.M. 320, 378 P.2d 364).⁹

⁹ It is well-settled that courts liberally construe the authority granted by laws designed to protect public health to effectuate their purposes. See, e.g., Spokane Cty. Health Dist. v. Brockett, 839 P.2d 324, 329 (Wash. 1992) (“Because protecting and preserving the health of its citizens from disease is an important governmental function, public health statutes and the actions of local health boards implementing

Section 12-10A-19(A) of the PHERA, the provision challenged by the Real Parties in Interest, is designed to ensure compliance with emergency measures enacted in response to a public health emergency. Section 12-10A-19(A) permits the Secretary of Health and the Secretary of Public Safety to “enforce the provisions of the [PHERA] by imposing a civil administrative penalty of up to five thousand dollars (\$5,000) for each violation of [the PHERA].” They may only impose such penalties through a hearing process created through emergency rules. § 12-10A-19(A); see also 7.1.30 NMAC (regulations governing civil penalty assessments under the PHERA). The text of the PHERA is otherwise open-ended with respect to the scope of activities for which an administrative penalty under the terms of Section 12-10A-19(A) could be imposed, except for its statement that the provisions of the PHERA should not be construed to “limit specific enforcement powers enumerated in [the PHERA].” § 12-10A-19(B). Although the PHERA does not contain specific provisions contemplating business closures and restrictions as part of the State’s emergency response, the PHERA—and by extension, Section 12-10A-19(A)—was intended to encompass all measures necessary to coordinate,

those statutes are liberally construed.”); see also United States v. Article of Drug Bacto-Unidisk, 394 U.S. 784, 798 (1969); State v. Mountjoy, 891 P.2d 376, 384 (Kan. 1995); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985); United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984); Shinrone Farms, Inc. v. Gosch, 319 N.W.2d 298, 302 (Iowa 1982); State ex rel. Florence-Carlton Sch. Dist. v. Bd. of Cty. Comm’rs, 590 P.2d 602, 605 (Mont. 1978).

implement, and effectuate a statewide response to a public health emergency like COVID-19.

The PHERA constitutes one part of the statutory framework identified as the Emergency Powers Code. NMSA 1978, § 12-9B-1 (2005). The Emergency Powers Code include, inter alia, the All Hazard Emergency Management Act, NMSA 1978, §§ 12-10-1 to -10 (1959, as amended through 2007) (“the AHEMA”), the Emergency Licensing Act, the Emergency Management Assistance Compact, the Riot Control Act, the PHERA, and other statutes providing succession plans for state government, and mechanisms for emergency disaster relief funding. The various provisions of the Emergency Powers Code are intended to be pieced together and used in concert, as needed, to give the State the tools it requires to organize any response and relief efforts in an emergency situation. To this end, “in the event of any man-made or natural disaster causing or threatening widespread physical and economic harm that is beyond local control and requir[es] the resource of the state,” the AHEMA empowers the Governor to “exercise direction and control over any and all state forces and resources engaged in emergency operations or related all hazard emergency functions within the state.” § 12-10-4(A). The AHEMA also allows the Governor to “issue, amend or rescind the necessary orders, rules and procedures” to carry out an emergency response and she may “provide resources and services necessary . . . for any other action necessary to protect the public health,

safety, and welfare.” § 12-10-4(B)(2) & (3). The COVID-19 pandemic was (and remains) a natural disaster of global proportions that threatens statewide harm, is beyond local control, and requires the resources of both the state and federal governments in mitigation and relief efforts. It was therefore appropriate for the Governor to invoke her powers under the AHEMA and to coordinate the State’s emergency response efforts to COVID-19 through Executive Order 2020-004, attached as Exhibit 13 to this Petition.

The Governor also declared a state of public health emergency under the PHERA through Executive Order 2020-004. The PHERA permits the Governor, after consultation with the Secretary of Health, to declare a state of public health emergency “upon the occurrence of a public health emergency,” which is defined as “the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious . . . agent, including a threatening communicable disease, that poses an imminent threat of harm to the population of New Mexico or any portion thereof.” § 12-10A-3(G). A “threatening communicable disease” is “a disease that causes death or great bodily harm that passes from one person to another and for which there are no means by which the public can reasonably avoid the risk of contracting the disease.” § 12-10A-3(L). The COVID-19 pandemic plainly presents an appropriate circumstance to declare a state of public health emergency because it

constitutes a threatening communicable disease that poses an imminent threat of harm to all New Mexicans.¹⁰

Under the PHERA, that emergency declaration “authorize[d] the secretary of health, the secretary of public safety, and the [secretary of homeland security and emergency management] to coordinate a response” to the COVID-19 public health emergency. § 12-10A-5(A); Exhibit 13, p. 3. The PHERA is the primary section of the Emergency Powers Code that guides the State’s response to public health crises within existing statutory powers and constitutional limits. PHERA has three explicit purposes: (1) to provide the State “with an ability to manage public health emergencies in a manner that protects civil rights and the liberties of individual persons;” (2) to “prepare for a public health emergency;” and (3) to “provide access to appropriate care, if needed, for an indefinite number of infected, exposed or endangered people in the event of a public health emergency.” § 12-10A-2. The PHERA effectuates these purposes, in part, by allowing Secretary of Health to take certain drastic measures that could become necessary during a health emergency, such as securing health care facilities and supplies for public use through the exercise of eminent domain, providing for the safe disposal of human remains, enforcing

¹⁰ The Governor’s declaration of a public health emergency contained the information required by Section 12-10A-5(B) and has been renewed and extended, after consultation with the Secretary of Health, for periods of thirty days or less, as required by Section 12-10A-5(D)(2).

involuntary isolation or quarantine, and requiring immediate vaccinations. §§ 12-10A-6, -7 to -13, -15. Because the exercise of those powers will inevitably implicate some of the most closely held and fundamental rights of New Mexicans, the PHERA provides a highly specific set of procedures that balance the needs of a health emergency with individual rights. Id.

However, the PHERA does not limit the Department of Health and other state agencies from using less drastic measures to meet the challenges of a public health crisis. Instead, the law broadly authorizes the Departments of Health, Public Safety, and Homeland Security and Emergency Management to “coordinate a response to the public health emergency.” § 12-10A-5(A). That emergency response is not artificially limited by the specific and extreme measures directly addressed by the PHERA, it can also include the exercise of existing non-emergency statutory powers. That is why, in addition to providing a ready-made set of detailed procedures that would apply to various potential emergency measures, the PHERA also permits state agencies to “promulgate and implement rules that are reasonable and necessary to implement and effectuate the [PHERA].” § 12-10A-17. In other words, the PHERA empowers the Department of Health and other state agencies to create emergency rules or directives that “implement and effectuate” any authorized measures that are necessary to respond during a public health emergency.

The business closures and restrictions in the PHEOs are unquestionably proper exercises of the Secretary of Health’s statutory powers and are necessary measures to implement and effectuate the State’s response to the public health crisis precipitated by COVID-19. The Public Health Act, NMSA 1978, §§ 24-1-1 to -40 (1973, as amended through 2019) (“the PHA”), empowers the Department of Health to “control and abate the causes of disease, especially epidemics[;]” to “close any public place and forbid gatherings of people when necessary for the protection of public health;” to “respond to public health emergencies;” and to “maintain and enforce rules for the control of conditions of public health importance.” § 24-1-3(C), (E), (F), (Q).¹¹ These authorized closures and restrictions are vital to the State’s implementation of its emergency response to the COVID-19 pandemic because they minimize person-to-person contact and non-essential public outings to prevent the spread of a contagious virus to the greatest degree possible and to mitigate its inevitable and significant impacts to our State’s health care system by avoiding spikes in infection rates.¹² The Secretary of Health’s authority to

¹¹ The business closures and restrictions in the PHEOs were also a proper exercise of the Secretary of Health’s authority under the PHERA to “secure . . . health care facilities for public use,” which this Court should broadly construe to effectuate the PHERA’s stated purpose of “provid[ing] access to appropriate care, if needed for an indefinite number of infected, exposed or endangered people in the event of a public health emergency.” § 12-10A-6(A)(1); § 12-10A-2(C).

¹² The Real Parties in Interest may quibble with policy choices in a PHEO. But that is immaterial to the question of whether such measures were properly enacted under

implement business closures and restrictions during non-emergency situations does not preclude her from implementing and enforcing such measures as part of the State's emergency response. Cf. § 12-10A-4(B) (permitting the Secretary of Health to “use powers and duties conferred under the [PHA] to investigate the conditions leading to the issuance” of an enhanced public health advisory); § 12-10A-19(C) (making violations of the PHERA co-extensive with any other remedies available under law).

The Court should hold that Section 12-10A-19(A) may be used to punish the violation of any rule promulgated and implemented as a necessary response to a public health emergency under the PHERA.

the PHERA. See Friends of Devito v. Wolf, No. 68 MM 2020, 2020 Pa. LEXIS 1987, at *38-39 (Pa. Apr. 13, 2020) (unpublished) (“Petitioners suggest that the public interest would best be served by keeping businesses open Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.”).

C. Businesses that were closed or restricted under a PHEO are not entitled to compensation under Section 12-10A-15(A) of the PHERA.

This Court may also provide guidance on another narrow issue of statutory interpretation: whether Section 12-10A-15(A) categorically excludes the payment of just compensation for temporary business closures and restrictions enacted in response to a public health crisis. That provision requires the State to “pay just compensation to the owner of health care supplies, a health facility or any other property that is lawfully taken or appropriated . . . for temporary or permanent use during a public health emergency.” § 12-10A-15(A). The amount of compensation provided to the property owner is “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” and includes lost revenues and expenses.

Id. The initial determination of whether compensation is due, and how much, is vested in the New Mexico Attorney General; his findings and conclusions are then appealable to a district court. § 12-10A-15(B) & (C).¹³ The Attorney General is also required, “prior to the taking or appropriating of property,” to institute civil proceedings against the property under the “the Eminent Domain Code, other

¹³ In their Complaint, the Real Parties in Interest do not allege that they have taken any steps to initiate this mandatory procedure for claiming compensation under Section 12-10A-15. However, their failure to comply with this requirement, that failure does not affect the predicate legal determination of whether they could even be eligible in the first instance.

applicable laws, court rules or rules the courts may develop during a state of public health emergency,” to the extent that it is practicable and consistent with the protection of public health to do so. § 12-10A-15(D).

Section 12-10A-15’s application to property “taken or appropriated” for “temporary or permanent use” and its multiple references to eminent domain procedures suggest that it is primarily concerned with categorical takings for a “public use”—i.e., the State’s exercise of eminent domain powers to physically take control over property. Article II, Section 20 of the New Mexico Constitution defines the eminent domain powers of the State: “Private property shall not be taken or damaged for public use without just compensation.”

As an initial matter, New Mexico courts have not considered a health measure that requires private property to be appropriated or even destroyed to be a “taking” that requires just compensation under Article II, Section 20 so long as it is a valid and reasonable exercise of the police power. For instance, this Court has observed: “The right to seize and destroy 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.” State v. 44 Gunny Sacks of Grain, 1972-NMSC-033, ¶ 9, 83 N.M. 755, 497 P.2d 966. Therefore, because “[i]njury which results from the proper exercise of the police power is not compensable,” the State is not obligated to provide compensation when it seizes and destroys food under to the Food Act. Id.

¶¶ 10-11. In other words, state and local governments are not required to pay compensation when a valid and reasonable public health measure reduces or destroys the value of the property if the intended use or possession of the property would be injurious to public health. See Temple Baptist Church v. City Albuquerque, 1982-NMSC-055, ¶ 27, 98 N.M. 138, 646 P.2d 565 (“[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 a ‘taking’ of property for the public benefit.”) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962)); Mitchell v. City of Roswell, 1941-NMSC-007, ¶ 11, 45 N.M. 92, 111 P.2d 41 (“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”) (internal citation omitted); cf. First English Evangelical Lutheran Church v. Cty. of L.A., 482 U.S. 304, 313 (1987) (observing that a compensable taking has not occurred where “the denial of all use was insulated as a part of the State’s authority to enact safety regulations”); Miller v. City of Albuquerque, 1976-NMSC-052, ¶ 10, 89 N.M. 503, 554 P.2d 665 (“As a valid exercise of the police power, zoning is not a compensable taking, even when it results in substantial reduction in the value of property.”); Garcia v. Vill. of Tijeras, 1988-NMCA-090, ¶ 39, 108 N.M. 116, 767 P.2d 355 (concluding that an ordinance permitting the destruction of private property was a

reasonable exercise of the local police power and therefore could not constitute a taking). The PHEOs are a reasonable and valid exercise of the State's core police power to protect public health and therefore their restrictions do not constitute a compensable taking.

Moreover, the temporary closure or restriction of a business for public health reasons cannot qualify as a regulatory taking. See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002) (discussing the difference between a more traditional "categorical taking" and a "regulatory taking"). The Pennsylvania Supreme Court has already addressed this issue in the context of COVID-19-related restrictions on businesses and it unequivocally concluded that those restrictions did not constitute a regulatory taking because they were "only a temporary loss of the use of the Petitioners' business premises" and "the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power." Friends of Devito, 2020 Pa. LEXIS 1987, at *51. That court relied primarily on Tahoe-Sierra Pres. Council, Inc., 535 U.S. at 329, 334-35, 342, in which the United States Supreme Court determined that two development moratoria totaling 32 consecutive months were not regulatory takings because they were temporary measures that were properly enacted under the local police power. Friends of Devito, 2020 Pa. LEXIS 1987, at *48-50. The

Pennsylvania court also relied on Nat'l Amusements, Inc. v. Borough of Palmyra, 716 F.3d 57, 63 (3d Cir. 2013), which held that a local government's emergency action to close down an outdoor flea market for approximately five months due to dangers from potential unexploded artillery shells on the property was not a compensable taking because it was a temporary measure enacted through a core exercise of the police power. Friends of Devito, 2020 Pa. LEXIS 1987, at *50; see also United States v. Cent. Eureka Mining Co., 357 U.S. 155, 156-61, 166-68 (1958) (holding that an order from the national War Production Board requiring certain "nonessential" gold mines to cease operations was a temporary emergency measure to preserve equipment and manpower for war efforts and therefore did not constitute a taking). The PHEOs are valid temporary public health measures that are reasonably related to a proper purpose and do not unreasonable deprive property owners of all, or substantially all, of the beneficial uses of their property. See Temple Baptist Church, 1982-NMSC-055, ¶ 27 (describing regulatory takings test in New Mexico).

The Court should hold that businesses restricted or closed by PHEOs are not entitled to compensation under Section 12-10A-15 as a matter of law.

D. The Court should stay Case No. D-905-CV-2020-00233.

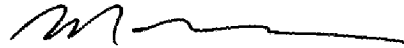
For the same reasons that an emergency exercise of superintending control is appropriate—to prevent confusion or conflicting decisions as to the legality of the

State's emergency response measures prior to this Court providing definitive guidance—Petitioners respectfully ask that the Court order all proceedings stayed in Case No. D-905-CV-2020-00233 during the pendency of this Petition. See Rule 12-504(D)(2)(a) NMRA (stay proper where “irreparable injury, loss, or damage will result to the petitioner before the respondent . . . can be heard in opposition.”). Petitioners will informally notify Respondent and Real Parties in Interest of this Petition at the time of filing and serve the Petition as soon as possible thereafter.

IV. Conclusion.

The Petitioners respectfully request that the Court grant this Petition and expeditiously resolve the legal issues that it describes and issue a stay of Case No. D-905-CV-2020-00233 during the pendency of this matter.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure, specifically Rule 12-504(G)(3) NMRA. The body of this brief employs 14-point Times New Roman font and contains 5,997 words, counted using Microsoft Office Word.

Respectfully submitted,



Matthew L. Garcia,

VERIFICATION

I, Jonathan J. Guss, counsel for Petitioners, being duly sworn upon my oath, state that I have read this Emergency Verified Petition for Superintending Control and Request for Stay, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: June 1, 2020

Respectfully submitted,

/s/ Jonathan J. Guss

Jonathan J. Guss

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, a true and correct copy of the foregoing Emergency Verified Petition for Superintending Control and Request for Stay was served by email and U.S. Mail to Respondent and Real Parties in Interest:

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Per Rule 12-504(E) NMRA

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