IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Pharmaceutical Research and Manufacturers of America, Plaintiff, v. Stuart Williams, Stacey Jassey, Mary Phipps, Andrew Behm, James Bialke, Amy Paradis, Rabih Nahas, Samantha Schirmer, and Kendra Metz, in their official capacities as members of the Minnesota Board of Pharmacy; and Nate Clark, Peter Benner, Suyapa Miranda, David Fisher, Jodi Harpstead, Phil Norrgard, Stephanie Stoffel, and Andrew Whitman, in their official capacities as members of the Board of MNsure, Defendants.	Case No. 20-cv-1497-DSD-DTS **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Scholarly Authority

Other Authorities

INTRODUCTION

Plaintiff Pharmaceutical Research and Manufacturers of America (PhRMA) demonstrated in its opening brief that it is entitled to summary judgment on its claim that the Alec Smith Insulin Affordability Act (the Act) violates the Takings Clause of the Fifth Amendment. Under the Supreme Court's decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), it is clear as a matter of law that the Act effects *per se* physical takings of insulin manufacturers' personal property without compensation. Defendants offer a scattershot array of reasons to try to show that the reasoning and result in *Horne* do not control this case; that Minnesota owes no compensation for the insulin it is taking; and that Minnesota provides an adequate damages remedy that precludes the injunctive and equitable relief PhRMA seeks. None of their arguments, however, has merit.

Relying heavily on cases involving *regulatory* takings and *due process* claims, defendants try to narrow and distinguish *Horne*'s binding holding concerning *physical* takings. Defendants ask this Court to ignore *Horne* on the grounds that it did not address a statute designed to regulate the use of property to promote the public health and safety, but rather an economic law in which the government itself took possession of property. But *Horne*, along with the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), foreclose all of defendants' attempted distinctions.

Together *Horne* and *Loretto* make clear that (1) a law that deprives an owner of the rights to possess, use, and dispose of personal property (as the Act does) is a *per se*

taking of property, not a mere regulation of the property's "use"; (2) a physical appropriation of property is a *per se* taking regardless of whether the government keeps property for its own use or compels a transfer to another; (3) the government must pay compensation for a *per se* taking of property regardless of the purpose of the underlying law; and (4) it is inappropriate to rely (as defendants repeatedly do) on the reasoning in regulatory takings cases, much less in substantive due process cases, when assessing a physical taking. Collectively, these principles preclude defendants' arguments that Minnesota can take insulin without compensation in order to abate an alleged "nuisance" caused by the manufacturers' pricing practices, to adjust the economic burdens and benefits of life in the "medical context," or as a condition of licensure.

Nor can Minnesota avoid its obligation to pay just compensation on the grounds that the manufacturers' patient assistance programs are so "similar to the Act's" requirements that the manufacturers suffer no compensable loss under the Act. Defendants' Memorandum Supporting Dismissal and Opposing Summary Judgment (Defs. Br.) 36. While the generosity of those programs belies defendants' groundless nuisance theory, it does not undermine PhRMA's showing that the Act causes uncompensated takings. Defendants' "net loss" theory applies only in the narrow circumstance where a property interest arises solely as a result of a government program. Here, the manufacturers created their insulin products and are entitled to the market value of the products that the Act compels them to give away for free.

Finally, defendants have failed to refute PhRMA's showing that it is entitled to injunctive and declaratory relief. Minnesota law plainly fails to provide an adequate

damages remedy for all of the future takings the Act compels. Indeed, under state law, injunctive relief is the appropriate remedy where, as here, the state has the discretion to "reverse" takings that have not yet occurred, and the Eighth Circuit has long recognized that a plaintiff has no adequate remedy at law if it must "litigate a multiplicity of suits having a community of facts and issues." *Equitable Life Assur. Soc. of U.S. v. Wert*, 102 F.2d 10, 14 (8th Cir. 1939) (Sanborn, J.). The balance of hardships also weighs in favor of injunctive relief here, where the manufacturers are suffering violations of their constitutional rights and their voluntary programs are, by defendants' own admission, similar to the Act's coverage. At a bare minimum, PhRMA is entitled to declaratory relief, which would settle the question of whether the Act effects an unconstitutional taking of property. Such a ruling would provide the same benefits that a state court could render in a mandamus action. And the Supreme Court made clear in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), that takings claims should not be afforded lesser treatment than other constitutional claims brought in federal court under Section 1983. *See id.* at 2169-70.[1]

[1] In accordance with the parties' agreement, this brief is limited to issues raised in defendants' opposition to the motion for summary judgment. This brief thus does not address arguments in § I.A.-B. of Defs. Br., but does address the arguments in § I.C., which defendants incorporate by reference into their summary judgment opposition. *See id.* at 37; *id.* at 38. In addition, because defendants acknowledge that they are not relying on the Act's exemption to argue that the Act does not compel manufacturers to give away insulin in accordance with the Act's terms, *id.* at 21, PhRMA agrees that its Commerce Clause challenge to the exemption is moot.

I. THE ACT COMPELS *PER SE* TAKINGS OF INSULIN MANUFACTURERS' PERSONAL PROPERTY.

Defendants argue at length that the Act does not effect a *per se* taking. Defs. Br. 22-34. But they never once discuss what a *per se* taking actually is. Instead, defendants repeatedly ignore or attempt to blur the fundamental legal distinctions between physical appropriations of property—which *always* give rise to *per se* takings—and restrictions on the owner's use of property—which may or may not give rise to a compensable *regulatory* taking. PhRMA first explains why, under controlling Supreme Court precedent, the Act indisputably effects *per se* takings of manufacturers' personal property. PhRMA then addresses defendants' various efforts to escape that conclusion.

A. Because The Act Appropriates Personal Property, It Causes *Per Se* Takings.

A *per se* taking is an invasion of property rights for which the government has a "categorical duty to compensate" the property owner. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2015) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002)). To understand why the Act gives rise to such a categorical duty, it is necessary to understand the critical distinction the Supreme Court has drawn between laws that appropriate physical property, and regulatory laws that diminish the value of property by restricting the exercise of discrete property rights.

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Indeed, before the Supreme Court's 1922 decision in

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), it was understood that the Takings Clause protected "*only* against a direct appropriation of property." *Horne*, 135 S. Ct. at 2427 (emphasis added). In *Pennsylvania Coal*, the Court first recognized the concept of a "regulatory taking"—a regulation of the property that, while not completely eliminating *all* of the owner's rights in the property, still goes "'too far.'" *Id.* (quoting *Pa. Coal*, 260 U.S. at 415). Over 50 years later, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 124 (1978), the Court elucidated the standards for determining whether a property restriction goes "too far," and thus amounts to a regulatory taking. Such a determination requires "ad hoc" factual inquiries into "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Horne*, 135 S. Ct. at 2427.[2]

Shortly after *Penn Central*, however, the Supreme Court in *Loretto* reaffirmed that a physical appropriation of real property is fundamentally different, and always gives rise "to a *per se* taking." *Id.* First, *Loretto* explained that a permanent physical appropriation of property is a *per se* taking because "it effectively destroys *each*" of the critical "[p]roperty rights in a physical thing"—namely, "the rights 'to possess, use *and* dispose of it.'" 458 U.S. at 435 (second emphasis added). Second, *Loretto* made clear that the *Penn Central* factors for assessing a regulatory taking are *irrelevant* when there has been a physical appropriation of property. A physical appropriation is a taking "without regard

[2] Although most regulatory taking challenges concern restrictions on an owner's right to use property, the Court has applied the same analysis to restrictions on other discrete incidents of ownership, such as prohibitions on sales of property. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. Third—and crucially for this case—a physical appropriation "authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is" the recipient of the property. *Id.* at 432 n.9.

In *Horne*, the Court extended *Loretto* to physical appropriations of *personal* property. Stressing "the 'longstanding distinction' between government acquisitions of property and regulations," the Court explained that *Loretto*'s reasoning that physical appropriation destroys the owner's rights to possess, use, and dispose of property "is equally applicable to a physical appropriation of personal property." *Horne*, 135 S. Ct. at 2427. Thus, the government "has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 2426.

Minnesota's new law clearly effects *per se* takings of the manufacturers' personal property. The Act's requirement that manufacturers give away insulin for free to eligible residents "destroys *each*" of the critical property rights manufacturers have in their insulin. *Loretto*, 458 U.S. at 435. Manufacturers no longer have the right to possess, use, or dispose of the insulin they have been compelled to hand over to residents. Under *Horne*, that is dispositive. And the *Penn Central* inquiry and factors—which, again, govern only when a regulation *does not* completely eliminate an owner's property rights—are irrelevant. *See Horne*, 135 S. Ct. at 2427 (reaffirming "the rule" that "a physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors").

To try to get out from under *Horne*, defendants repeatedly assert that the Act merely "regulates the manufacturer's *use* of the insulin." Defs. Br. 31 (emphasis added); *see also id.* at 32 (Act operates "by regulating how the manufacturers may use their property"); *id.* at 34 ("the Act regulates how manufacturers must use their insulin"). But this *ipse dixit* is indisputably wrong. When eligible individuals seek insulin under the Act, the manufacturers are stripped of *all* of their property rights with respect to that insulin—including the rights to possess, use, and dispose of the insulin—and are instead required to give away that insulin for free on the state's prescribed terms, or pay significant fines. *Cf. Andrus*, 444 U.S. 65-66 (restriction on sale of eagle feathers did not compel a "physical invasion" or "surrender" of the artifacts, as the owners continued to have the "rights to possess and transport their property," "to donate or devise" it, or to "exhibit" it for a fee). To describe the Act's impact on the manufacturers' personal property as "'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citation omitted). Worse still, it is to ignore the Court's controlling pronouncements in *Loretto* and *Horne*.

In short, the Act plainly effects *per se* takings of the manufacturers' insulin under *Horne* and *Loretto*. As PhRMA explains next, defendants' efforts to try to distinguish or carve out exceptions to these controlling cases are wholly unavailing.[3]

[3] As PhRMA has explained, Br. 41, the Act's provision allowing manufacturers to reimburse pharmacies that dispense their insulin in lieu of replacing the insulin does not render the taking any less *per se*. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570

B. It Is Irrelevant That The Act Does Not Appropriate Insulin For The Government's Own Use.

Defendants seek to distinguish *Horne* on the ground that, "[u]nlike the raisin marketing order" challenged in that case, "the Act does not allow the state to physically appropriate the manufacturers' insulin *for its own use*." Defs. Br. 31 (emphasis added). But defendants do not even acknowledge, let alone contest, PhRMA's showing that a *per se* taking does not depend on who receives private property that is appropriated by law. *See* Plaintiff's Memorandum Opposing Dismissal and Supporting Summary Judgment (PhRMA Br.) 40. PhRMA explained that, under *Loretto*, a compulsory transfer of real property from an owner to a private citizen is a *per se* taking and that, under *Horne*, this principle necessarily applies to compulsory transfers of personal property between citizens. *Id.* (citing and quoting *Loretto* and *Horne*); *see also Loretto*, 458 U.S. at 432 n.9 (a physical appropriation "authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is" the recipient of the property).

Remarkably, defendants never once cite, much less distinguish, *Loretto*—the modern polestar of physical takings law.[4] *Loretto* makes clear, however, that the fact that the Act requires the transfer of insulin to private citizens and not to Minnesota itself is a distinction without legal significance. *See also E. Enters. v. Apfel*, 524 U.S. 498, 542-43,

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U.S. 595, 611-12 (2013) (state cannot avoid taking of physical proper by giving owner option to spend money or give up the property). Defendants do not dispute this point.

[4] While defendants ignore *Loretto*, they suggest that *Horne* can be distinguished on the ground that the raisin marketing order did not take property for a public use. Defs. Br. 23 (citing *Horne*, 135 S. Ct. at 2433 (Thomas, J., concurring). No other Justice, however, joined the suggestion that the marketing order took property for a private use.

544 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (recognizing that a taking occurs "when property is appropriated by the government *or is transferred* to other private citizens," and that the government cannot "give itself immunity from a takings claim by the device of requiring the transfer of property from one private citizen to another") (emphasis added).

C. The Act's Purpose Has No Bearing On Whether It Gives Rise To *Per Se* Takings.

Defendants also assert that this case "is complex with its own set of 'particular facts,'" and that *Horne* is therefore "not controlling." Defs. Br. 22-23 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987)). Instead, defendants claim, the "factual background must be explored" to understand why the Act "is a legitimate use of police power to protect the health and safety of the public—not a taking." *Id.* at 24. This effort to distinguish *Horne* is flawed from beginning to end.

For starters, defendants cite *DeBenedictis* for the proposition that takings cases can be distinguished based on their "particular facts." But *DeBenedictis* was a *regulatory* takings case. Given *Penn Central*'s ad hoc test, "particular facts" matter in regulatory takings cases, and different restrictions on uses of property can be distinguished based on their different purposes and different impacts. But that is not true where a law physically appropriates personal property. In that situation, the only facts that matter are that the

owner is deprived of the right to possess, use, and dispose of its property, which is true here.[5]

Similarly, it is irrelevant that the law in *Horne* was designed "to maintain an orderly raisin market," whereas the Act was adopted "to protect the health, safety, or welfare" of Minnesota citizens. Defs. Br. 23. In *Loretto*, the Court squarely held that a physical appropriation of real property by the government "is a taking *without regard to the public interests that it may serve*," 458 U.S. at 426 (emphasis added). *Horne*, in turn, emphasized this aspect of the decision when it extended *Loretto* to physical appropriations of personal property. *See* 135 S. Ct. at 2427. By endorsing this aspect of *Loretto*'s reasoning, *Horne* made clear that the public interests served by a law that physically appropriates personal property have no bearing on whether there is a taking. That reasoning necessarily applies to exercises of the state's police powers to promote the public health and safety.

Defendants try to escape this dispositive principle by indiscriminately blending distinct constitutional concepts. They cite cases holding that use of the police power to abate nuisances does not violate the *Due Process Clause*, then cite *regulatory takings* cases to try to show that the highly deferential standard of review applicable to due process claims somehow applies when a state attempts to abate an alleged public nuisance through a *physical taking.* This effort at constitutional alchemy is meritless.

[5] Accordingly, resolution of the *per se* takings claim PhRMA asserts does not require discovery or consideration of any additional facts.

Defendants rely on the reasoning the Supreme Court employed in rejecting *due process* challenges to state regulation of private property that was "devoted to a public use," *Munn v. Illinois*, 94 U.S. 113, 130 (1877), or was used in a way that injures the public, *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887). With respect to these due process challenges, the Court applied a highly deferential standard in which "every possible presumption is to be indulged in favor of the validity of a statute," and a law could be struck down only if it was "arbitrary." *Mugler*, 123 U.S. at 661, 663.[6] The Court subsequently applied this deferential standard to other laws that regulated or burdened—but did not physically appropriate—property.[7]

Relying heavily on *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211 (1986), defendants offer an elaborate—and wholly mistaken—theory for why this same deferential due process standard applies here. *Connolly* involved a law that required an employer "'to use [its] assets for the benefit of another'" in order to address a problem

[6] In a portion of *Mugler* that defendants do not cite, the Court rejected the argument that a prohibition on use of property to make and sell liquor was a taking. The Court explained that the principles recognized in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872)—which held that the permanent flooding of private property was a physical appropriation, and thus a taking—"have no application to the case under consideration." *Mugler*, 123 U.S. at 667-68. In *Munn*, the majority did not address a takings claim.

[7] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (no due process violation where law required coal mine operators to pay black lung benefits to miners who retired before law took effect); *Atchison, Topeka & Santa Fe Ry. v. Pub. Utils. Comm'n*, 346 U.S. 346 (1953) (no due process violation where railroads required to pay costs of road improvements necessitated by railroad tracks); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405 (1935) (remanding for determination whether imposing costs of grade separations on railroad was arbitrary); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (no due process violation where state required owner to cut down trees infected with communicable disease but owner retained "the privilege of using the trees when felled").

the employer had caused "by withdrawing from [a] pension plan." Defs. Br. 24, 26 (quoting *Connolly*, 475 U.S. at 223). The Supreme Court had previously rejected a due process challenge to the same law, and thought "it would be surprising to discover now that Congress unconstitutionally had taken the [employer's] assets." *Id.* (paraphrasing *Connolly*, 475 U.S. at 223). Based on these selective quotes and paraphrases, defendants claim that (1) insulin manufacturers can likewise be required to use their assets (insulin) for the benefit of others in order to remedy the harms caused by their allegedly "greedy" and "unethical" pricing practices, *id.* 24; (2) it would be equally surprising to treat the Act as an unconstitutional taking; and (3) there is "no 'constitutionally compelled reason to require [Minnesota] to assume the financial burden of attaining this goal,'" *id.* at 26 (quoting *Connolly*, 475 U.S. at 228).

The glaring flaw in this argument is that *Connolly* was a *regulatory takings* case. The Court expressly stated that "under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets." 475 U.S. at 226. The "assets" the employer was required to transfer were not physical property, but money (unassociated with any specific property or property interest) necessary "to fulfill [a] statutory liability." *Id.* at 225. The Court applied *Penn Central*'s three factors to determine whether this compelled payment constituted a regulatory taking. *Id.* at 225-26.

Because *Connolly* was a regulatory takings case, its reasoning is irrelevant in cases, like this one, where a law appropriates personal property. As *Horne* makes clear, it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' *and vice versa.*" 135 S.

Ct. at 2428 (emphasis added) (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 323). *Connolly* thus provides no support for defendants' theory that physical appropriations of property give rise to *per se* takings only when property is taken to regulate commercial activities, but not when property is taken to promote public health and safety.[8]

D. There Is No "Nuisance Exception" To The *Per Se* Takings Rule For Physical Appropriations Of Property.

Undaunted, defendants claim that "persuasive case law" demonstrates "that the nuisance exception to takings applies for both regulatory and physical takings." Defs. Br. 25. But the two decisions defendants cite are wholly unpersuasive. And the exception these cases purport to recognize would not apply here in any event.

In *Hendler v. United States*, 36 Fed. Cl. 574 (1996), the Federal Circuit had found a physical taking and remanded for a compensation award. On remand, the Claims Court expressed its "understanding" (in gratuitous dicta with no accompanying legal analysis) that "the nuisance exception … would obviate the need for compensation even under the physical taking theory." *Id.* at 586 n.13. But the court then stated that it would nevertheless award compensation in accordance with the Federal Circuit's prior contrary ruling. Unexplained dicta is not "persuasive" authority.

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[8] Indeed, six years after *Connolly*, the Court explained that the "'harmful or noxious uses' principle" recognized in cases like *Mugler* was simply a precursor to the recognition, embodied in the *Penn Central* test, that government may often restrict uses of land, and thereby "affect property *values by regulation* without incurring an obligation to compensate." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022-23 (1992) (emphasis added) (citing *Penn Central Transportation Co.*, 438 U.S. at 125). *See also id.* at 1026 ("'[P]revention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any *regulatory diminution in value* …." (emphases altered)).

In *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230 (2004), the court expressed the view that the Supreme Court's reasoning for recognizing a nuisance exception for a *regulatory* taking in *Lucas* also applied to physical takings. This decision is both non-precedential,[9] and mistaken. The Claims Court erred by treating what amounted to an easement over the plaintiffs' leased land as simply a restriction on the plaintiffs' right to use the land. *See id.* at 236 (physical takings claim "can be defeated where the owner intends a *use* that is prohibited as a nuisance" (emphasis added)). It thus overlooked the critical difference between regulatory restrictions on use of land and physical appropriations.

In fact, *Lucas* itself noted this difference. There, the Court explained that, even when a regulation "deprives land of all economically beneficial use," the state owes no compensation if "the proscribed use interests were not part of [the landowner's] title"—and all land is encumbered by the principle that noxious uses of land can be abated. 505 U.S. at 1027. The Court then *contrasted* land-use restrictions with permanent physical occupations, stating that the government cannot physically appropriate property without compensation "no matter how weighty the asserted 'public interests' involved—though we assuredly *would* permit the government to assert a *permanent easement* that was a

[9] Defendants cite the *Gravel* court's decision at summary judgment, but the final judgment entered after trial was vacated in a decision affirmed by the Supreme Court. *See John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556, 560-61 (2004) (decision on final judgment), *vacated*, 457 F.3d 1345, 1346-47 (Fed. Cir. 2006) (holding that the Claims Court "lacked jurisdiction" and vacating and remanding with instruction to dismiss the complaint), *aff'd*, 552 U.S. 130 (2008).

pre-existing limitation upon the landowner's title." *Id.* at 1028-29 (second emphasis added) (citation omitted) (quoting *Loretto*, 458 U.S. at 426).

Lucas thus makes clear that, while the right to *use* land is subject to reasonable exercises of the police power, the state cannot use the police power to appropriate (without compensation) the full panoply of rights to "'possess, use *and* dispose of'" physical property, *Loretto*, 458 U.S. at 435 (emphasis added), regardless of the interests the state seeks to promote. Instead, compensation is always required for a physical appropriation, unless the owner's title never included all of the rights to possess, use, and dispose of the property that a state law appropriates. Thus, Jean Loretto would not have been entitled to compensation if she had purchased her building subject to an easement that allowed cable companies to install equipment on the building's roof; in that circumstance, she would have had no right to exclude such installations, so New York's law could not have deprived her of such a right. If, on the other hand, she used her building as an illegal nightclub that created a nuisance for her neighbors, New York could have abated the nuisance by prohibiting its *use* as a nightclub. But it could not have confiscated the building and transferred it to her neighbors without paying compensation.

Even if this Court were to overlook the analytical shortcomings in the non-precedential *Gravel* decision, that decision still would not help defendants. It stated that the government must identify the legal principles "that would prohibit the use of" the property that an owner is engaging in, and warned that "'nonexistent rules of state substantive law' cannot be invoked to deny rights protected by the federal Constitution.'" 60 Fed. Cl. at 239-40. Here, insulin is a life-saving medicine that defendants admit does

not itself "create a nuisance." Defs. Br. 24. Defendants have cited nothing—no statute, regulation, or judicial decision—showing that the pricing of a medicine approved by the Food and Drug Administration (FDA) can constitute a cognizable "nuisance" under Minnesota law.

Indeed, selling a prescription drug is not a "use" of physical property, but an exercise of the right to "dispose" of property. *See Andrus*, 444 U.S. at 65 (prohibition on sale of eagle feathers was a "restriction … on one means of disposing of the artifacts"). Insofar as Minnesota's public nuisance statute applies to sales, it does so only for the "unlawful sale" of "controlled substances," "unlicensed sales of alcoholic beverages," or "unlawful sales or gifts of alcoholic beverages by an unlicensed person"—all within buildings. *See* Minn. Stat. § 617.81, subd. 2(v)-(vii). And defendants cite no authority for the extraordinary proposition that a nuisance can be remedied not simply by abating a noxious use, but by an uncompensated confiscation and transfer of the property to a third party.

In short, there is no basis for defendants' contention that Minnesota can appropriate the private property of insulin manufacturers without compensation based on a public nuisance theory.

E. Insulin Manufacturers Did Not Relinquish Their Property Rights As Part Of A Voluntary Exchange For Licensure In Minnesota.

In yet another attempt to escape *Loretto* and *Horne*, defendants claim that insulin manufacturers voluntarily exchanged their property rights for the right to market insulin in Minnesota. Defs. Br. 28-30. Defendants note that Minnesota requires pharmaceutical

companies licensed in the state "to operate in a manner prescribed by … state law," Minn. Stat. § 151.252, subd. 1(d), and that the Act was part of state law when the manufacturers renewed their licenses. Defs. Br. 30. Defendants thus claim that this case is controlled by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which held that the Environmental Protection Agency (EPA) could require pesticide manufacturers to disclose protected trade secrets as a condition to receiving permits from EPA to sell those products. Like the nuisance argument, this "voluntary exchange" argument is groundless.

First, contrary to defendants' suggestion, Defs. Br. 29, *Monsanto* did not involve a *per se* taking of Monsanto's trade secrets. EPA's disclosure regulations did not deprive Monsanto of *all* rights in its trade secrets, *Loretto*, 458 U.S. at 435; the data Monsanto had to disclose, including its trade secrets, "*retain[ed] usefulness for Monsanto* even after they [were] disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries." *Monsanto*, 467 U.S. at 1012 (emphasis added). *Monsanto* thus involved a straightforward regulatory takings claim, and the Court discussed Monsanto's notice of the regulatory disclosure requirements in assessing the company's "reasonable investment-backed expectations." *Id.* at 1005-07. That discussion provides no basis for holding that a pharmaceutical company waives its right to challenge *per se* takings of its property simply because it is aware of a state's confiscatory law and agrees, as part of a licensing obligation, to abide by state law.

Second, in *Loretto* and *Horne*, the Court stated that a property owner's right to rent or sell property cannot be "conditioned on [their] forfeiting the right to compensation

for a physical occupation." *Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17). And in *Horne*, the Court refused to extend *Monsanto* to physical takings "by regarding basic and familiar uses of property as a 'Government benefit.'" *Id.* In nonetheless asking this Court to be the first to extend *Monsanto* to a physical taking, defendants argue that "*Horne* did not involve a health and safety regulation or a permit to sell in a regulated market"; that insulin manufacturers, like pesticide manufacturers, "are highly regulated"; and that a "license to act as a drug manufacturer in Minnesota is on the same order as a permit to sell hazardous chemicals." Defs. Br. 29-30. Their attempt to analogize this case to *Monsanto*, however, is deeply flawed.

Under the federal pesticide law, Monsanto obtained the enormously valuable rights to market a product throughout the nation, and "a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978." *Monsanto*, 467 U.S. at 994. Those rights, moreover, were based on a showing by the company, and a finding by EPA, that the product would "not cause 'unreasonable adverse effects on the environment.'" *Id.* at 992. Thus, Monsanto gave up only some of its property rights—the right to exclude others from its trade secrets, but not the right to use those secrets—in exchange for an approval that was essential to the existence of a marketable product, and that afforded the company exclusive rights to sell the product.

The "voluntary exchange" defendants purport to identify here is not remotely similar. It is FDA, not Minnesota, that approves the prescription medicines that may be sold in the United States. Indeed, defendants have failed to identify any Minnesota law or agency action that is connected in any way to the existence of these products, or any

exclusive rights to market them, yet defendants claim that Minnesota can appropriate *all* of the manufacturers' property rights in insulin covered by the Act.

At the end of the day, the "benefit" Minnesota has conferred is simply the right to sell a *federally*-approved and *federally*-regulated product within its borders. That is not a "special governmental benefit that [Minnesota] may hold hostage, to be ransomed by the waiver of constitutional protection." *Horne*, 135 S. Ct. at 2130-31. Indeed, at the time of *Loretto*, New York City landlords were heavily regulated, but the right to rent apartments could not be conditioned on forfeiting the right to compensation for physical takings. 458 U.S. at 439 n.17. New York plainly could not have avoided that result by requiring landlords to obtain licenses conditioned on compliance with all state laws, then claiming that a landlord who obtained a license had waived her right to challenge the cable access law. Defendants' efforts to obtain the same impermissible result here should be rejected.[10]

Defendants' reliance on *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), is equally misplaced. *See* Defs. Br. 30-31. That case did not involve any taking of physical property, but rather a challenge to limits Minnesota placed on the rates that nursing homes could charge non-Medicaid residents in facilities that also served Medicaid

[10] Indeed, defendants' argument, if credited, would allow a state to appropriate *any* product so long as the state requires compliance with state and federal law as a condition of being able to sell that product. *Horne* rejected that line of argument. *See* 135 S. Ct. at 2430-31 (the sale of products may be "subject to reasonable government regulation," but cannot be held "hostage, to be ransomed by the waiver of constitutional protection").

patients. 742 F.2d at 445-46. It thus provides no basis for extending *Monsanto*'s "voluntary exchange" concept to a *per se* physical taking.

Moreover, the nursing homes received reimbursements for Medicaid patients who otherwise could not pay. Deeming this benefit insufficient, the nursing homes sought to further subsidize services to Medicaid patients by charging higher rates for similar services to their non-Medicaid patients. *Id.* at 445. The state sought to prevent this, first by capping rates for non-Medicaid patients, then barring homes that had historically charged below capped-rates from raising their rates to the capped level. *Id.* The court upheld the law because it did "not involve a forced taking of property by the state," but instead a "voluntary participation in [a state] program." *Id.* at 446. Here, by contrast, Minnesota is not offering manufacturers an opportunity to participate in a program that subsidizes insulin purchases by eligible residents, then imposing conditions to prevent manufacturers from supplementing those subsidies. The whole point of the Act is to force manufacturers to give insulin for free to persons who fall outside the state's safety net programs so Minnesota will not have to provide increased subsidies to those programs.

F. There Is No "Medical Products Exception" To The *Per Se* Takings Rule For Physical Appropriations Of Property.

Finally, defendants argue that, in the "medical context," *Penn Central*, rather than *Loretto* and *Horne*, should apply because (according to defendants) the Act does not appropriate insulin for the government's own use, but instead merely "regulates the manufacturer's use of the insulin" in order to "adjust[] the benefits and burdens of economic life to promote the common good." Defs. Br. 31-32. This argument is simply a

repackaged amalgam of defendants' other flawed arguments, and fails for the same reasons.

Defendants cite (again) *Connolly*, as well as *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), as cases where the Court supposedly upheld laws that "permanently deprived [an] employer of … assets," even though "the government 'did not physically invade or permanently appropriate any of the employer's assets for its own use.'" Defs. Br. 32. But as discussed above, the fact that Minnesota appropriates insulin for its citizens, rather than for its own use, is irrelevant. *Supra*, § I.B. And, contrary to defendants' suggestion, *Concrete Pipe* held that employers could *not* suffer a complete and permanent deprivation of property in the absence of a physical appropriation. The Court "*reject[ed]* Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation," explaining that Concrete Pipe could not "shoehorn its claim into this analysis by asserting that" the funds taken were taken in their "entirety." 508 U.S. at 643-44 (emphasis added). "[T]he relevant question," the Court explained, "is whether the property taken is all, or only a portion." *Id.* at 644. Here, the Act does not merely "regulate" the manufacturers' use of insulin, *supra*, § I.A., but instead takes all rights in the insulin it covers. It thus effects a *per se* physical taking, not a regulatory taking governed by the *Penn Central* analysis.

Defendants' reliance, Defs. Br. 32-33, on *Sierra Medical Services Alliance v. Kent*, 883 F.3d 1216 (9th Cir. 2018), and *Franklin Memorial Hospital v. Harvey*, 575 F.3d 121 (1st Cir. 2009), is misplaced for the same reasons. In *Kent*, the Ninth Circuit

held that a state law requiring plaintiffs to provide free emergency ambulance services should be evaluated under *Penn Central*, not as a *per se* taking, because the law did "not directly appropriate the Plaintiffs' ambulances or other personal property," but instead "constitutes a temporary restriction on Plaintiffs' use of their property." 883 F.3d at 1225. In *Harvey*, the First Circuit concluded that the state law did not physically appropriate the hospital's beds or medicines because the hospital was "not required to serve low income patients; it may choose to stop using its property as a hospital, which is what makes it subject to Maine's free care laws." 575 F.3d at 126. Here, the First Circuit's analogy to rent control is completely inapposite: the manufacturers cannot choose "to stop using [their] property as a" medication for treating diabetes; that is its only purpose. Moreover, *Harvey* predates *Horne* and did not separately explain why being forced to provide free medicines was not a physical appropriation of that personal property.

* * *

As PhRMA's *amici* have explained, a decision to uphold the physical appropriation of insulin in this case would open the door to uncompensated takings of many other types of personal property that citizens need but cannot afford. *See* Br. of the National Association of Manufacturers and Chamber of Commerce of the United States of America as *Amicus Curiae* 13-20; Br. *Amicus Curiae* of the Goldwater Institute 4. Defendants blithely dismiss these concerns by asserting that "the insulin market is nuanced even compared to the traditional drug market." Defs. Br. 34. But there is nothing "nuanced" about defendants' legal theories. They would justify uncompensated physical takings of any personal property if the state can identify a health and safety rationale for

the taking and either (a) a basis for arguing that the owner charges more for the property than the state believes is fair or (b) an even more generalized claim that the taking appropriately "adjusts the benefits and burdens of economic life to promote the common good." *Id.* at 32.[11] Because *Loretto* and *Horne* foreclose these justifications for physical appropriations of property, this Court should reject defendants' invitation to take the first step down this slippery slope.

II. MANUFACTURERS NEED NOT SUFFER A "NET LOSS" TO ESTABLISH A COMPENSABLE TAKING.

Defendants argue that, even if a taking has occurred, there is no constitutional violation because PhRMA has failed to prove that insulin manufacturers suffered a "net pecuniary loss." Defs. Br. 35. This argument is baseless.

The Supreme Court "'has repeatedly held that just compensation is normally to be measured by 'the *market value of the property* at the time of the taking.'" *Horne*, 135 S. Ct. at 2432 (emphasis added). There is no question that the manufacturers' insulin had a market value of more than $0. Indeed, the Act only applies to insulin that has a wholesale acquisition cost of more than $8 per milliliter, which federal law defines as "the manufacturer's list price" to "wholesalers or direct purchasers," "not including prompt pay or other discounts, rebates or reductions in price," 42 U.S.C. § 1395w-3a(c)(6)(B).

[11] Indeed, defendants' assurances about the nuances of the insulin market are undercut by the article they cite, which argues for nationalization of the pharmaceutical industry. Fran Quigley, *Tell Me How It Ends: The Path to Nationalizing the U.S. Pharmaceutical Industry*, 53(4) U. Mich. J.L. Reform 755, 803 (2020).

And defendants' purported justification for appropriating this property is that the manufacturers charge prices that the state views as excessive.

Yet, on the issue of compensation, defendants completely shift gears: far from claiming that manufacturers have caused an "insulin affordability crisis" that prevents eligible residents from purchasing insulin they need, Defs. Br. 24-25, defendants tout the fact that manufacturers have adopted patient assistance "programs—with eligibility requirements *similar to the Act's*—to provide free and reduced-cost insulin to individuals." *Id.* at 36 (emphasis added). In light of these programs, defendants argue that PhRMA cannot establish that any compensation is due, because the manufacturers "would have provided the insulin for free" under their own programs, and thus have "not suffered a net loss." *Id.* This argument directly undermines defendants' nuisance claims.[12] But it provides no basis for ruling that the state can appropriate valuable insulin without paying compensation for it.

Defendants base their "net loss" theory on *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). But *Brown* recognized an exception to the "market value" rule in a narrow—indeed, *sui generis*—situation that is plainly inapplicable here.

[12] Defendants' claims that manufacturers have caused an insulin "affordability crisis," Defs. Br. 24-25, are also belied by Minnesota's law requiring insurers that impose cost-sharing requirements on beneficiaries to limit out-of-pocket payments for insulin to the net price the insurer pays. That statute recognizes that many patients cannot afford insulin because their *insurers* fail to pass on "rebates or discounts" that they receive "from a drug manufacturer or pharmacy benefit manager." Minn. Stat. § 62Q.48, subd. (2)(e), (3). *See also* Br. of T1International et al. as *Amici Curiae* 11, n.4, 14, 17 (explaining that insured patients may be unable to afford their insulin because their insurance has high deductibles or large copayments for insulin).

The property at issue in *Brown* was interest earned on funds that are deposited for short periods of time and pooled with other short-term deposits in Interest on Lawyer Trust Accounts (IOLTA). In *Brown*, the Court stressed that, under the relevant ethics rules, funds could be deposited in IOLTA accounts only if they would *not* earn interest if deposited separately. *Id.* at 239-40. Based on that requirement, the Court held that, "[b]ecause of the way the IOLTA program operates, the compensation due [to persons whose funds were deposited in IOLTA accounts] for any taking of their property would be nil." *Id.* at 240.

Here, by contrast, defendants do not and cannot dispute that each vial of insulin taken under the Act has independent market value, and that the market value of each vial does not depend on the existence of the Act (the way the earned interest at issue in *Brown* depended on the IOLTA program). Moreover, defendants cite no case in which *Brown*'s reasoning has been applied to appropriations of physical property that is sold in interstate commerce, and thus has an ascertainable market value.

Defendants obliquely refer to another exception to the market value rule, Defs. Br. 35, but it is equally inapplicable. Under *Bauman v. Ross*, 167 U.S. 548 (1897), "when the Government takes only a portion of a parcel of property" and the remainder of the parcel "is specially and directly increased in value by" public improvements on the appropriated portion, "the damages to the whole parcel by the appropriation of part of it are lessened." *Horne*, 135 S. Ct. at 2434 (Breyer, J., concurring in part and dissenting in part) (quoting *Bauman*, 167 U.S. at 574). Here, however, the Act does not take "only a portion of" a vial of insulin; for eligible individuals, the Act takes all ownership rights in the

manufacturer's insulin. Defendants, moreover, do not and cannot identify any "potential benefits" that manufacturers derive "from the Act," Defs. Br. 35-36—which simply strips them of property without any compensation. In all events, *Horne* made clear that the "special benefits" that can be deducted from compensation for a physical taking are themselves *physical* benefits—"such as new access to a waterway or highway, or filling in of swampland"—and that benefits from regulation of a market in which a property owner participates are not relevant. 135 S. Ct. at 2432.

Ultimately, defendants argue that if a manufacturer decides to give away personal property for free to certain individuals based on criteria of its own choosing, a state can mandate that the manufacturer continue doing so, adjust the manufacturer's criteria, force the manufacturer to adopt a costly and distinct, state-specified administrative system for giving away its property, subject the manufacturer's application of the (state-adjusted) criteria to state review, and impose fines if the manufacturer fails to comply—then disclaim any responsibility to pay just compensation for the product unless the manufacturer can prove that it has suffered a "net loss."[13] Defendants cite no authority for this novel and extraordinary exception to the "market value" rule of just compensation. The Court should decline defendants' invitation to be the first to create such an exception.

[13] Under the Act's Urgent Need Program, moreover, pharmacies seeking reimbursement or replacement insulin do not provide information that would enable a manufacturer to determine whether the patient would have qualified for free insulin under its own programs—and thus to make the "net loss" showing defendants claim is a precondition to just compensation.

III. PROSPECTIVE INJUNCTIVE RELIEF IN FEDERAL COURT IS NOT FORECLOSED BY STATE-LAW REMEDIES.

Defendants are also wrong to argue that PhRMA's motion for summary judgment must be denied because this Court is powerless to enter either an injunction or a declaratory judgment to remedy the Act's unconstitutional taking of the manufacturers' insulin. It is an overstatement to say that "equitable relief is not available to enjoin a taking of private property" whenever "a suit for compensation can be brought against the government subsequent to the taking." Defs. Br. 11. The rules governing injunctive relief in takings cases stem from the general principle that an injunction will not be entered if the plaintiff has "a plain, adequate, and complete remedy at law." *Knick*, 139 S. Ct. at 2175 (quoting *Hurley v. Kincaid*, 285 U.S. 95, 99 (1932)); *see also* PhRMA Br. 23. Thus, federal courts will not "invalidate [government] regulations as unconstitutional" under the Takings Clause when "an *adequate* provision for obtaining just compensation exists" and when "when the property owner can receive *complete relief* through a Fifth Amendment claim brought under" those compensatory procedures. *Knick*, 139 S. Ct. at 2176, 2179 (emphases added). As PhRMA's opening brief explained, that is not the situation here. *See* PhRMA Br. 23-26.

The Act itself provides no compensation for the insulin the manufacturers are compelled to give away for free, and defendants deny that any such compensation is required. *See* Defs. Br. 22-36. Consequently, insulin manufacturers will have to file state court mandamus actions to compel the state to initiate eminent domain proceedings. But state court mandamus action can only compel the state to provide compensation for

insulin a manufacturer has already given away under the Act; it cannot compel the state to provide compensation for the insulin the Act requires the manufacturer to give away in the future. Defendants have failed to refute PhRMA's showing that this state court compensation remedy is inadequate, and that PhRMA is entitled to an injunction against enforcement of the Act, or at least a declaratory judgment, to remedy Minnesota's ongoing taking of the manufacturers' insulin without just compensation.

A. PhRMA Is Entitled To Injunctive Relief.

1. Defendants first argue that "PhRMA cannot demonstrate that its members have suffered or will suffer an irreparable injury as a matter law" because the members can obtain compensation through state court mandamus proceedings. Defs. Br. 38. But a mandamus action cannot provide a complete compensatory remedy because, among other things, it is retrospective, providing compensation only for the insulin that was taken from the manufacturer in the past. PhRMA Br. 23-26. The state has the sovereign power to decide whether it wants to take more insulin in the future (here, by keeping the Act in place), and the state court has no power to force its hand by compelling payment for future takings. *See McShane v. City of Faribault*, 292 N.W.2d 253, 259 (Minn. 1980), *abrogated in part by DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610 (2012). That is why the Minnesota Supreme Court held in *McShane* that when a law effects a taking of property without compensation that is "reversible," an "injunction against enforcement," and not mandamus to compel eminent domain proceedings, is the "appropriate remedy." *Id.* An injunction would give the state "the option of repealing"

the law (and thereby reversing the taking) or retaining the law and providing compensation for the property taken. *Id.*

Defendants respond that "*McShane* was abrogated by *DeCook*." Defs. Br. 13. But as PhRMA explained, *McShane* was abrogated only insofar as it held that mandamus to compel compensation "was not the appropriate remedy for what could be only a temporary taking," since the law is now clear that the state must provide just compensation for even a temporary taking of property. PhRMA Br. 25 (quoting *DeCook*, 811 N.W.2d at 612). Defendants have not shown that *McShane*'s other holding—*i.e.*, that as a matter of Minnesota law, a mandamus action cannot be used to compel compensation for takings that are "reversible" because they have not yet occurred—is invalid. Indeed, defendants wholeheartedly agree that if the Act effects a taking of insulin, the state should be left with the "options" of amending or withdrawing the Act or leaving it in place and "exercis[ing] eminent domain"—*i.e.*, condemning and paying for insulin that it wants to provide to eligible residents. Defs. Br. 18. But that is the scenario where *McShane* said an injunction *is* the "appropriate remedy" because it would give the state precisely those options. *McShane*, 292 N.W.2d at 259-60. And defendants nowhere explain why an injunction is an *impermissible* remedy in federal court if it is the *appropriate* remedy in state court.

2. Defendants instead invoke federal case law, suggesting that no injunction can issue because the Eighth Circuit has already held that Minnesota's inverse condemnation procedures provide an adequate compensatory remedy, Defs. Br. 13, or

that *Knick* resolved the issue by stating that any compensation procedures "should be presumed to be an adequate remedy," *id.* at 38. Neither suggestion is correct.

The Eighth Circuit cases were brought before *Knick*, when plaintiffs had to exhaust "adequate procedure[s]" for seeking compensation in state court before bringing a taking claim in federal court. *Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918, 923 (8th Cir. 2016); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). The Eighth Circuit dismissed both cases as unripe because the plaintiffs had not brought mandamus actions to compel eminent domain, which the court said would have allowed them to "seek just compensation," *Koscielski*, 435 F.3d at 903-04, and would not have been "futile," *Am. Family Ins.*, 836 F.3d at 923-24. These cases have no application here. They involved alleged takings of discrete property for which compensation could be provided in a single eminent domain proceeding,[14] not a law that compels ongoing takings of new items of property forever (assuming the Act is not repealed).[15] And the Eighth Circuit had no occasion in either case to address whether an injunction is an appropriate remedy for such continuous takings.

Knick likewise did not address the unusual situation of a law that compels the taking of new items of private property on an ongoing basis. As PhRMA previously

[14] *Am. Family Ins.*, 836 F.3d at 920 (alleged taking of condominiums flooded by broken water main that was repaired within twelve hours); *Koscielski*, 435 F.3d at 900 (alleged taking of firearms dealership by zoning ordinance barring it from leasing property in its desired location).

[15] The Urgent Need Program is permanent. The Continuing Safety Net Program will expire on December 31, 2024, unless the legislature extends it. *See* Minn. Stat. § 151.74, subd. 16; Defs. Br. 16.

explained, *Knick* involved a law that required a homeowner to allow public access to a cemetery in her yard, *Knick*, 139 S. Ct. at 2168, which is akin to "a classic right-of-way easement" for which compensation is routinely granted in a single eminent domain proceeding. PhRMA Br. 27 (quoting *Nollan*, 483 U.S. at 831-32 & n.5). The Court's statement that "equitable relief is *generally* unavailable" because "nearly all state governments provide just compensation remedies to property owners who have suffered a taking," *Knick*, 139 S. Ct. at 2176-77 (emphasis added), is not a "*holding*" that injunctive relief is *always* "foreclosed in takings actions," Defs. Br. 13 (emphasis added). Indeed, the Court assured the United States that "[f]ederal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive *complete relief* through *a Fifth Amendment claim* brought under the Tucker Act." *Knick*, 139 S. Ct. at 2179 (emphases added). The Court nowhere suggested that the government could compel companies to give way their products away on a permanent, ongoing basis and force them to bring a series of retrospective inverse condemnation suits to obtain the just compensation required by the Fifth Amendment.[16]

3. Courts have long recognized that "[a]n inadequacy of legal remedy exists where one is bound to litigate a multiplicity of suits having a community of facts and

[16] Nor has the Court held that there can be no claim for a "future taking." Defs. Br. 12. *Knick* recognized that the Takings Clause is violated when property is taken without compensation regardless of *future* compensation proceedings, 139 S. Ct. at 2170, and *Hurley* stated that compensation need not be paid in *advance* of a taking, 285 U.S. at 104. Neither principle, however, means that a takings claim is never ripe until the very moment property is appropriated.

issues." *Equitable Life Assur. Soc.*, 102 F.2d at 14 (citing Supreme Court cases). "Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts." *Id.*; *see also, e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982) (historically, collection of a state tax could be enjoined if the taxpayer "has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury …." (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871))); *U.S. ex rel. Zissler v. Regents of Univ. of Minn.*, 992 F. Supp. 1097, 1112 (D. Minn. 1998) (Kyle, J.) (equitable relief is available "unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances"). PhRMA is aware of *no* case holding that an inverse condemnation remedy is adequate if it forces the property owner to file a repeated series of lawsuits to obtain the just compensation required by the Fifth Amendment. *See* PhRMA Br. 27-33.

The *Regional Rail Reorganization Act Cases* cited by defendants required no such repeated litigation. *See* Defs. Br. 17-18. That case arose out of a congressionally-mandated reorganization of eight railroads that had entered reorganization proceedings under the Bankruptcy Act. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 108, 108-09 (1974). The bankrupt railroads were to be reorganized into a new private corporation that would receive an infusion of federal funding, and they were required to continue to provide rail service until the reorganization took effect. *Id.* at 111, 116-17. The district

court enjoined the continuation-of-service requirement because it thought (1) the operating losses might erode the value of the bankruptcy estate to such an extent that it could become a "taking," and (2) the reorganization act precluded the shareholders and creditors from seeking compensation from the United States under the Tucker Act. *Id.* at 118-20.

The Supreme Court reversed, holding that an injunction was improper because the Tucker Act remedy was available to provide compensation for any "erosion taking" that might occur. *Id.* at 124-25, 136. But the Rail Act governed a discrete event (the bankruptcy reorganization) and any "erosion taking" it could have caused was limited to that event.[17] There was no suggestion that the railroad estate would have had to bring a series of Tucker Act suits to obtain compensation. And the Court certainly did not hold that the government can compel an owner to give away new items of private property on a permanent ongoing basis and force the owner to repeatedly sue the government to obtain the compensation the Constitution requires.

Indeed, a plurality of the Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498, concluded that the availability of damages under the Tucker Act did not foreclose claims

[17] Defendants' reliance, Defs. Br. 16-17, on *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992), and *National Fuel Gas Distribution Corp. v. New York State Energy Research & Development Authority*, 265 F. Supp. 3d 286 (W.D.N.Y. 2017), is similarly misplaced. The alleged taking of chicken and eggs at issue in *Rose Acre Farms* arose from the government's regulation of a discrete event (a salmonella outbreak) for which compensation could be sought in a single Tucker Act suit. *See* PhRMA Br. 27-28. And, in *National Fuel*, plaintiff claimed that the state had destroyed its right to "'possess, use and dispose of' [its] *pipeline*." 265 F. Supp. 3d at 293 (emphasis added). This is a claim of a permanent physical occupation of real property for which compensation could likewise be sought in a single Tucker Act suit. *Id.* at 295 n.2.

for injunctive and declaratory relief from a succession of alleged takings mandated by the Coal Act. Although not binding here, the logic of the decision supports the conclusion that manufacturers should not be compelled to give away their insulin on an ongoing basis and forced repeatedly to sue to receive compensation. *See* PhRMA Br. 29-31 (discussing *Eastern Enterprises* and *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1 (1st Cir. 2007), which relied on similar reasoning in a case involving a series of alleged takings of unclaimed funds and interest in an insurance fund in Puerto Rico). Defendants respond that those cases involved the "direct transfer [of] funds," not the "taking of physical property—insulin." Defs. Br. 15. But as defendants acknowledge, *id.*, the Act expressly allows manufacturers to "reimburse the pharmacy in an amount that covers the pharmacy's acquisition cost" for the insulin the pharmacy dispensed under the Urgent Need Program. Minn. Stat. § 151.74, subd. 3(d). When they do so, compensation for the taking would necessarily require the same "dollar-for-dollar compensation" at issue in *Eastern Enterprises*.

Defendants also argue that there is no "dollar-for-dollar compensation" required here because, in defendants' view, the market value of insulin is inflated, and the state could use the inverse condemnation process to pay "less than what it would have cost the state to purchase the insulin" directly. Defs. Br. 15. But Minnesota is required to pay the manufacturers the fair market value of the insulin taken from them under the Act, *see, e.g.*, *Horne*, 135 S. Ct. at 2432, so the state should not get a lower price by exercising its sovereign authority to take the insulin. To the extent the state hopes that it can get a below-market price by forcing manufacturers to bear the burden of filing repeated inverse

condemnation actions to "prove their damages" to factfinders, potentially years after the taking occurs, Defs. Br. 16, that is yet another reason to enjoin the Act.[18]

4. The balance of hardships also weighs in favor of an injunction prohibiting defendants from enforcing the Act. Defendants claim that an injunction would be an affront to state sovereignty and interfere with Minnesota's chosen method for dealing with "the crisis of insulin affordability." Defs. Br. 40. But the state has no sovereign right to compel manufacturers to give away their insulin on a permanent ongoing basis and then force them to bring repeated retrospective inverse condemnation actions to compel the state to compensate them for the insulin that was taken. That scheme does not provide the complete and adequate compensation remedy required by Fifth Amendment, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Defendants further emphasize that insulin is a "life-saving" medication that should be widely available, and that there is a "'robust public interest' in safeguarding access to healthcare." Defs. Br. 40-41. But the PhRMA members that sell insulin in Minnesota

[18] In addition, it is unclear whether a manufacturer would be "fully compensated" for the "attorney's fees" that such repeated and contested litigation would necessarily entail. Defs. Br. 16; *see also id.* at 13. Defendants cite Minn. Stat. § 117.045, which authorizes an award of attorney's fees for successful mandamus actions to "initiate eminent domain proceedings relating to a person's real property," but is silent about proceedings relating to personal property. Minn. Stat. § 117.031 mandates attorney's fees in eminent domain proceedings if the award "is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition," but makes attorney's fees discretionary if the award is "at least 20 percent, but not more than 40 percent, greater than the last written offer," and expressly prohibits attorney's fees if the award "does not exceed $25,000."

have already devoted significant resources to provide insulin to individuals who have difficulty paying for it. *See* PhRMA Br. 1. The manufacturers have voluntarily developed affordability programs that provide discounts and co-payment assistance to significantly reduce patients' out-of-pocket costs, and they also provide free insulin to a great number of patients. *See Insulin Affordability*, Eli Lilly & Co., https://www.insulinaffordability.com (last visited Nov. 17, 2020) (information about Ely Lilly's programs); *NovoCare®*, Novo Nordisk, https://www.novocare.com/ (last visited Nov. 17, 2020) (information about Novo Nordisk's programs); *Patient Assistance Connection*, Sanofi, https://www.sanofipatientconnection.com/ (last visited Nov. 17, 2020) (information about Sanofi's programs); Compl. ¶¶ 56-63 (summarizing the programs). Defendants have admitted that the manufacturers' programs "have similar eligibility requirements to the Act" and "target the same populations that the Act seeks to protect." Defendants' Memorandum Supporting Motion to Dismiss 18-19 (Dkt. Entry 16). The Minnesota legislature's view that the public interest would be served by a state-mandated expansion of these programs "is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co.*, 260 U.S. at 416.

B. PhRMA Is Entitled To Declaratory Relief.

In all events, PhRMA is entitled to a declaratory judgment that the Act effects a taking of property without just compensation in violation of the Fifth Amendment. As PhRMA previously demonstrated, *Knick* does not foreclose a federal court from issuing declaratory relief in a takings case. PhRMA Br. 33. And "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel*

v. Thompson, 415 U.S. 452, 466 (1974). A declaratory judgment is a "milder" remedy that may be entered even though "all of the traditional equitable prerequisites to the issuance of an injunction" are not satisfied. *Id.* at 471; *see also id.* at 471-72 ("a failure to demonstrate irreparable injury" does not "preclude[] the granting of declaratory relief").

Defendants err in saying that "a declaration that the Act effects a taking would serve no useful purpose" or "would operate as a *de facto* injunction." Defs. Br. 20, 42-43. A declaratory judgment would "'clarify and settle' the legal relations at issue and would afford relief from the 'uncertainty, insecurity, and controversy'" about whether the Act effects a taking of insulin without just compensation. *Scottsdale Ins. Co. v. Detco Indus., Inc.*, 426 F.3d 994, 999 (8th Cir. 2005). A declaratory judgment would not enjoin defendants from enforcing the Act. But the "persuasive force" of the federal court's opinion and judgment would give state officials, courts, and legislators an opportunity "to reconsider their respective responsibilities toward the statute" in the future. *Steffel*, 415 U.S. at 470. "Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew." *Id.* Indeed, defendants themselves say that state officials and legislators would undertake that very type of assessment if a *state* court were to hold, in a mandamus action, that the Act effects a taking of insulin. Defs. Br. 18. There is no reason a *federal* court cannot issue a declaratory judgment to prompt that same assessment.

There are no pending state court proceedings to enforce the Act, so a declaratory judgment that the Act affects a taking of compensation without just compensation "would not result in unnecessary entanglement between the federal and state court systems."

Scottsdale Ins. Co., 428 F.3d at 999. Nor is there a "particular state interest" in having these federal constitutional questions "decided in state court." *Id.* Quite the contrary, Congress enacted Section 1983 to allow "the lower federal courts to determine the constitutionality of actions, taken by persons under color of state law, allegedly depriving other individuals of rights guaranteed by the Constitution." *Steffel*, 415 U.S. at 463-64. *Knick* makes clear that the Takings Clause is not some "'poor relation' among the provisions of the Bill of Rights" that may be excluded from "a federal forum under § 1983" and relegated to state courts. 139 S. Ct. at 2169-70. PhRMA's invocation of that federal forum "in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism." *Id.* at 2177, n.8.

CONCLUSION

For the foregoing reasons, and those set forth in PhRMA's motion, the Court should grant PhRMA summary judgment on its claim that the Act effects *per se* takings of the manufacturers' insulin, issue a declaration that the Act violates the Takings Clause of the Fifth Amendment, and enjoin future operation of the Act.

Respectfully submitted,

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