UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Pharmaceutical Research and Manufacturers of America, Plaintiff, v. Stuart Williams, et al., in their official capacities as members of the Minnesota Board of Pharmacy, Defendants.	File No. 20-cv-1497 (DSD/DTS) Zoom Video Conference Minneapolis, Minnesota Tuesday, December 8, 2020 10:10 a.m.

BEFORE THE HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT COURT SENIOR JUDGE
(MOTIONS HEARING)

APPEARANCES:

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P R O C E E D I N G S

IN COURT VIA ZOOM VIDEO CONFERENCE

THE COURT: Good morning. Usually at this point I would say, "Take your seats," but I think most of you are seated. Remain seated, please.

This is the matter of Pharmaceutical Research and Manufacturers of America versus Stuart Williams, et al.

And may I have appearances, please? Who is representing Pharmaceutical Research and so forth?

MR. GUERRA: I am, Your Honor. Joe Guerra from Sidley Austin. And thank you for allowing me to appear pro hac vice this morning.

THE COURT: Okay. Thank you.

And who is representing the defendants in general?

MS. KRANS: Sarah Krans on behalf of defendants, Your Honor. And also on the meeting is Leah Tabbert of my office.

THE COURT: I didn't quite understand what you just said. I'm sorry. The last part. I heard your name. But what was the other thing you just said?

MS. KRANS: Sarah Krans on behalf of the defendants --

THE COURT: That I heard.

MS. KRANS: -- and also present is Leah Tabbert from my office --

THE COURT: Okay.

MS. KRANS: -- is also present.

THE COURT: All right. Thank you. And I have those.

This is -- there are three motions that are before the court this morning. The first motion is that of a motion -- for a motion to dismiss brought by the defendants. The second motion is a motion for summary judgment brought by the plaintiff. And then we have a motion to alter or supplement the pleadings.

In talking with my clerk, who has already talked to you, I understand that you are not going to spend much time on the third motion, but you are going to do the first two motions in order. As I understand it, we're going to have a half hour each, that is, 15 minutes each on the first motion, 15 minutes each on the second motion, and you don't want me to control how you make rebuttal. Am I understanding how it's going to work? Because I want to make sure I keep track of the time and make sure that we don't overrun or that we're unfair to anybody. So is that -- is that how it's going to work?

And just so we're sure, Mr. Guerra, is that how you understand it?

MR. GUERRA: Yes, Your Honor. Fifteen minutes per side on the motion to dismiss, fifteen minutes per side on

the motion for summary judgment, and we are reserving whatever time is left. We haven't specified rebuttal time.

THE COURT: Okay. Well, having been a lawyer for a long time myself and having been a judge for quite a while, there probably won't be any rebuttal, but -- knowing how things work, but good luck. We'll see how it works out. And sorry to --

MR. GUERRA: Okay. Thank you, Your Honor.

THE COURT: And, Ms. Krans, you understand the same?

MS. KRANS: Yes, Your Honor.

THE COURT: Okay. And so you are first up, Ms. Krans. If you would, please go ahead. And before you start --

MS. KRANS: Thank you, Your Honor.

THE COURT: -- let me tell you both, I have read the briefs. I think I understand what this is about. Don't, please, don't go back and recite the briefs to me, because you will be boring me. And that's a bad thing. That's a sin in the court, to bore the judge. So please just go ahead and try to put the point on your case why you think you should prevail, if you would. Okay? Both of you? And thank you.

And go ahead, Ms. Krans, please.

MS. KRANS: Your Honor, to address the insulin

affordability crisis ravaging our country in this state, in April Minnesota enacted the Alec Smith Insulin Affordability Act. The Act provides a safety net for those who need insulin, but cannot obtain it because of its exorbitant price. It is named after Alec Smith who tragically, like many others, died after rationing his insulin. The Act is intended to prevent additional unnecessary deaths and serious health consequences resulting from Minnesotans' inability to afford insulin.

Pharmaceutical Research and Manufacturers of America, not the insulin manufacturers affected by the Act, brought this action claiming that the Act is an unconstitutional taking, because it takes the manufacturers' insulin without providing just compensation. Rather than seeking just compensation for this alleged taking, however, PhRMA asks this court to enjoin enforcement of this potentially lifesaving act.

This case must be dismissed because it involves the wrong plaintiff and the wrong court, requesting the wrong type of relief for a taking. PhRMA is the wrong plaintiff because it lacks associational standing to bring these takings claims on behalf of the insulin manufacturers. The court is the wrong court to hear the manufacturers' takings claims, because the defendants are immune from suit under the Eleventh Amendment. Finally, as stated in the

text of the constitution, just compensation is the remedy for a taking.

As such, PhRMA's claims for equitable relief fail as a matter of the law. A ruling in defendants' favor on any one of these three arguments requires dismissal of this case. These issues must be determined prior to and independent of the merits of PhRMA's claims.

First, PhRMA lacks associational standing. The remaining standing issue after briefing is whether PhRMA meets the requirement that neither the claim asserted, nor the relief requested requires participation of the individual members of the lawsuit. Here, both the claim and the relief requested require the insulin manufacturers' participation, making associational standing improper.

PhRMA asserts as-applied takings claims. A number of courts have held that associations lack standing to bring as-applied takings claims even when seeking only declaratory or injunctive relief. That is because the facts from the individual members are necessary to even determine whether a taking has occurred in as-applied takings challenges. And even if this court would determine that a per se taking has occurred without the manufacturers' participation, their participation is still necessary to show they have suffered some pecuniary loss for a Fifth Amendment violation to occur. That the manufacturers have provided insulin under

the Act here is not sufficient evidence to show a pecuniary loss, because if the manufacturers would have provided the applicant with insulin under their own programs, they have not suffered any loss.

Also, takings claims are generally incompatible with associational standing, because the appropriate remedy for takings is damages, which necessarily requires individual participation from the members. And this was recognized by the Ninth Circuit in the *Washington Legal Foundation* case. There, although the federation only sought injunctive relief for the alleged taking, the court held that the foundation lacked associational standing. But even if injunctive relief were an available remedy, here the manufacturers' participation is still required because they need to demonstrate the necessary injunctive relief factors.

Because an as-applied takings claim necessarily requires participation of PhRMA's members, PhRMA has failed to meet its burden to establish associational standing and this action must be dismissed.

Second, this case must also be dismissed because the defendants are immune from suit in federal court under the Eleventh Amendment. PhRMA claims that the court has jurisdiction over defendants under the *Ex Parte Young* exception (audio distortion) the Eleventh Amendment. However, this narrowly construed legal fiction is

incompatible with PhRMA's takings claims. The reasoning behind *Young* is that an unconstitutional law is void, so a state official lacks state authority to enforce it. Under *Young*, a federal court may only order an official to refrain from violating the law.

THE COURT: Ms. Krans, let me -- let me interrupt you just a second. They have sued the individuals, and I think there is an allegation at least that the individuals of the pharmacy board can enforce this law. And isn't that the proper -- aren't those the proper place? Even though they can't sue the state, they can sue the individuals in their individual capacity as to what they can and can't do. Please address that issue, because I think that -- I think that's what the plaintiffs intended by suing those individuals. Go ahead.

MS. KRANS: I'm sorry, Your Honor. The microphone wasn't working properly. I didn't -- I couldn't hear what you were asking.

THE COURT: Oh, I'm sorry. Can you hear me now? I think --

MS. KRANS: I can hear you now.

THE COURT: I think the state is not providing you good equipment, so -- but, anyway. So what I asked you is to make sure you address the fact that the plaintiffs have sued individuals in their individual capacity and that those

individuals, I think they've alleged, at least, can enforce the Act. And aren't those the proper defendants in a case like this involving --

MS. KRANS: Your Honor.

THE COURT: -- the Eleventh Amendment? Okay.

MS. KRANS: Yes, Your Honor. Under *Ex Parte Young*, public officials can be sued in their official capacity, but that is not the only consideration. Another consideration is whether the state is truly the substantial party in interest.

THE COURT: Right.

MS. KRANS: And just to be clear, they sued the board members in their official capacity, not in their individual capacities.

THE COURT: Okay. Thank you.

MS. KRANS: Under *Young*, under *Young*, a federal court may only order an official to refrain from violating the federal law. And this is in response to your question. If the court's decree would operate against the state, the state is the real substantial party in interest. And *Young* is inapplicable. And the state is considered the real party in interest when money damages are involved, because they're paid from the state treasury.

Takings are unique in that the taking itself is a valid exercise of a state's sovereign power. That power is

simply conditioned on the requirement that the state pay just compensation. Accordingly, it's the failure to pay just compensation that triggers the violation of the Fifth Amendment, not the taking itself. Therefore, for a takings claim, in order to comply with the constitution and *Young*, is not an order to enjoin the taking itself, but, rather, an order for just compensation, which is not permitted under *Ex Parte Young*, because the state would be the real party in interest. And for these reasons, the state is the real party in interest in the action for the relief from taking, including relief labeled as perspective, unless the action is challenging the underlying validity of the taking itself, such as a taking for private use or a taking that is so arbitrary that it violates substantive due process. And that's not the case here. PhRMA does not contest the validity of the alleged taking. It only contends the Act is unconstitutional because it fails to pay compensation.

Any injunction preventing an alleged taking impermissibly interferes with a valid state action. And an order requiring that just compensation be paid is impermissible under *Young*, because the state is the real party in interest. And such equitable claims under the takings clause are the fictional equivalent of damages claims, because the essence of all takings claims is that the plaintiff did not receive just compensation for a

government action. Here, the equitable relief sought by PhRMA necessarily requires a determination by the court that the plaintiff is entitled to compensation by the state. The state is the true party in interest, and *Young* is inapplicable.

Young is also inapplicable to a takings claim because it implicates a special sovereignty right, a state's sovereign right to take property for a public purpose. In *Idaho versus Coeur d'Alene Tribe of Idaho*, the Supreme Court held that the *Young* exception was inapplicable where special sovereignty interests were implicated. The Eighth Circuit and the District of Minnesota have also recognized that although *Ex Parte Young* does not include an inquiry into the merits of the claim, the court may question whether the suit and the remedy it seeks implicates special sovereignty interests such that an *Ex Parte Young* claim will not lie.

The right to take private property for public use belongs to every independent government as an incident of sovereignty and requires no constitutional recognition. This was stated in *United States v. Jones* by the Supreme Court in 1883.

Accordingly, an injunction limiting a state's sovereign right to take private property for public use implicates a special sovereignty interest such that an *Ex Parte Young* action cannot lie. Here, the Act was enacted to

save lives in (audio distortion) of Minnesotans. Any interference by this court with the state's alleged taking of insulin pointedly implicates the state's special sovereignty interest.

Finally, *Ex Parte Young* is inapplicable because the equitable relief (audio distortion) by *Young* is barred by *Knick*. Even if PhRMA can survive these jurisdictional deficiencies, its claims for equitable relief are foreclosed. Damages are the remedy for an uncompensated taking.

The Supreme Court in *Knick* recently reiterated and repeatedly stated that equitable relief is foreclosed for takings claims where the property owner has some way to obtain compensation after the fact. That is true here. The insulin manufacturers may obtain just compensation through a court action if the Act affects the taking. There can be no question that the taking of insulin is compensable. It is a commodity. But rather than taking advantage of the systems in place to obtain just compensation for any insulin taken, PhRMA seeks to bring an entire statutory framework, duly enacted by the legislature, to save lives of Minnesotans to a grinding halt. *Knick* disposes of this case.

PhRMA seeks to sidestep *Knick* asking this court to find an exception to the rule for what it alleges are ongoing takings, but courts have denied injunctions in other

cases involving continuous takings.

PhRMA also argues that legal remedies are inadequate because the Act will result in a multiplicity of suits, and it cites *Wert* in support of that assertion, but *Wert* and the cases it cited recognize that preventing a multiplicity of suits alone is not necessarily enough to provide the equitable relief and that the equity still must be balanced. There, the court denied injunctive relief. PhRMA's unsupported assumption that there will be a multiplicity of suits does not make inverse condemnation procedures inadequate.

PhRMA's reliance on *Eastern Enterprises* and *Galarza* is also misplaced because they only apply to the direct transfer of funds and not the burdening of real or physical property.

The remedy for a taking is just compensation. Insulin is compensable under Minnesota's inverse condemnation procedures. As such, *Knick* forecloses the equitable relief that PhRMA seeks. Because the constitution requires compensation, the proper remedy is to order payment, not to invalidate a law that provides lifesaving medication to those who would otherwise be unable to obtain it.

Because the takings claims here were brought by the wrong plaintiff in the wrong court, seeking the wrong

type of relief, this court should grant defendants' motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted.

Thank you. I will reserve my remaining time.

THE COURT: Okay. Well, amazingly, you still have two minutes. You've proved me wrong right from the beginning. Thank you.

Let me ask you a couple of questions, and I would like short answers, and I won't take from your time.

In the Eighth Circuit, our circuit, and what -- we apply certain standards to an injunction. There's a four-part, four-part test. Do you believe that those four parts ought to be met by the plaintiffs in this case to show that an injunction is appropriate? Neither of you, neither you nor the defendants, argued about what we call the *Dataphase* tests, and I was surprised that I didn't see *Dataphase* mentioned in your brief or the brief of the defendants. That's question number one. Yes or no.

Question number two. Is the state court an appropriate court to hear the case that PhRMA has brought? That's another yes or no.

So go ahead and answer those, if you would.

MS. KRANS: Yes, they do need to meet the factors for an injunctive relief. And that is actually in defendants' response to their motion for summary judgment, I

believe.

THE COURT: Okay. Well, I didn't see *Dataphase* mentioned, and that's the key, you know, that's the flag that I look for, but go ahead.

MS. KRANS: Yes, Your Honor. The *Ebay, Inc.*, which is the U.S. Supreme Court case that cites pretty much the same factors as *Dataphase*, was cited.

THE COURT: Right. Okay.

MS. KRANS: And to the second question the answer is also yes. The state court is the appropriate court. The Eighth Circuit has found that having a state court decide a federal takings case is not -- is not an injustice.

THE COURT: Okay. So if we were to agree with you that they're in the wrong court, they still have -- PhRMA still has a place to go to get relief, correct?

MS. KRANS: That is correct. The manufacturers can bring an inverse condemnation --

THE COURT: Okay. All right.

MS. KRANS: -- claim in state court.

THE COURT: All right. Good. Thank you. I appreciate your answers.

Now, Mr. Guerra, you heard my questions. I would like you to start your response, if you would, as to the answers to those same two questions. I think they're fairly crucial to the court's decision. And then take whatever

else time you need. But go ahead, please, if you would.

MR. GUERRA: Yes, Your Honor.

Well, to answer them with one word each, our answers, not surprisingly, are no and no.

THE COURT: Okay.

MR. GUERRA: Let me rephrase. We do agree that we have to meet the four-part factor, four-part factor test.

THE COURT: I would hope so. I would hope so.

MR. GUERRA: And we have included arguments, and I will get to them in a bit, for why we do that, Your Honor. And we do not think that there is an adequate remedy and a complete remedy in state court, and that's why we're entitled to an injunction.

If I could start with the beginning of Ms. Krans's arguments, though.

THE COURT: Go ahead.

MR. GUERRA: On associational standing, there's no dispute they conceded that PhRMA has satisfied the injury-in-fact requirement. And there is no need for the manufacturers to participate individually in this case in order for it to be properly resolved.

Ms. Krans refers to the as-applied cases, but she's talking about, with the exception of the *Washington Legal Foundation* case, she's talking about cases involving the application of the *Penn Central* factors, which is an ad

hoc balancing test that applies for regulatory takings. We are not asserting a regulatory takings case. We are asserting a claim for per se physical takings. And as I will discuss in the motion for summary judgment, there are no disputed facts that need to be resolved in order to dispose of that claim in our favor.

There is also -- she did mention the *Washington Legal Foundation* case as a case involving a per se taking where a court declined -- declined to enter an injunction, but in that circumstance, Your Honor, the individual -- the individual-affected plaintiffs were already participating. And that's why, as I recall the facts of that case, it was not necessary or it was inappropriate, actually, for an association to pursue the claim.

And she's also argued that the manufacturers have to participate in order to demonstrate that they've suffered a net loss, which she describes as a showing that they would have -- that they've given away more insulin under the Act than they would have given away under their own programs, but there is no such requirement under the takings clause, Your Honor.

The only authority that the state cites for that proposition is the Supreme Court decision in *Washington Legal Foundation*. And that case is extraordinarily unique and sui generis because it's a situation in which the

plaintiffs claimed the right to recover interest that was earned on interest-only lawyer trust accounts, IOLTA accounts. And the Supreme Court said you haven't suffered any compensable loss, because the only reason you have the interest that you are seeking to recover is because of the program that gave rise to it. So if a program both creates the interest, the property interest, and then takes it away, that's not a compensable loss.

We have nothing of that kind here, Your Honor. We are in a situation in which obviously the insulin is not the product of any program that Minnesota has put in place. They are simply trying to take away the insulin. Its value was not attributable to any Minnesota program, and so they can't claim that they can thereby take it and we can't recover anything. The manufacturers have no legal claim unless they can demonstrate that they wouldn't have given it away otherwise.

And I would also just stress on this point, Your Honor, our position is that when the manufacturers create voluntary programs to dispense insulin based on their own views of how to do so and the state passes a law that says now you must do it and if you don't we are going to penalize you, from that point forward all of the insulin that's directed is distributed pursuant to the state's compulsion and all of it is compensable as a per se physical taking for

the reasons I'll discuss on the summary judgment front.

So there's simply no need for the manufacturers to actually participate in this case in order for it to be properly resolved. And we've, therefore, satisfied the third prong for associational standing.

On sovereign immunity, Your Honor, the government makes two basic points, both of which we submit are incorrect. The first, in their brief, is that this suit interferes with their sovereign rights, because they have the sovereign right to take private property for public use, and that an injunction would impede their ability to do that, but that's actually not correct. They don't have the sovereign right to violate the takings clause. And that's exactly what they are doing.

Knick holds that when the state takes property from an owner and doesn't pay for it simultaneously with the taking, the takings clause is violated. It may be for purposes of a remedy that a post-deprivation mechanism bears on whether you get an injunction, but the statute itself violates the takings clause every single time insulin is given away under it because there's no compensation to the manufacturers. The state does not have any sovereign right to continue week after week, month after month, year after year violating the takings clause with its -- with its statutory program.

And this is exactly the circumstance in which *Ex Parte Young* ought to apply. It's the circumstance in which an injunction from this court would say to the officers, to the federal officials who are responsible for implementing this statute, you must refrain from enforcing a statute that is violating the constitution. That's exactly what *Ex Parte Young* says the Eleventh Amendment does not bar, and that's exactly the relief we are seeking here.

Then the state argues, well, that relief is the functional equivalent of an injunction, I mean -- excuse me -- of a damages award and you can't award damages against the state. We agree that you can't award damages against the state, which is why we aren't seeking them. We have filed a claim for an injunction, and an injunction is not the equivalent of a damages award. An injunction stops the program from continuing and requires the state to decide if there's another way that it can pursue its public policy goals, what ways that do not violate the federal constitution. And that's, again, exactly what the purpose of the *Ex Parte Young* doctrine is designed to do.

So the last basis for their defense, Your Honor, is that you can't grant an injunction. And we respectfully disagree because in *Knick* the Supreme Court said that equitable relief is foreclosed if there's a plain, adequate and complete remedy available under state law. And the

problem here is there is not a complete and adequate remedy because, as the Eighth Circuit pointed out in the *Equitable Life Assurance* case, a remedy is not complete when it requires you to file multiple suits in state court against the same defendants based on the same or substantially the same issues. And that's necessarily what was going -- is going to happen here because, first, as a legal matter, a state court in a mandamus action cannot compel the state to pay for the takings that the law is going to cause in the future. It can only compel payment for the past. So by definition that's an incomplete remedy. And as a practical matter, the state court has no ability to award future damages for future takings because no one knows how much insulin is going to be taken under the statute. The only thing we do know is that the statute, particularly the Urgent Need Program, has no end date and the takings are going to go on indefinitely.

And so the state's response is to say, well, yeah, but maybe the state will fold its tent if they lose the first case in the state court mandamus action and they realize it's a takings. That's not a basis for denying us relief that we're otherwise entitled to. They can't make a binding commitment on the state that it will stop this law in response to a loss in the state court action. And we have a right, where we're facing the prospect of multiple

suits, to an injunction so that we don't -- the manufacturers don't have to sustain that burden.

In addition, Your Honor, they say, well, it's really no big deal because you can sue once every six years when the statute of limitations runs out on takings claims and you can get fees and interest. But, first of all, the manufacturers are entitled to a reasonably prompt award of just compensation. Six years is not that. And for the reasons we point out in footnote 18 of our reply brief, it's far from clear that we would in fact be able to -- the manufacturers would be able to recover attorneys fees. But even if you accept those theories, the reality remains that you still need to bring multiple lawsuits. Every six years at a minimum the manufacturers are going to have to go back in.

That's the circumstance in *Equitable Life Assurance* where the Eighth Circuit said you don't have to keep doing that. In that case they concluded that the reality was that the plaintiff could in fact seek and demand consolidation of the claims in the state court proceeding and therefore obviate the need for multiple suits, but that's not an option here for the reasons I mentioned. There's just no escaping that future takings can't be remedied in a -- in a mandamus action.

And that's the logic of *Eastern Enterprises* and

the *Galarza* case where the plurality of the court in the First Circuit said you don't have to keep going back to the well over and over again in order to bring the same claim against the same defendant for the same violation. None of those cases, not *Equitable Life*, not *Eastern Enterprise*, not *Galarza*, say, But if you can get your fees, it's okay. The point is multiple lawsuits means we're entitled to an injunction.

And the other reality is that it also means that our injury -- the manufacturers' injuries are in fact irreparable. The logic of *Knick* is you suffer a constitutional violation when the property is taken, but your injury isn't irreparable if you have a complete and adequate remedy available to you at law. And it necessarily follows that when there isn't a complete and adequate remedy, your injury is irreparable and therefore -- and that's the normal presumption. The normal presumption is all constitutional violations are irreparable. The takings clause is a bit of an exception because it's about money, and that's why the complete remedy theory can foreclose injunctive relief; but when the complete remedy theory isn't available any longer, then in fact the injury is irreparable.

And so that's the second prong, likelihood of success, I'll discuss in the next phase. We have an

irreparable injury. We've cited authority for the proposition, unsurprising proposition, that it's always in the public interest to abate violations of the constitution.

And, finally, because of the defendants' own acknowledgement that the program here -- the manufacturers' assistance programs are so similar to the requirements of the Act, they can't say that there will be horrible injury to the public, given their own acknowledgement that those programs are out there and are so similar in scope.

Your Honor, the state argues that, well, this is no different than other cases in which there were ongoing takings. They cite *Knick*, *National Fuel Gas*, *Rose Acres Farms*. We disagree because in all of those cases the plaintiff, the property owner could bring one lawsuit and seek all of its damages in that one lawsuit. *Knick* involved -- *Knick* and *National Fuel Gas* involved cases in which the parties alleged that they had suffered per se physical takings. If you have a per se physical taking of one piece of property, you can remedy that in one lawsuit.

In *Rose Acres Farms*, the farm there that was having to sell its eggs and hens at below market rates while they -- because of a salmonella outbreak, didn't say that each such sale was a separate taking of personal property. This was pre-*Horne*. They didn't argue a theory of ongoing takings. They said this entire regime is a taking. And

they eventually did seek relief in the federal claim court in one action for all of the damages they sustained during the pendency of that regulatory response to the disease infecting their facilities. They lost, but they had the ability to get all their relief in a single action. That's what we don't have here, and that's why injunctive relief is appropriate.

THE COURT: Before you -- let me just interrupt you. Before you finish your argument, would you address the Supreme Court case of *Knick* and what effect it has on this case and the court's ability to grant the relief you are seeking?

MR. GUERRA: Yes, Your Honor. I'm sorry if I wasn't clear, but that was what I was addressing. *Knick* is the case that says you can get an injunction if you do not have a complete -- they said it the other way.

THE COURT: Okay.

MR. GUERRA: They said if there is a complete and adequate remedy, then no injunctive relief follows. And what I've been explaining is in the unique circumstance where a law keeps compelling takings for as far as the eye can see, there isn't a complete remedy. There's only a partial remedy that's retrospective --

THE COURT: Okay.

MR. GUERRA: -- and no ability to put an end to

the takings through a damages remedy.

THE COURT: Okay. Good. All right. Thank you.

MR. GUERRA: Your Honor, the last -- the last thing I would say in my remaining time is that even if you were to disagree with us, we submit that we're still entitled to an injunction -- excuse me -- declaratory relief. We don't need to make a showing of irreparable harm for that. It's not the equivalent of a damages award. It's not the equivalent of an injunction. It gives the state the opportunity to continue to press forward with its program, but knowing, though, now that that program is giving rise to takings liability and allowing the state legislature to decide whether they want to keep doing that. That's exactly what the state says would happen if we sued in the state court. And we shouldn't be relegated -- because it's a takings claim, we should have a right to get the relief available in federal court and shouldn't be relegated to a state court remedy, just as the court said in *Knick*.

And the last observation I will make, Your Honor, is it's true that in a passing reference the Supreme Court said in *Knick* that generally equitable relief is not available if you have a complete and adequate remedy, but they never talked about anything but injunctions. They referred three times to injunctive relief, enjoining, setting aside. They never said, And you can't get a

declaration either. And because of the reasons I just said that it's a different form of relief, we think it should be available, if you disagree on the injunction.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

And, Ms. Krans, you've saved two minutes for rebuttal. And do you want to take those two minutes? And do that now, please.

MS. KRANS: Yes, Your Honor.

Knick has foreclosed the equitable relief that PhRMA seeks. It stated that governments need not fear that the holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available, as they have been for nearly 150 years, injunctive relief will be foreclosed. PhRMA is requesting that you make an exception to *Knick*, what *Knick* states about injunctive relief. It tries to sidestep *Knick* to find an exception for what it says are these ongoing takings, but courts have denied injunctions in other cases involving continuous takings.

He mentioned *Rose Acres Farms*. There, the farm had to continuously over a period of two years send their eggs to the egg breakers rather than selling them as whole farms. Each of those could have independently been seen as a taking, yet the court in the middle of this two-year

period, when this was still ongoing, said where the constitution says compensation is the remedy, go seek compensation. It reversed the injunction that the earlier court had put into place. And that's the Seventh Circuit.

The same is true in the *Regional Rail Act* cases, where there's this ongoing taking where the railroads were forced to continue to run the trains even though it was depleting all of their assets. Again, the Supreme Court there said injunctive relief is not appropriate.

The holding in *Knick* is not new. And PhRMA is requesting that you make an exception to the rule. That's not appropriate.

THE COURT: Thank you very much.

Now we're going to shift gears a little bit and talk about the defendant -- the plaintiff's motion for summary judgment.

And do you want to start that out, Mr. Guerra?

You know, I think much of the argument that has been made already -- that's why I was going to combine the two -- much of the argument that's been made applies to the summary judgment. Different standards can be applied by the court, obviously.

But beyond that, make any distinction you have and go at it, if you would, please, Mr. Guerra. Go now. Thank you.

MR. GUERRA: Yes, Your Honor. Thank you very much. And I agree that we have covered a lot of the terrain already with respect to our motion.

So as I -- I would say that we are entitled to summary judgment here because the insulin law clearly causes unconstitutional per se physical takings. And we've already discussed that we have standing to enjoin -- to challenge them and that you have the authority to enjoin them.

By requiring that insulin be given away to eligible residents under the state's selected criteria, the Insulin Act strips the owners, the manufacturers of the insulin, of their rights to possess, use and dispose of valuable personal property. Under *Horne* and *Loretto*, those facts and those facts alone are sufficient to establish that the Act causes per se physical takings, which give rise to a categorical duty to pay just compensation at the time of the taking.

Defendants essentially ask you to ignore *Horne* and *Loretto* through their various arguments. They say that you should distinguish *Horne* on the grounds that the raisin act that was at issue there was not a public health and safety law as the Insulin Act is. But in both *Loretto* and *Horne*, the court made clear that a physical appropriation of property is, quote, a taking without regard to the public interest that it may serve. That's actually from *Loretto* at

458 U.S. 426. So the public purpose of the statute is irrelevant to the legal question before Your Honor.

And for this reason, defendants' reliance on numerous regulatory takings cases, such as *Connelly* and *Concrete Pipe*, as well as their reliance on due process cases, is completely misplaced. In these kinds of cases the purpose of a law and its impact on particular property are very relevant to determining whether the state has constitutionally exercised its powers, its police powers. But the Supreme Court made clear in the *Lucas v. South Carolina* case that the due process cases concerning police power exercises were simply precursors to the court's regulatory takings cases, the *Penn Central* analysis. And *Horne* makes clear that regulatory takings cases do not apply to physical takings cases and that that precedent should not be relied upon in determining whether a law that directly appropriates physical property constitutes a taking. In fact, it said again that laws that physically appropriate property are per se takings no matter what purposes they serve and what the impact they have.

Accordingly, the government's theory here that there's a nuisance exception for per se physical takings is simply wrong. First of all, they don't cite any authority for the striking proposition that the pricing of a lawful and in fact beneficial product could ever be a nuisance; but

even if they could, nuisance laws regulate the use of property. Governments can't abate a nuisance by taking the property away from the owner and giving it to somebody else without paying for it. And in fact the *Lucas v. South Carolina* court made just that distinction. The court explained there -- it contrasted land use regulations that can abate a nuisance without giving rise to a regulatory taking, and it contrasted that with physical appropriations of land, which it said always require compensation no matter how weighty the interests are that are being served by the underlying law.

Similarly, it's not the case that the manufacturers here have waived their rights to take -- to bring takings claims when they renewed their licenses to operate in the state. Again, *Loretto* and *Horne* are dispositive here. They hold that the right to rent or sell property can't be conditioned on a forfeiture of the right to compensation for a physical taking, and that -- yet that's exactly what Minnesota's argument amounts to here.

And this case is remotely analogous to *Monsanto*, which they rely on heavily, because there the court found no regulatory taking. It was not, as the government suggests, a per se taking that the court failed to recognize as such because in fact the trade secrets that were appropriated still had value to the -- to the company. The court said

the disclosure of trade secrets in exchange for a license to sell pesticides that couldn't otherwise be sold at all unless EPA verified that they didn't harm the environment was not a regulatory taking. Here, it is the Food and Drug Administration that has determined that the manufacturers can sell their prescription medications in the United States. Minnesota has no role in that process whatsoever, and it can't claim to have conferred the kind of benefit on the manufacturers that the federal law in *Monsanto* conferred on the pesticide manufacturers.

And for this reason, the government's reliance on *Minnesota Association of Health Care Facilities* is also misplaced. In that case the Eighth Circuit found that there was no regulatory taking because the health care providers voluntarily accepted medicaid payments in exchange for accepting the burdens of the medicaid program, which eventually came to include a requirement that the companies -- excuse me -- limit the amount that they charge non-medicaid patients.

Here, the manufacturers haven't agreed to give up their insulin in exchange for any state payments that the state is going to make for that insulin. The whole point of the Insulin Act is to not pay for that property and to make the manufacturers give it away for free at no cost to the state.

Defendants say there's no taking here because the Act doesn't take property for the government's own use, but, again, *Loretto* disposes of that argument completely. There, the Supreme Court found a per se taking from a law that allowed the third party cable company, not the government, to permanently occupy the plaintiff's property, and that was a taking notwithstanding that the government didn't actually occupy the property or take it for its own use.

Nor is it the case, as defendants insist, that this law merely regulates the use of the manufacturers' private property. A law that regulates the use of property presupposes necessarily that the owner of the property still possesses it and that the owner is using it, because they still possess it in some way that is causing some injury to society and that the state can regulate that use. Here, the law is not a regulation of use. It deprives the manufacturers of the very property. That's not a regulation of use. That is a per se taking, because it strips the owner of all right to possess and use and dispose of the property as it sees fit.

For that reason, this case is not analogous to the *Sierra Medical Services* case. There was no -- from the Ninth Circuit that the defendants rely on. There was no physical taking in that case. And the court concluded that there was no regulatory taking because the law was just a

temporary restriction on the use of the ambulances that the company owned and required them to use it to provide services on occasion to people who couldn't pay for the service. The court there concluded that there was not a sufficiently severe impact to determine -- to give rise to a regulatory taking, but, of course, that's not the test for a physical taking. *Loretto* makes clear that it doesn't matter whether it's a severe impact or not. What matters is that there is a physical appropriation, which is what is going on here.

And in *Franklin Memorial Hospital* out of the First Circuit, the First Circuit, which defendants also rely on, the First Circuit only analyzed the impact of the main mandatory care law on the hospital's use of its rooms, and it found that there was no physical taking of those rooms and no regulatory taking, again, because the financial impact on the company -- on the hospital wasn't severe enough.

Now, it's true, as the state points out, that there was a claim in the *Franklin Memorial* case that the hospital also had to give away its medicine for free. The First Circuit noted that claim and then did not discuss it further. And we submit that that case cannot be read and cannot be understood as saying that giving away medicine for free is also a mere regulatory takings. And if that is what

the First Circuit thought of that aspect of the law, then it was mistaken and it's been overruled by *Horne*, because that decision came out six years later and it makes clear that if you have to give away your -- your real property, not just your -- excuse me -- your personal property, not just real property, that causes a per se takings.

So, Your Honor, we think that it's crystal-clear here that the Act -- the operation of the Act on the manufacturers gives rise to per se physical takings, and those are categorical takings that require compensation at the time of the appropriation, and that's not being paid under the Act. And so we are clearly entitled to summary judgment that there is a per se taking.

And for the reasons I discussed earlier -- and I know Your Honor has bifurcated the discussion, we've already covered the topic, but we think that we are also entitled to relief based on the fact that there's no net loss requirement under the *Washington Legal Foundation* decision in the Supreme Court that applies here and because we think you have the authority, because of the lack of complete remedies, to issue an injunction to remedy the per se takings that this law causes.

And with that, Your Honor, I've even bested Ms. Krans, and I think I have got about four-plus minutes left for rebuttal.

THE COURT: You have. And both of you have confounded my initial assumption that you would take up all the time before you ever had a chance to rebut.

But, Ms. Krans, you now get a chance -- you have your full 15 minutes to go. You don't get a chance to rebut in this particular motion. But go ahead, if you would, please, on this summary judgment motion.

MS. KRANS: Yes, Your Honor.

And because the case should be dismissed under the three factors we already stated, the wrong plaintiff and the wrong court, asking for the wrong relief, the motion for summary judgment is moot. However, if this court does find that PhRMA has jurisdiction and equitable relief is possible, summary judgment still must be denied.

PhRMA asks this court to decide a complex constitutional issue on the dearth of facts without any discovery whatsoever. PhRMA's motion is premature. And PhRMA has failed to prove that it's entitled to the relief sought, requiring denial of its motion. Because PhRMA has failed to demonstrate it is entitled to either injunctive relief or declaratory relief, regardless of the answer to the constitutional question it poses, there is no need and it would be improper at this point to reach the constitutional questions. That's assuming that the court agrees that PhRMA is not entitled to either injunctive or

declaratory relief because they failed to prove they're entitled to it.

PhRMA has failed to demonstrate that it meets the four-factor test to obtain injunctive relief. PhRMA has failed to demonstrate an irreparable injury. Insulin is compensable and economic loss is not irreparable harm. The manufacturers will get compensation for any takings, interest from the date of taking, attorneys fees and costs if they are to prevail on their inverse condemnation proceeding, but PhRMA has an adequate legal remedy as has already been discussed.

Also, Your Honor, the balance of hardships weigh heavily in defendants' favor. PhRMA's claimed hardship is that the manufacturers will have to provide insulin and potentially bring possible -- or multiple suits for compensation, but PhRMA fails to present any facts that reflect the actual burden the Act may have on the manufacturers. PhRMA has failed to even inform the court how much insulin the manufacturers have provided under the Act.

Insulin yields 24 billion in annual revenue. Providing some insulin, it could be ten vials, it could be twenty, it could be a thousand -- the court has not been informed how many vials of insulin have been provided in this Act. Providing some insulin and bringing lawsuits for

damages are not hardships for the insulin manufacturers.

By contrast, the hardship to the defendants is great. An injunction would destroy a statutory framework duly enacted by the Minnesota legislature to address the insulin affordability crisis and save the lives of Minnesotans. Most notably, Your Honor, the public would suffer potentially irreparable harm if the Act is enjoined.

The amici brief, T1International and others that have joined in that brief, show the impact of the Act and the potentially catastrophic consequences to those with diabetes who may be relying on the Act to obtain insulin.

PhRMA argues that our own programs are sufficient so there is no harm to the public, but the amici brief shows that the manufacturers' own programs were insufficient. People were getting vouchers that didn't work or they were continuously rejected. Although the criteria do overlap, it wasn't accessible to the people who needed it.

The result of an injunction could mean the unnecessary loss of more Minnesotan lives or hospitalizations caused by insulin rationing. Additional strain on the medical and hospital systems would harm every Minnesotan, especially now during this pandemic. Further, the Act could prevent significant medical costs that may ultimately be borne by the public. One model estimated that 8.3 billion in direct medical costs would be averted if all

people adhered to their diabetes medication.

Your Honor, the public should not be put in peril because the insulin manufacturers don't want to prove their damages. Regardless of whether PhRMA could prove the Act affects the taking, it failed to prove that it is entitled to injunctive relief and its motion for summary judgment for an injunction must be denied.

Additionally, PhRMA has failed to prove it's entitled to declaratory judgment. PhRMA seeks a declaration that the Act violates the takings clause of the Fifth Amendment.

Knick states that equitable relief is unavailable when a state government provides just compensation remedies. This applies to both injunctions and declarations, because a declaration that the Act is unconstitutional is the functional equivalent of an unwanted injunction. Several cases subsequent to *Knick* that are cited in defendants' brief have held that *Knick* forecloses declaratory as well as injunctive relief for these reasons.

And PhRMA asserts that a declaratory judgment is not the functional equivalent of an injunction in this case, asserting it would not enjoin defendants from enforcing the Act, but PhRMA fails to explain how the board could continue to enforce the Act that has been declared unconstitutional. And that was the whole basis for *Horne's* defense and the

administrative action that led to the *Horne* case. There, the procedural posture is they tried to penalize *Horne* for not abiding by the Act. His defense was it was an unconstitutional taking, and the Supreme Court upheld that.

Further, under *Duke Power* it says individuals threatened with a taking may resort to a declaratory judgment action before potentially uncompensable takings are sustained. Insulin is compensable, and *Duke Power's* dicta is inapplicable.

PhRMA's motion for summary judgment on the declaratory relief must also be denied.

Again, because PhRMA has failed to prove it's entitled to either injunctive or declaratory relief, it's motion must be denied and the court need not consider whether the Act affects the constitutional taking at this time. But even if the court does reach this issue, PhRMA's motion must be denied because it has failed to prove the Act affects the taking.

PhRMA argues that the Act constitutes a per se taking under *Loretto* and *Horne* and so all other facts and circumstances surrounding the alleged taking should be ignored. But whether an alleged taking should be analyzed as a per se taking or a regular taking is not the bright line test that PhRMA contends it is. Numerous courts, including *Washington Legal Foundation* and the courts in

Horne, have struggled with this question. The facts and circumstances in this case more closely resemble the facts and circumstances in *Connolly*, in *Ruckelshaus*, in *Sierra Medical Services* and *Franklin Memorial Hospital*, than the facts in *Loretto* or *Horne*. And each of these cases was decided after *Loretto*, and *Sierra Medical Services* was decided after *Horne*. And each involves owners losing the full bundles of sticks in their property. And in each of the cases there was no taking in the constitutional sense.

Here, the Act abates the harm or public nuisance caused by the insulin manufacturers. It is a voluntary exchange for the valuable benefit of a license to sell insulin in Minnesota. Now, PhRMA claimed there is no valuable exchange. However, to even be subject to the Act, the manufacturer has to sell over $2 million of insulin in Minnesota. Being able to sell over $2 million in products in the state is a valuable exchange. It is also a public program that adjusts the benefits and burdens of economic life to promote the common good. In each of these type of circumstances, courts have held there is no taking. And, likewise, there is no taking here.

Takings cases are among the most litigated and perplexing in current law. The Supreme Court has often explained that the just compensation guarantee was designed to bar government from forcing some people alone to bear the

public burdens which, in all fairness and justice, should be borne by the public as whole. And at the end of the day the decisions seem to hinge on this purpose. And here fairness and justice require the insulin manufacturers, not the public as a whole, bear the burden because they caused the problem.

In addition, PhRMA has failed to prove any pecuniary loss, which the court in *Brown* has held is necessary to have a Fifth Amendment takings claim. The idea behind this is if compensation is nil, then you didn't fail to pay compensation. PhRMA -- PhRMA claims it's because it -- that *Washington Legal Foundation* is unique because there what was taken was created by the beneficence of the IOLTA program, but in fact the majority in that case disclaimed that that was the reasoning. They said the reasoning was because if compensation is nil, then you didn't violate the takings because you didn't -- you weren't required to pay just compensation.

In assessing whether the government has effected an unconstitutional taking, the just compensation due is measured by the property owner's loss, not the government's gain. So a private property is entitled to be put in as good of a position pecuniarily as if his property had not been taken. Here, if the manufacturers' insulin program -- they would have been providing the insulin for free anyways,

their loss for those is zero. They have not provided any facts in this case showing that they have in fact provided insulin that they wouldn't have already been providing under their own act.

Your Honor, with that, unless you have any questions, I'll conclude.

THE COURT: No. All right. No, I don't. And you are leaving time on the -- on the timer, and that's good. Thank you. Go ahead.

Mr. Guerra has the rebuttal this time. And you have about five minutes, if I recall correctly, but go ahead.

MR. GUERRA: Thank you. Thank you, Your Honor.

First of all, I would just note, Your Honor, that the state has precious little to say about whether there really is a per se taking here. They devoted almost all of their time just now to talking about the remedy question that I thought we were talking about in the first phase of this hearing.

So on the few things that they did say, they said there's no bright line for per se takings. I urge you to read *Horne* and *Loretto*, Your Honor. I think it's quite clear that there is a bright line test and that when there's a physical appropriation of property there is a per se taking. I don't know how you can say that being forced to

turn over your property does not entail a physical appropriation. And it's simply not true that the cases -- the other cases they cite involved comparable losses of the full package of property rights.

In *Monsanto* -- we quote at length in our rely brief all of the benefits that the company continues to retain in its trade secrets, even though it has to disclose them. So it hadn't lost all of the full benefits of rights, which is why the Supreme Court didn't think it was dealing with a per se takings case. It wasn't mistaken about that. It was a regulatory takings case.

The same with the *Sierra Medical* case, which as counsel notes does post-date *Horne*, but the court said they are not taking away the ambulances; they are just telling you that occasionally you are going to have to use them without remuneration. And that's a temporary restriction on use, not a deprivation of the actual physical piece of property.

Claiming that because the manufacturers sell a lot of insulin in Minnesota and therefore -- sorry -- subject to the Act, is a big benefit is just another way of saying you have the right to sell in our state, which is the very thing that *Horne* and *Loretto* say is not a lever for saying you have to therefore give up your rights under the takings clause.

So -- and, again, Your Honor, on the -- on the net loss question, the compensation that was due being nil in that case was precisely because but for the -- but for the program there was no property in the first place. That's why compensation owed was nil. I mean, the Supreme Court said because of the operation of this act. What they were referring to was because the only time people put money in an IOLTA account is when it otherwise can't generate interest, meaning that the only reason that there's any interest at issue in this case is because of a program that gave rise to that interest, and therefore the -- and therefore there was no taking because it simply gave with one hand and took back with the other.

The value -- the measure of our loss is the market value of the property in our hands, not whether we would decide -- or not whether the manufacturers would decide to give it away for free. That's their choice. And that the law here deprives them of that choice. And then the state turns around and says, but there's no loss here because even though we're making you do it you used to do it on your own.

On the question of irreparable harm, Your Honor, where they say that there's no facts to support an irreparable injury, and then there were some references to facts that I don't believe are in this record yet about the overall value of the insulin market, the short answer to

that is ordinarily the violation of constitutional rights is presumed to be irreparable. *Knick* recognizes an exception for a circumstance in the takings context saying that for this particular constitutional right it's not irreparable if you have a complete and adequate remedy at state law. Therefore, as I explained earlier, if you don't have that right, then it is irreparable. You don't have to show that the amount of money at issue in a constitutional violation is going to put you out of business. If that were the case, there would never be an opportunity -- there would be no reason for *Knick* to say anything about a complete and adequate remedy. All it had to say was absent a showing of irreparable injury you will never get an injunction for a taking. And that's not what it said. It talked about the adequacy of a remedy and whether it was complete. And for the reasons I described earlier, there is no adequate and complete remedy here.

And on the balance of hardship, Your Honor, the manufacturers, as they state in the complaint and as we stated in our opening brief, they don't believe people should go without medication that they need. And as we point out, part of the problem here is the failure to pass on rebates, which the state has taken actions to address. But the state cannot out of one side of its mouth say these programs are so similar to the Act that you've suffered no

taking and then turn around and in the next breath say that the Act -- the programs are insufficient to prevent harms to our citizens.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

Well, it's been very interesting listening to your comments. I appreciate them very much. I am going to take this matter under advisement, and we will issue an order soon, I hope, but at the same time I'm not going to decide off my shoulders this here or off the top of my head this morning.

Thank you very much for taking part, being here and taking part in this Zoom hearing. COVID has made us do all kinds of strange things, having Zoom hearings. I'd much rather have you in the courtroom, but, being what it is, it works quite well. So thank you again for your comments. I appreciate them. And the court is now going to stand in recess.

Before I do that, maybe I should -- is there any -- you know, we still have that other motion, which I think I correctly said you are not going to spend time doing. But was I incorrect in that, that you do not want to address the motion to amend? Was I correct in assuming that?

MR. GUERRA: That's correct, unless defense

counsel wants to say anything. We're happy to rest on the papers on that one.

THE COURT: Okay. Well, and you have -- the briefs are very fine. I mean, you have good briefs in all the motions this morning.

Ms. Krans, do you agree that we can decide that on the briefs?

MS. KRANS: Yes, Your Honor.

THE COURT: Okay. Good.

And I think probably both of you assume that however the court comes out on the other motions, it's probably going to determine that issue anyway, and I believe that's true also.

Well, the court is going to stand in recess. Thank you again.

THE CLERK: All rise.

(Court adjourned at 11:18 a.m., 12-08-2020.)

* * *

I, Renee A. Rogge, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR