No. 21-1731

United States Court of Appeals for the Eighth Circuit

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,

Plaintiff - Appellant

v.

STUART WILLIAMS; STACEY JASSEY; MARY PHIPPS; ANDREW BEHM; JAMES BIALKE; AMY PARADIS; RABIH NAHAS; SAMANTHA SCHIRMER; KENDRA METZ, all in their official capacities as members of the Minnesota Board of Pharmacy,

Defendants - Appellees

On Appeal from the United States District Court for the District of Minnesota, No. 0:20-cv-01497

BRIEF OF PLAINTIFF-APPELLANT

John M. Baker
Mark L. Johnson
Katherine M. Swenson
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830

Joseph R. Guerra
Kathleen M. Mueller
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jguerra@sidley.com

Counsel for Plaintiff-Appellant

SUMMARY OF CASE

Pharmaceutical Research and Manufacturers of America (PhRMA) challenged a Minnesota law that requires manufacturers of insulin to give their insulin to state residents for free. Each compelled distribution of free insulin is an unconstitutional taking. But the court below dismissed the case, holding that such repeated constitutional violations cannot be redressed in federal court through equitable relief.

That ruling is wrong. Insulin manufacturers cannot obtain in a single state-law inverse condemnation action full relief for all of the unlawful takings that Minnesota's extraordinary law has caused and will cause. Manufacturers thus have no adequate and complete remedy at law. Under well-settled principles, therefore, they are entitled to injunctive and declaratory relief. The ruling below should be reversed.

This Court should also resolve PhRMA's takings claim. That claim is governed by two recent Supreme Court decisions; defendants do not dispute any facts that are relevant under those decisions; and PhRMA's claim can properly be resolved as a matter of law in this Court.

Given the importance of the issues raised, PhRMA requests 20 minutes of argument time.

CORPORATE DISCLOSURE STATEMENT

Appellant Pharmaceutical Research and Manufacturers of America does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Rule

Scholarly Authority

Other Authorities

INTRODUCTION

This case involves an extraordinary taking of private property. To perform their functions, governments must often acquire various types of private property. When the government needs private land, that property is usually not fungible. To build a highway, for example, the government needs the land where the highway will run; land elsewhere won't do. Accordingly, the government must negotiate a sale with the owner, or, if the owner will not sell, exercise eminent domain. Either way, the government acknowledges it must pay for the property. It does not simply pass a law requiring owners to give away their land for free.

The government also often needs to acquire personal property, such as commercial goods. Because such goods ordinarily are fungible, there is no need for a government to exercise eminent domain to acquire them. After all, the owners of office chairs or patrol cars or medicines are in the business of selling these goods. Accordingly, governments pay for commercial goods they need by purchasing them on the market. As with real property, governments do not enact laws that compel manufacturers to give their goods away for free.

Minnesota, however, has chosen a different path—one that the Constitution forecloses. The State wishes to provide insulin to certain residents who do not qualify for Medicaid or other state assistance, but it does not want to pay for the medicine. So the State passed a law that requires insulin manufacturers to give their products away to such Minnesota residents for free, and subjects the manufacturers to fines if they do not do so.

This unprecedented—and flatly unconstitutional—law is made all the more extraordinary by the fact that the three insulin manufacturers that Minnesota has targeted already have programs that provide free or reduced-cost insulin (directly or through charitable organizations) to a great number of patients. Doc. 1, ¶¶ 56-63.[1] Indeed, defendants—the state officials charged with enforcing the law—acknowledged below that the manufacturers' voluntary programs "target the same populations that the [law] seeks to protect." Doc. 16, at 18-19. Minnesota decided, however, that these programs are not generous enough, and has compelled the companies to provide free insulin to Minnesota residents

[1] "Doc." citations refer to filings in the district court below, *PhRMA v. Williams*, No. 0:20-cv-01497-DSD-DTS (D. Minn.).

through new programs with state-mandated criteria. Remarkably, defendants deny that this law results in any cognizable taking of the manufacturers' property.

PhRMA brought this suit for declaratory and injunctive relief to vindicate its members' rights under the Takings Clause of U.S. Constitution in federal court. But the district court held that it could not grant PhRMA equitable relief even if its members' constitutional rights were violated, because the members could bring inverse condemnation actions in Minnesota courts. This holding was wrong as a matter of law. Equitable relief is available when there is no plain, adequate, and complete legal remedy. And long-standing principles of equity—as well as the historical development of takings litigation—establish that property owners do *not* have a plain, adequate, and complete legal remedy if they must bring a series of actions to recover just compensation. But that is precisely what Minnesota is requiring the insulin manufacturers to do here.

If a manufacturer brings an inverse condemnation action, a Minnesota court can award compensation for the insulin that has already been given away under the Act, but it cannot order the State to

pay compensation for insulin the manufacturer will be forced to give away in the future. Unable to obtain complete relief in a single action, manufacturers must file successive actions to obtain compensation as the State continues to take new vials of insulin. Contrary to the district court's view, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), did not hold that federal courts are powerless to provide injunctive or declaratory relief when a law repeatedly compels new deprivations of property from the same owners, over and over again, without end.

Indeed, defendants' "adequate remedy" defense is as extraordinary as the law itself. If Minnesota intended to pay just compensation (*i.e.*, the fair market price) for insulin, it could have simply purchased that medication. Instead, defendants claim that manufacturers can be required to bring repetitive inverse condemnation actions to enable Minnesota to pay "less than what it would cost the state to purchase the insulin" on the market. *See* Doc. 66, at 15. "This 'sue me' approach to the Takings Clause is untenable," *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring), and confirms that injunctive and declaratory relief is necessary to redress the essentially never-ending violations of the

Takings Clause that Minnesota's law causes. The district court's contrary ruling should be reversed.

In addition, this Court should reach the merits and rule that Minnesota's law effects *per se* unconstitutional takings that warrant permanent injunctive relief. There are no material facts in dispute with respect to these legal questions, and no reason that this litigation should be prolonged by a remand while Minnesota continues to violate the Constitution.

JURISDICTIONAL STATEMENT

PhRMA appeals a final judgment of the U.S. District for the District of Minnesota. The district court had jurisdiction for this 42 U.S.C. § 1983 suit under 28 U.S.C. §§ 1331 and 1343, and this Court has jurisdiction under 28 U.S.C. § 1291. On March 15, 2021, the district court granted defendants' motion to dismiss for lack of standing, denied PhRMA's motion for leave to file a supplemental complaint, denied PhRMA's motion for summary judgment as moot, and dismissed the case without prejudice. The court entered final judgment on March 16, 2021, and re-entered it on March 19, 2021. PhRMA noticed its appeal on March 30, 2021.

ISSUES PRESENTED

1. Whether a multiplicity of inverse condemnation actions to seek compensation for violations of the Takings Clause caused by a Minnesota law that repeatedly takes new, discrete pieces of private property from pharmaceutical manufacturers without compensation is an "adequate and complete" remedy that forecloses the injunctive and declaratory relief PhRMA seeks in this suit.

Apposite authorities:

- *Equitable Life Assurance Soc'y of U.S. v. Wert*, 102 F.2d 10 (8th Cir. 1939);
- *E. Enters. v. Apfel*, 524 U.S. 498 (1998);
- 4 John Norton Pomeroy, *Equity Jurisprudence* § 243, at 357 (3d ed. 1905).

2. Whether a Minnesota law that requires pharmaceutical manufacturers to provide insulin at no charge to eligible state residents, and provides no compensation for the insulin that manufacturers are required to give away for free, violates the Takings Clause by ordering a series of *per se* takings of personal property without just compensation.

Apposite authorities:

- *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015);
- *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019);
- *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Whether, because Minnesota's law violates the Constitution and there is no adequate remedy at law, PhRMA is entitled to a permanent injunction barring enforcement of the law or, alternatively, a declaration that the law is unconstitutional.

Apposite authorities:

- *Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999).

STATEMENT OF THE CASE

Diabetes is a chronic disease that, if untreated, can cause serious health problems. *See* Minn. Dep't of Health, *About Diabetes*, https://www.health.state.mn.us/diseases/diabetes/about/diabetes.html (last visited May 18, 2021). It is caused by insufficient production of insulin, or by the development of resistance to insulin. *Id.* Insulin is a hormone that signals the body's cells to absorb glucose from the blood for energy. *Id.* Diabetes is often treated with injectable insulin. Since

insulin was discovered in 1921, manufacturers have developed (and continue to develop) improved insulin products that help people with diabetes better manage their diabetes and live longer and healthier lives. Doc. 1, ¶¶ 39-44.

A. The Act

The Alec Smith Insulin Affordability Act (the Act) requires manufacturers of "insulin that is self-administered on an outpatient basis" to provide insulin for free to certain Minnesota residents. Minn. Stat. § 151.74, subd. 1(b)(1). The Act has two parts.

1. The Continuing Safety Net Program

Under the Continuing Safety Net Program, a manufacturer "shall make a patient assistance program available" to provide free insulin products to any Minnesota resident who (1) has family income of 400% or less of the federal poverty level; (2) is not enrolled in Medicaid or MinnesotaCare; (3) is not eligible for federally funded healthcare or Veterans Administration prescription drug benefits; and (4) is not enrolled in an insurance plan that covers a 30-day supply of insulin for $75 or less out of pocket (including co-payments, deductibles, and coinsurance). *See id.*, subd. 4(a), 4(b). Individuals with prescription drug

coverage under Medicare Part D can also receive free insulin if they have spent more than $1,000 on prescription drugs in the calendar year and meet the other eligibility criteria. *Id.*, subd. 4(c).

Insulin manufacturers must accept applications from Minnesota residents, determine whether the individuals are eligible, and provide notice of those eligibility determinations. *Id.*, subd. 5(a). Applicants can appeal an adverse eligibility decision to a state review panel, which may overrule the manufacturer. *Id.*, subd. 8.

If a resident is deemed eligible, the manufacturer must provide a "statement of eligibility" that the individual can present at a pharmacy to obtain free insulin from the manufacturer for up to one year. *Id.*, subd. 5(b), 6(a). Alternatively, for eligible residents with private health insurance, the manufacturer may "determine that the individual's insulin needs are better addressed through the use of the manufacturer's co-payment assistance program," and "provide the individual with the necessary coupons to submit to a pharmacy." *Id.*, subd. 5(c).

When presented with an eligibility statement, the pharmacy orders insulin from the manufacturer, which must send a 90-day supply

of insulin to the individual or pharmacy "at no charge." *Id.*, subd. 6(c), 6(g). The pharmacy, however, can charge a co-payment "not to exceed $50 for each 90-day supply" to cover "the pharmacy's costs for processing and dispensing" the insulin. *Id.*, subd. 6(e).

This process must be repeated if an individual orders more insulin throughout the full year of eligibility and, in any subsequent years of the program for which there is a "a redetermination of eligibility." *Id.*, subd. 5(b).[2] "Upon receipt of a reorder from a pharmacy," the manufacturer must send "an additional 90-day supply of the product, unless a lesser amount is requested"—again "at no charge." *Id.*, subd. 6(f).

2. The Urgent Need Program

Under the Act's Urgent Need Program, manufacturers must provide a 30-day supply of free insulin to Minnesota residents who (1) are not enrolled in Medicaid or MinnesotaCare; (2) are not enrolled in a prescription drug coverage plan that would cover a 30-day supply of

[2] The Continuing Safety Net program is set to expire on December 31, 2024, but the legislature will review the program and determine whether it should continue beyond that date. Minn. Stat. § 151.74, subd. 16.

insulin for $75 or less out of pocket (including co-payments, deductibles, and coinsurance); (3) have not received insulin under the Urgent Need Program within the past 12 months (with some exceptions); (4) have readily available for use less than a seven-day supply of insulin; and (5) need insulin to avoid the likelihood of suffering significant health consequences. *See id.*, subd. 2(a)-(b), 9.[3]

When an eligible resident applies under this program, the pharmacy "shall dispense" a 30-day supply of insulin to that person. *Id.*, subd. 3(c). The pharmacy then submits an electronic claim for payment to the insulin manufacturer (or its vendor); the manufacturer must either "send to the pharmacy a replacement supply of the same insulin," or "reimburse the pharmacy in an amount that covers the pharmacy's acquisition cost" for the dispensed insulin. *Id.*, subd. 3(d). The pharmacy may collect a co-payment from the individual of up to $35 for the 30-day supply. *Id.*, subd. 3(e). But none of that co-payment goes to the manufacturer that provides the free replacement insulin (or its monetary equivalent) to the pharmacy. *Id.*, subd. 3(d).

[3] The Urgent Need program has no expiration date, so eligible residents can use it to obtain insulin every year.

3. Enforcement of the Act

If a manufacturer does not comply with the Act's requirements, it is subject to a penalty of $200,000 per month. *Id.*, subd. 10(a)-(b). This penalty increases to $600,000 per month if a manufacturer remains noncompliant after one year. *Id.*, subd. 10(a).

There are two limited exceptions to the Act's mandates and penalties. First, a manufacturer is exempt if it has "annual gross revenue of $2,000,000 or less from insulin sales in Minnesota." *Id.*, subd. 1(c). Second, a manufacturer's "insulin product is exempt from [the Act] if the wholesale acquisition cost ["WAC"] of the insulin is $8 or less per milliliter or applicable National Council for Prescription Drug Plan billing unit, for the entire assessment time period, adjusted annually based on the Consumer Price Index." *Id.*, subd. 1(d).

B. Proceedings Below

PhRMA filed this lawsuit on behalf of itself and three of its members—Eli Lilly and Company, Novo Nordisk Inc., and Sanofi—which manufacture most of the insulin sold in the United States and are subject to the Act. Doc. 1, ¶ 13. PhRMA alleged that forcing manufacturers to give their personal property away for free under the

Act's programs constitutes a *per se* taking of private property. *See id.* ¶¶ 82-83. And because the Act does not provide just compensation for that property, these takings are unconstitutional. *Id.* PhRMA also alleged that the Urgent Need Program's alternative of allowing a manufacturer to reimburse a pharmacy for the cost of acquiring the manufacturer's product instead of replacing it does not avoid the unconstitutional taking. *Id.* ¶ 84.[4]

PhRMA sued the members of the Minnesota Board of Pharmacy in their official capacities under 42 U.S.C. § 1983 and *Ex Parte Young*, 209 U.S. 123 (1908), seeking a declaration that the Act is unconstitutional and an injunction barring its enforcement. Doc. 1, ¶¶ 15-32, 34, Prayer for Relief.[5]

---

[4] PhRMA also alleged that, if the Act's WAC-based exemption was intended to give manufacturers the "option" of avoiding the unconstitutional taking by lowering their products' WAC, that "option" is unconstitutional under the Commerce Clause. Doc. 1, ¶¶ 86-89. Defendants did not raise such a defense below, however, and PhRMA later agreed that this claim was moot. *See* Doc. 72, at 3 n.1.

[5] PhRMA also named employees of MNsure as defendants, but later stipulated to their dismissal based on defendants' representations that those employees have no enforcement responsibilities under the Act. Doc. 21.

Defendants moved to dismiss. Because PhRMA had sued the day before the Act took effect, defendants argued that (1) PhRMA's claims were not yet ripe; (2) PhRMA lacked associational standing because its members had suffered no actual or threatened Article III injury; and (3) defendants were immune from suit, as there was no ongoing constitutional violation justifying equitable relief. *See* Doc. 16, at 11, 16-18, 21-26. Defendants also argued that, because property owners can seek just compensation through an inverse condemnation action in Minnesota state court, equitable relief is not available. *Id.* at 12-13, 20, 26-32. Finally, defendants claimed that PhRMA had failed to plead a valid takings claim because (according to defendants) states can take property if they pay just compensation, and need not pay before a taking occurs. *Id.* at 11.

PhRMA opposed defendants' motion and cross-moved for summary judgment. In response to defendants' jurisdictional arguments, PhRMA submitted declarations establishing that each manufacturer had since been compelled to provide insulin and reimburse pharmacies (or were in the process of reimbursing pharmacies) for insulin as required under the Act. *See* Docs. 29-31

(reproduced in the concurrently filed Separate Appendix of Plaintiff-Appellant ("Appx.") at Appx.16-27).[6]

PhRMA explained that the government violates the Takings Clause the moment it "takes private property without paying for it … *without regard to subsequent state court proceedings*." *Knick*, 139 S. Ct. at 2170 (emphasis added); *see also id.* (overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). PhRMA had thus pled a valid takings claim, since Minnesota does not pay for insulin when it is taken. Doc. 27, at 12-14. The undisputed facts made clear, moreover, that the Act's requirements caused *per se* physical takings. *Id.* at 36-41; Doc. 72, at 4-26.

PhRMA further demonstrated that an inverse condemnation action is not a plain, adequate, and complete remedy at law that precludes injunctive relief in the circumstances of this case. Because of the repetitive and never-ending nature of the takings effected by the Act, insulin manufacturers would necessarily have to bring a multiplicity of compensation suits, which renders the inverse

[6] PhRMA also filed a contingent motion to file a supplemental complaint, which alleged the same post-effective-date facts. Doc. 34.

condemnation remedy inadequate. Doc. 27, at 23-33; Doc. 72, at 27-36. At a bare minimum, PhRMA showed, it was entitled to declaratory relief. Doc. 27, at 33-34; Doc. 72, at 36-38.

Defendants opposed the cross-motion and argued that the law does not effect a *per se* taking. Doc. 66, at 22-36. Defendants did not challenge any of the undisputed material facts PhRMA recited in its cross-motion. Instead, they made passing reference to facts and discovery that they allegedly need to support certain defenses to the takings claim. *Id.* at 10, 36.

C. The Decision Below

The district court granted defendants' motion to dismiss and denied PhRMA's motions to file a supplemental complaint and for summary judgment. Add.1-14.[7] The court concluded that PhRMA lacks standing because it cannot satisfy Article III's redressability prong. Add.8. The basis for that conclusion rests almost entirely on the district court's reading of *Knick*, and two decisions of this Court.

According to the district court (Add.9-10):

[7] "Add." citations refer to the concurrently filed Addendum of Plaintiff-Appellant.

> *Knick* explained that the appropriate remedy for a government taking is compensation. 139 S. Ct. at 2175-77. Equitable relief is unavailable because "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Id.* at 2176. The Court held that injunctive relief is foreclosed "as long as just compensation remedies are available – as they have been for nearly 150 years…." *Id.* at 2179.
>
> Here, just compensation remedies are available in Minnesota through inverse condemnation actions in state court. *Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918, 923 (8th Cir. 2016)….

The district court dismissed the fact that manufacturers must bring multiple compensation suits as irrelevant. Citing *Knick*, it asserted that "a 'future taking'—or a taking that has not happened yet—does not give rise to a claim under the Takings Clause." Add.10. In all events, the lower court stated, "where 'nearly all state governments provide just compensations remedies,' equitable relief is 'generally unavailable,'" *id.* (quoting *Knick*, 139 S. Ct. at 2176), and it was "unaware of any cases in which a court found a state's inverse procedures to be inadequate," Add.10-11 (citing *Am. Family Ins.* and *Cormack v. Settle-Beshears*, 474 F.3d 528, 531 (8th Cir. 2007)).

The district court also ruled that declaratory relief "would be the functional equivalent of an injunction barring enforcement," and thus

improper. Add.11. Once again, the district court invoked *Knick*, noting that the "Supreme Court assured governments that they 'need not fear that [*Knick*] will lead federal courts to invalidate their regulations as unconstitutional.'" *Id.* (alteration in original) (quoting *Knick*, 139 S. Ct. at 2179).

SUMMARY OF ARGUMENT

I. The district court erred in ruling that, because insulin manufacturers can seek just compensation through state-court inverse condemnation actions, PhRMA lacks standing to seek injunctive and declaratory relief to redress violations of the Takings Clause.

A. In a single Minnesota inverse condemnation action, a court cannot require the State to pay compensation for all of the repetitive takings the Act causes. It can only award compensation for insulin that has already been given away. Thus, manufacturers must bring successive suits to obtain compensation for the endless takings of insulin that the Act compels. *Infra* § I.A.1. This Court has long recognized—and numerous authorities confirm—that a legal remedy is inadequate if "one is bound to litigate a multiplicity of suits having a community of facts and issues" to obtain complete relief. *Equitable Life*

Assurance Soc'y of U.S. v. Wert, 102 F.2d 10, 14 (8th Cir. 1939); *see also infra* § I.A.2. Because Minnesota's inverse condemnation mechanism is an inadequate legal remedy for the repetitive, unconstitutional takings at issue here, injunctive relief is available.

Knick did not address, much less reject, the principle that a multiplicity of suits is not an adequate and complete legal remedy. Instead, *Knick* simply reiterated the well-settled rule that injunctive relief is unavailable in takings actions *if* the property owner has a "plain, adequate, and complete remedy at law." *Knick*, 139 S. Ct. at 2715 (quoting *Hurley v. Kincaid*, 285 U.S. 95, 99 (1932)). Neither *Knick* nor the decisions of this Court that were cited below addressed a law that repeatedly took new items of property from the same owners.

The historical development of just compensation remedies confirms that an injunction is appropriate when multiple suits are needed to obtain such compensation. For decades after the Fifth Amendment was adopted, the typical remedy for a landowner whose property was taken by the government was an action for ejectment or injunction. At that time, landowners had no adequate and complete remedy at law, because the court could only award damages in a

trespass action for the government's prior unauthorized occupation of the property. It was only later, when landowners could obtain "permanent damages" to compensate for the government's past *and future* taking of the property in a single action, that courts began denying prospective injunctive relief. *Infra* § I.A.3. Here, where manufacturers cannot obtain "permanent damages" in a single action, the rationale for foreclosing injunctive relief does not apply.

Although the Supreme Court has apparently never ruled on the adequacy of a legal remedy in a case involving repetitive *per se* takings of property, it and at least one circuit have relied on the basic rationale of the multiplicity-of-suits principle in analogous circumstances. *Infra* § I.A.4.

Defendants failed to refute PhRMA's showing that the multiplicity-of-suits principle, and the rationale underlying it, are fully applicable to this unusual case. Indeed, defendants' contrary arguments would, if accepted, sanction an abuse of the Takings Clause. Here, not only is the legal remedy of inverse condemnation inadequate, but there is also no justification for allowing the State to continue to take identifiable property without contemporaneous compensation.

Governments may not be able to determine in advance whether a regulation will go "too far" and constitute a regulatory taking for which they should pay contemporaneous compensation. But Minnesota's law causes repeated *per se* physical takings of targeted goods that are *commercially available*. It is decidedly inequitable to allow the State to compel manufacturers to give away such goods for free and require them to file repeated lawsuits for payment, when Minnesota could simply purchase, rather than confiscate, these commercial goods. *Infra* § I.A.5.

B. The district court further erred in holding that *Knick* deprives federal courts of the power to grant declaratory relief. *Knick* announced no bar on declaratory relief, and none can be inferred from the general bar on injunctive relief. The Declaratory Judgment Act authorizes federal courts to enter a declaratory judgment "whether or not further relief is or could be sought," 28 U.S.C. § 2201(a), and there is no justification for creating an exception for takings cases. *Infra* § I.B.1.

Nor is a declaratory judgment the functional equivalent of an injunction. A declaratory judgment that the Act violates the Takings Clause would not prevent defendants from enforcing the Act. It would

simply resolve the dispute about whether the Act effects a taking, while allowing the state legislature to decide how to comply with the Takings Clause. *Infra* § I.B.2.

II. In addition to reversing the dismissal of this lawsuit for lack of standing, this Court should resolve the underlying takings claim. When eligible Minnesota residents request insulin under the Act, manufacturers are required to provide insulin at no charge. Those undisputed facts establish that the Act effects *per se* physical takings, because they deprive manufacturers of the entire bundle of rights in the insulin—"the rights to possess, use and dispose of" it, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). *Infra* § II.A.

Defendants cannot avoid that conclusion by arguing that the Act is only a restriction on the "use" of insulin, or that discovery is needed to determine whether the law goes "too far" and effects a regulatory taking. A requirement that property be given away for free is not a mere restriction on use, and *Horne* makes clear that cases involving regulatory takings are not controlling precedent for cases involving physical takings. *Infra* § II.B.1.

Defendants also cannot defend the Act as abating a nuisance or imposing a reasonable licensing condition. The sale of a life-saving medicine approved by the Food and Drug Administration (FDA) is not a cognizable "nuisance"—much less one that Minnesota can remedy by confiscating the medicine and transferring it to pharmacies and patients at no charge. *Infra* § II.B.2. And the right to sell a federally approved medicine 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. *Infra* § II.B.3.

Finally, there is no basis for defendants' theory that a State can strip owners of the right to choose how to dispose of their property, and then claim that its compulsory law causes no taking (or "net loss") because the owner would have made the same choice that the State is now compelling.

III. This Court should remand for entry of a permanent injunction, or, at a minimum, declare that the Act violates the Takings Clause. *See Bank One, Utah, N.A. v. Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999). PhRMA has demonstrated, as a matter of law, that the Act causes unconstitutional takings and that the resulting injuries to its

members are irreparable because there is no adequate legal remedy. The State has no valid interest in enforcing an unconstitutional law, nor is the public harmed when unconstitutional laws are enjoined or declared unconstitutional.

STANDARD OF REVIEW

This Court reviews "the district court's dismissal for lack of standing de novo, accepting the material allegations in the complaint as true and drawing all inferences in plaintiffs' favor." *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017). Similarly, this Court can resolve claims that were raised on summary judgment but not resolved below where there are no disputed material facts and the claims raise legal questions. *Murray v. Am. Family Mut. Ins. Co.*, 429 F.3d 757, 765 (8th Cir. 2005).

ARGUMENT

I. PhRMA HAS STANDING TO PURSUE ITS TAKINGS CLAIM.

PhRMA alleged in its complaint that each time a manufacturer is forced to provide insulin to an eligible Minnesota resident at no charge under the Act, the manufacturer suffers a distinct, uncompensated *per se* taking of personal property. In dismissing the complaint for lack of

standing, the district court had to—and did—accept these allegations as true. *See* Add.7. The district court nevertheless concluded that it was powerless to redress these ongoing constitutional violations through equitable relief, and that PhRMA therefore lacked standing because it could not satisfy Article III's redressability prong. That ruling is mistaken.

A. Injunctive Relief Is Available When, As Here, A Law Authorizes An Endless Series Of Repetitive *Per Se* Takings Of Private Property.

The district court relied on the general rule that injunctive relief is unavailable in takings actions *if* the property owner has a "plain, adequate, and complete remedy at law." *Knick*, 139 S. Ct. at 2715 (quoting *Hurley*, 285 U.S. at 99). In most cases, a state-law inverse condemnation action satisfies this requirement. But not here. An inverse condemnation action can provide just compensation only for takings that have already occurred. But the Act authorizes a repetitive (and essentially endless) series of new, *per se* takings. Thus, manufacturers must repeatedly bring new suits to obtain just compensation for all the insulin taken by the Act.

It is a well-settled rule that a multiplicity of damages suits is not an adequate and complete legal remedy that forecloses injunctive relief. *See Equitable Life Assurance*, 102 F.2d at 14-15 (Sanborn, J.) (citing Supreme Court cases). Because of the repetitive takings that the Act compels, this settled rule applies here. *Knick* does not dictate otherwise. In fact, the history of takings litigation that *Knick* relied upon underscores why injunctive relief is available here; other decisions bolster that conclusion; and defendants' contrary arguments would, if accepted, justify governmental misuse of the power to acquire private property.

1. Manufacturers Have No Adequate and Complete Legal Remedy Because They Must Bring a Multiplicity of Suits to Obtain Just Compensation.

This Court has 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 issues." *Equitable Life Assurance*, 102 F.2d at 14. "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. That principle was well-established when this Court invoked it over eighty years ago.

A 1905 treatise explained that equitable relief is available to "determine the rights of all the parties, and grant the relief requisite to meet the ends of justice, in order to *prevent a multiplicity of suits*." John Norton Pomeroy, *Equity Jurisprudence* § 243, at 356-57 (3d ed. 1905). This principle applied where, *inter alia*, "the same injured party, in order to obtain all the relief to which he is justly entitled, is obliged to bring a number of actions against the same wrong-doer, all growing out of the one wrongful act and involving similar questions of fact and of law." *Id.* § 245, at 359; *see also id.* § 252, at 382 (equitable relief available if "plaintiff would be obliged to bring a succession, perhaps an indefinite number, of actions at law in order to obtain relief," because "the wrong complained of [is] in its very nature continuous").

Thus, "[i]t is not enough to bar equitable relief that a remedy at law exist. Such remedy must be adequate to afford full redress, both in respect to the final relief sought and the mode of obtaining it." 1 Fred F. Lawrence, *A Treatise on the Substantive Law of Equity Jurisprudence*, § 76, at 112 (1929) (footnote omitted). To be adequate, a remedy "must

be … 'so complete that it attains the full end and justice of the case, reaching the whole mischief and securing the whole right of the party in a perfect manner at the present time and in the future.'" *Id.* § 77, at 112.

These principles are still recognized, *see* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2944 (3d ed. 2013) (legal remedy is inadequate "if plaintiff demonstrates that effective legal relief can be secured only by a multiplicity of actions"), and they are dispositive here. A single inverse condemnation action cannot provide "full redress" for the repetitive takings mandated by the Act. Such an action cannot address "the *whole* mischief" caused by the law; it cannot "secur[e] the *whole right* of [manufacturers] in a *perfect manner* at the *present time*," because it cannot secure their "*whole* right" to damages "*in the future*." Lawrence, *supra*, § 77, at 112 (emphases added). Instead, manufacturers must bring "a multiplicity of suits"—the hallmark of an *inadequate* and *incomplete* remedy. *Equitable Life Assurance*, 102 F.2d at 14. And even then, they cannot secure all of their rights in the future, because the Act will continue to compel new unconstitutional deprivations in perpetuity.

The district court's response to these clear inadequacies was to conclude (at the State's urging) that insulin manufacturers' right to be free of unconstitutional takings "in the future" is irrelevant. It concluded that a "taking that has not happened yet … does not give rise to a claim under the Takings Clause," thus the government "does not need to compensate for property it has not yet taken." Add.10. This reasoning is mistaken.

Parties who have already been harmed by unconstitutional actions have a legal right to be protected from a "real or immediate threat," or a "sufficient likelihood," that they will be subjected to the same unconstitutional action in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Because the Act's Urgent Need Program has no expiration date, and the Continuing Safety Net Program will remain in effect through at least 2024, manufacturers are not only likely, but certain, to suffer additional uncompensated *per se* takings in the future. And, to be adequate and complete, a legal remedy must provide, in a single action, relief that secures "the whole right of the [manufacturers] … at the present time and in the future.'" Lawrence, *supra*, § 77, at 112. It is thus no answer to say that future

unconstitutional takings have not occurred yet. Manufacturers have a right to be protected from those future harms and an injunction would provide that protection; because a single inverse condemnation action cannot provide equivalent relief, it is not an adequate and complete remedy. 11A Wright & Miller, *supra*, § 2944 (to be adequate, a legal remedy must be as "complete and as practical and efficient … as a remedy in equity").

2. Neither *Knick* Nor the Decisions of This Court Cited Below Foreclose Injunctive Relief Here.

Neither *Knick* nor the decisions of this Court cited below disavowed or rejected the multiplicity-of-suits principle in takings cases. Nor did they have any basis for doing so. None involved a law that authorized repetitive *per se* takings of property without compensation from the same property owner.

The local ordinance at issue in *Knick* took a single piece of property, *i.e.*, a permanent easement across the plaintiff's yard to afford public access to an historical grave site. 139 S. Ct. at 2168. That is a traditional, discrete *per se* taking. *See, e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987) ("a permanent grant of continuous [public] access" to real property is a taking). The *Knick* Court had no

reason to believe that a Pennsylvania inverse condemnation action would not provide a complete remedy for such an ordinary, one-time taking.

The decisions in *American Family Insurance* and *Cormack* are also inapposite. In the former, insurance companies brought takings claims to recover proceeds they had paid to their insureds for damages caused by a water main break. There were no repetitive takings, and the Court concluded that the companies had failed to comply with the exhaustion requirement of *Williamson County* (which the *Knick* Court has since repudiated). *Am. Family Ins.*, 836 F.3d at 923-24.

In *Cormack*, the plaintiff claimed that a local ordinance that banned fireworks sales resulted in a regulatory taking of a lease he had executed to allow such sales on his property. 474 F.3d at 530-31. The 2007 decision in *Cormack* also predated *Knick*, and this Court concluded that the plaintiff had failed to exhaust state remedies. The Court noted that the plaintiff had identified no inadequacy in those remedies, and stated that it had "been unable to find a case in which this court has declared a state's inverse condemnation procedures to be inadequate." *Id.* at 531.

Each case, therefore, addressed a discrete alleged taking. Thus, in stating that "equitable relief is *generally* unavailable" in light of existing state compensation remedies, *Knick*, 139 S. Ct. at 2176 (emphasis added), the Supreme Court did not determine (or even intimate) that equitable relief is barred even when a property owner must bring a series of inverse condemnation actions to recover damages for repetitive *per se* takings. And while the *Cormack* stated that it had found no case in which this Court deemed a state inverse condemnation procedure inadequate, the question is whether the Court has ever addressed a situation in which multiple inverse condemnations actions would be required and held that a multiplicity of such suits *is* an adequate remedy. Defendants have never cited such a case, and PhRMA is not aware of one.

Indeed, the fundamental flaw in the lower court's reliance on these cases, and on generalizations about the adequacy of state compensation remedies, is that it failed to recognize the extraordinary nature of the Minnesota Act. The district court concluded that Minnesota's inverse condemnation remedy was "adequate" because it allows state courts "to determine whether a taking occurred and the

monetary value of the harm." Add.11. Neither observation, however, addresses the fact that the Act compels repetitive takings that cannot be remedied in a single inverse condemnation action.[8]

3. The History of Takings Litigation Confirms That a Multiplicity of Suits Is Not an Adequate and Complete Remedy.

Far from disavowing the multiplicity of suits principle, the Court in *Knick* relied extensively on the "history of takings litigation" to confirm that the Takings Clause is violated the moment property is taken without payment of just compensation. *See* 139 S. Ct. at 2175-77. That same history confirms that inverse condemnation is an inadequate and incomplete remedy here.

Prior to the Civil War, if a statute authorized activity that invaded real property rights but did not provide for payment of compensation, the property owner could bring a trespass action. *Id.* at 2176 (citing Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52

[8] This same error underlies *Virginia Hospital & Healthcare Ass'n v. Kimsey*, 493 F. Supp. 3d 488 (E.D. Va. 2020), which the district court cited below. Add.8 n.4, Add.10. Like the district court here, the court in *Kimsey* mistakenly treated *Knick* as dispositive even where multiple suits are required. 493 F. Supp. 3d at 492-93.

Vand. L. Rev. 57, 67-69, 97-98 (1999)). In such actions, the "traditional rule was that the owner could only recover retrospective damages, for injury up until the time the owner brought suit. If the injury was continuing, the owner could bring successive actions, but could not bring a single action for permanent damages." Brauneis, *supra*, at 97-98 (footnote omitted). Instead, an owner had to "sue for ejectment or for an injunction to prevent prospective injury." *Id.* at 98.

After the Civil War, courts began awarding "permanent damages"—*i.e.*, compensation for the harms of past *and future* occupation of property. *Id.* at 133. "[U]nlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit; in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent." *Id.* (quoting *City of Denver v. Bayer*, 2 P. 6, 15 (Colo. 1883)). Thus, the courts created a "non-statutory post-deprivation procedure, with a *different measure of damages* than" the purely retrospective damages "traditionally allowed in trespass" actions. *Id.* at 135 (emphasis added).

One impetus for this new remedy was a recognition that, absent complete relief for future harms, property owners were entitled to injunctions, which could impede "the march of improvement." *Id.*; *see also id.* at 134 (referring to owners' "right absolutely to stop" projects requiring their land). Thus, the new "permanent damages" remedy was tied to, and justified by, the need to ensure that property owners were fully compensated for past and *future* loss of the property so that they could not block public improvements by refusing to sell property and demanding an injunction. *See also* 2 Philip Nichols, *The Law of Eminent Domain* § 478, at 1278-79 (2d ed. 1917) (explaining the benefit of a remedy that allows an owner to "have his damages assessed once and for all," and the builder of a public improvement to "be at the same time confirmed in its right of occupancy [of private property] without further interference").

This history confirms that an injunction may be issued when, as here, an inverse condemnation procedure cannot provide a property owner with an adequate and complete damages remedy for the takings caused by a law. Minnesota's inverse condemnation procedure does not allow an insulin manufacturer to "have [its] damages assessed *once and*

for all," *id.* (emphasis added), through a single action that awards "permanent damages"—*i.e.* compensation for past and future harms, Brauneis, *supra*, at 133. Instead, manufacturers must bring the very kind of "successive actions," *id.* at 98, that the complete "permanent damages" remedy was designed to obviate.

4. Other Authority Confirms That Multiple Damages Actions Are Not an Adequate and Complete Remedy for Repetitive Takings.

Having canvassed and relied upon this same historical background, it is notable that the *Knick* Court neither disavowed the multiplicity-of-suits basis for injunctive relief in takings cases, nor suggested that successive actions could constitute an adequate and complete remedy for a taking. To the contrary, the Court's statements that the availability of inverse condemnation actions will "*generally*" foreclose injunctive relief, and that "barring the government from acting will *ordinarily* not be appropriate," 139 S. Ct. at 2176-77 (emphasis added), are careful and important qualifications. Moreover, although the Supreme Court has apparently never ruled on the adequacy of a legal remedy in a case involving repetitive *per se* takings of new property, the Court and at least one circuit have relied on the basic

rationale of the multiplicity-of-suits principle in analogous circumstances.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality concluded that the availability of a damages action under the Tucker Act, 28 U.S.C. § 1491, did not foreclose claims seeking to declare invalid and enjoin a succession of alleged takings mandated by the Coal Act. That statute required former employers to pay annual assessments to fund health care benefits for retired mineworkers. 524 U.S. at 514-15. The plurality explained that requiring these companies to submit repetitive takings claims under the Tucker Act "would entail an utterly pointless set of activities," as every dollar paid under the Coal Act to fund health care benefits would then entitle the employer to seek compensation from the federal government in the same amount. *Id.* at 521. The plurality concluded that "it cannot be said that monetary relief against the Government is an available remedy" and that the district court could issue declaratory and injunctive relief. *Id.* at 521-22.

The First Circuit relied on similar reasoning in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). There, insurers had to fund

reserves to reimburse motorists who paid duplicate insurance premiums under Puerto Rico's licensing requirements. *Id.* at 6-8. The reserves were transferred to Puerto Rico's Treasury Secretary, who was required to return unclaimed funds every five years. *Id.* at 9-10. The insurers alleged that the Secretary had taken their property by failing to return the unclaimed funds and by retaining interest earned on the funds, and they sought injunctive relief to prevent future takings. *Id.* at 10-12. The court concluded that the insurers did not first have to seek compensation in court in accordance with *Williamson*'s then-extant ripeness requirement because, among other reasons, requiring the insurers to continue to turn over reserves to the Secretary only to seek the return of unclaimed funds and interest through takings actions would "entail an utterly pointless set of activities." *Id.* at 20 (quoting *E. Enters.*, 524 U.S. at 521 (plurality opinion)).

As in the foregoing cases, the Act requires manufacturers to engage in "piecemeal litigation" and "utterly pointless activities" to recover for the State's takings. Like *Eastern Enterprises*, manufacturers that reimburse pharmacies for insulin under the Act's Urgent Need Program must turn over funds to private parties, only to seek return of

the same amount in just-compensation awards from the State. And it is pointless for Minnesota to require manufacturers to bring a series of takings claims when the State could buy the insulin directly and arrange for its distribution to eligible residents.

5. Defendants Cannot Refute PhRMA's Showing That Inverse Condemnation Is Not an Adequate and Complete Remedy.

Defendants tried to downplay the burdens (and pointlessness) of successive actions, arguing in the district court that, under the relevant limitations period, manufacturers only have to sue once every six years to recover for the previous six years of takings, and can recover interest and attorneys' fees as well as just compensation in such sexennial suits. Doc. 66, at 13. It is not at all clear that manufacturers can recover their attorneys' fees in Minnesota eminent domain proceedings, if they bring such lawsuits.[9] But even if they could, they still must bring multiple

[9] Minn. Stat. § 117.045 authorizes awards 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 also makes attorney's fees in eminent domain proceedings discretionary if the compensation awarded is "at least 20 percent, but not more than 40 percent, greater than the last written offer" from the condemning authority.

suits in perpetuity. That alone makes inverse condemnation an inadequate and incomplete remedy. *See* Pomeroy, *supra*, § 244, at 358 ("The multiplicity of suits to be avoided … *shows* that the legal remedies are inadequate, and cannot meet the ends of justice …." (emphasis added)).

Nor is it an answer that the legislature might respond to a takings finding in an initial state-law inverse condemnation action by repealing the Act. Doc. 16, at 32. The Minnesota legislature's political response to such a finding is far from certain, and, to be adequate, "the sufficiency and completeness of the legal remedy must be *certain*." Pomeroy, *supra*, § 177, at 211 (emphasis added); *see also* Lawrence, *supra*, § 78, at 114 ("Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.").

Not only are defendants' "adequate remedy" arguments unavailing, they would, if accepted, sanction an abuse of the Takings Clause. *Knick* makes clear that the Clause is violated the moment the government "takes private property without paying for it … without regard to subsequent state court proceedings." 139 S. Ct. at 2170. It is only because of traditional principles of equity—in particular, the rule

that equity will not interfere when there is an adequate and complete legal remedy—that many governmental actions can "proceed in the absence of contemporaneous compensation." *Id.* at 2177; *see also id.* at 2180 (Thomas, J., concurring). Here, however, the equities are vastly different than in the typical takings case, and not only because of the need for multiple suits.

Because the test for a regulatory taking is a multi-factored balancing test, the federal government has argued that it is "impractical" for governments to always determine in advance whether a law "would effect a taking" and thus whether governments should "institute formal condemnation proceedings." Supplemental Letter Brief for the United States as *Amicus Curiae* at 5, *Knick*, 139 S. Ct. 2162; *see also Knick*, 139 S. Ct. at 2179 (citing the federal government's concerns). But that is not true when laws physically take targeted property. *See* Supplemental Letter Brief for the United States as *Amicus Curiae* at 5, *Knick*, 139 S. Ct. 2162 (noting that this impracticality argument does not apply to "certain physical invasions").

Here, Minnesota's law not only causes physical takings, it takes *commercially available* goods. In this circumstance, no governmental

exigencies or uncertainties justify imposing the burdens of post-deprivation lawsuits on the property owner, much less the burdens of a multiplicity of such suits. Minnesota could purchase insulin directly under contracts that fixed payment in advance for all doses dispensed to residents who meet the State's eligibility standards. Indeed, even in times of national emergency, the federal government does not require manufacturers of needed resources to give their property away for free and then force them to sue repeatedly for compensation.[10] It is plainly inequitable for Minnesota to impose such burdens here.

If a scheme of repetitive lawsuits is deemed an adequate compensation remedy here, governments across the country can likewise compel uncompensated transfers of commercial goods for use in public programs, leaving companies to seek payment through repeated inverse condemnation actions. Nothing in *Knick* suggests that the

[10] The Defense Production Act authorizes the President to compel a company to accept a contract to sell "scarce and critical" goods that the government may allocate to others, 50 U.S.C. § 4511(a)-(b), and implementing regulations prohibit the company from treating the government worse (on price or terms) than it treats others, *see* 45 C.F.R. §§ 101.20, 101.33; 15 C.F.R. § 700.13. This federal scheme thus recognizes manufacturers' right to be paid the market price of their goods, and does not require them to bring repetitive suits for payment.

Supreme Court intended to allow governments to repeatedly confiscate new items of private property and relegate property owners to such an ineffective remedial scheme. To the contrary, the Court's reference to a "plain, adequate, and complete remedy at law," 139 S. Ct. at 2175, invoked ordinary and long-settled equitable principles. Those principles make clear that requiring manufacturers to bring successive inverse condemnation suits to be paid for their commercial products is not a plain, adequate, and complete remedy for the unconstitutional takings the Act causes. Because there is no mechanism for manufacturers to have their past and future takings damages "assessed once and for all" in a single action for "permanent damages," injunctive relief is available. The district court's standing decision can and should be reversed on this ground alone.

B. PhRMA Is Entitled To Declaratory Relief.

For the reasons just discussed, the general prohibition on injunctive relief in takings cases does not apply here because a series of inverse condemnation actions is not an adequate and complete remedy for the taking of insulin compelled by the Act. But even if it such suits do collectively provide an adequate remedy, the district court erred in

holding that PhRMA cannot obtain declaratory relief. Add.11. "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57. Contrary to the district court's view, *Knick* does not bar "takings claims seeking declaratory relief," and a declaration that the Act causes unconstitutional takings is not "the functional equivalent of an injunction." Add.11-12.

1. *Knick* Does Not Bar Declaratory Relief in Takings Cases.

As noted earlier, *Knick* overruled *Williamson County,* which had held that the Takings Clause is not violated until a property owner exhausted state procedures and was denied just compensation. 473 U.S. at 194-95. In *Knick*, the Court stated that its decision should not upend any governmental reliance interests or "lead federal courts to invalidate their regulations as unconstitutional." 139 S. Ct. at 2179. "As long as an adequate provision for obtaining just compensation exists, there is no basis to *enjoin* the government's action effecting a taking." *Id.* at 2176 (emphasis added); *see also id.* at 2179 (complete and adequate compensation remedy generally forecloses "*injunctive* relief" (emphasis added)).

In contrast to its statements about *injunctive* relief, *Knick* nowhere states that there is any bar to the issuance of *declaratory* relief. Nor can any bar be inferred from the general prohibition on injunctive relief. The Declaratory Judgment Act expressly authorizes federal courts to "declare the rights … of any interested party … *whether or not further relief is or could be sought*." 28 U.S.C. § 2201(a) (emphasis added). Thus, "a request for declaratory relief may be considered independently of whether other forms of relief are appropriate." *Powell v. McCormack*, 395 U.S. 486, 517-18, 550 (1969) (holding that Congressman Powell was entitled to a declaration that the House of Representatives could not exclude him, regardless of whether a court could "issue mandamus or injunctions" against officers of the House).

The "Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974). There is no such federal policy against federal adjudication of takings claims. In fact, *Knick* overruled *Williamson County* precisely to *allow* takings

claims to be litigated in federal court. The Court explained that *Williamson County's* "state-litigation requirement" had effectively "'hand[ed] authority over federal takings claims to state courts'" and "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights.'" 139 S. Ct. at 2169. "Fidelity to the Takings Clause" required "restoring takings claims to the full-fledged constitutional status the Framers envisioned" so they can be litigated in federal court like other constitutional claims. *Id.* at 2170. The district court thus erred in reading *Knick* to bar declaratory relief.

2. The Declaration PhRMA Seeks Is Not the Functional Equivalent of an Injunction.

The district court also erred in holding that a declaration that the Act violates the Takings Clause is "the functional equivalent of an injunction barring enforcement." Add.11. Neither the lower court, nor the district court decision it cited, provided any explanation for that assertion. Nor could they, because it is based on a misconception of the nature of declaratory relief.

A declaratory judgment is a "milder" remedy that "Congress plainly intended" to be "an alternative to the strong medicine of the injunction." *Steffel*, 415 U.S. at 466, 471. "An injunction is a coercive

order by a court directing a party to do or refrain from doing something, and applies to future actions. A declaratory judgment states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future action." *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987); *see also, e.g.*, *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991) ("declaratory relief" is not "so coercive as equitable relief").

A declaratory judgment "clarify[ies] and settl[es] the legal relations in issue" and "afford[s] relief from the uncertainty, insecurity, and controversy" that gave rise to the lawsuit. *Alsager v. Dist. Court*, 518 F.2d 1160, 1163-64 (8th Cir. 1975) (quoting Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941)). But it leaves "state and local officials" with the discretion to determine how to "reform[] their practices to conform to the Constitution." *Caliste v. Cantrell*, 937 F.3d 525, 532 (5th Cir. 2019); *see also Steffel*, 415 U.S. at 470 (declaratory judgment gives state officials an opportunity "to reconsider their respective responsibilities toward the statute" in the future). That is why a federal court may issue a declaratory judgment against state officials even if "a more intrusive injunction would not be appropriate."

Roark v. S. Iron R-1 Sch. Dist., 573 F.3d 556, 562 (8th Cir. 2009) (citing *Steffel*, 415 U.S. at 467).

These principles are fully applicable here. 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). But a declaratory judgment would not enjoin the Act's enforcement.[11] Instead, its "persuasive force" 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. Defendants themselves argued below that state officials and legislators would undertake that very type of re-assessment if a *state* court were to hold, in an inverse condemnation action, that the Act effects a taking of insulin. *See* Doc. 66, at 18. There is no reason a *federal* court cannot

[11] A declaration, therefore, would not "invalidate" the law, which would remain in effect. *See Invalid*, Black's Law Dictionary (4th ed. 1968) ("Invalid" means "not of binding force or legal efficacy"). It is thus clear that, when *Knick* said its holding would not "lead federal courts to invalidate [governments'] regulations as unconstitutional," 139 S. Ct. at 2179, it was not stating or implying that declaratory relief could also be foreclosed by a complete and adequate legal remedy.

issue a declaratory judgment to prompt that same action by state officials to conform their actions to the Constitution.

II. THE ACT IS UNCONSTITUTIONAL.

In addition to reversing the dismissal of this suit, this Court should resolve the underlying takings claim, which was raised in PhRMA's cross-motion for summary judgment and presents straightforward legal questions. *See Murray*, 429 F.3d at 765. Undisputed facts establish that the Act causes unconstitutional *per se* takings. And the discovery defendants claimed they need pertains to issues that are irrelevant to a *per se* takings analysis. Accordingly, all issues necessary to the resolution of the merits—including the issue of what facts matter—turn on questions of *law*. There is thus no reason for a remand, which will simply allow Minnesota's unconstitutional law to continue to operate during the resulting period of delay.

A. The Act Causes A Series Of Uncompensated *Per Se* Takings.

The Supreme Court has divided takings claims into two distinct categories, each subject to a different analysis. "Regulatory takings" arise when *restrictions on the use* of property go "too far." *Horne*, 135 S. Ct. at 2427. Determining whether a regulation goes "too far" requires

"an 'ad hoc' factual inquiry" into a number of factors. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). The other category consists of "physical taking[s]." *Id.* In *Loretto*, 458 U.S. 419, the Court held that physical appropriations of real property are *per se* takings—*i.e.*, they always trigger a duty to pay compensation. In *Horne*, the Court extended this *per se* principle to physical takings of personal property. 135 S. Ct. at 2427.

Horne addressed a law that required raisin growers "to give a percentage of their crop to the Government, free of charge." *Id.* at 2424. This requirement caused *per se* physical takings, the Court held, because it deprived the growers of "the rights to possess, use and dispose of" their property. *Id.* at 2427 (quoting *Loretto*, 458 U.S. at 435). The same is true here: Manufacturers lose the right to possess, use, or dispose of each dose of insulin they are compelled to give away under the Act. Under *Horne*, the loss of those rights means that the Act causes *per se* physical takings of the manufacturers' insulin. It is undisputed, moreover, that Minnesota does not pay any compensation before, or contemporaneously with, these physical appropriations. Each such

physical taking, therefore, violates the Constitution. *See Knick*, 139 S. Ct. at 2170.

It is irrelevant that under the Urgent Need Program, manufacturers can reimburse pharmacies for the acquisition cost of the insulin they dispense instead of sending replacement insulin. The Supreme Court has rejected the argument that a government can avoid a taking by giving a property owner the option "to spend money rather than give up" the property itself. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 611-12 (2013). If the rule were otherwise, the Court explained, "it would be very easy" for the government to "evade the limitations" of the Takings Clause by "simply giv[ing] the owner a choice of either surrendering [the property] or making a payment equal to the [property's] value." *Id.* (government violated the Takings Clause by conditioning the grant of a land-use permit on the relinquishment of a "conservation easement" on part of the land, and could not avoid that violation by giving the owner the option of paying money "'in lieu of'" surrendering the easement).[12]

[12] Defendants never addressed, much less contested, this argument below. *See* Doc. 72, at 7 n.3.

For these reasons, the Act violates the Takings Clause as a matter of law. And, critically, that conclusion rests only on facts that defendants did not—and cannot—contest.

B. Defendants' Defenses To PhRMA's *Per Se* Physical Takings Claim Lack Merit.

In the district court, defendants raised various defenses to PhRMA's *per se* physical takings claim and cursorily asserted that they need discovery to support them. Doc. 66, at 10, 36. But as explained below, each defense fails as a matter of law.

1. Defendants' "Regulatory Takings" Defense.

Defendants argued below that "*Horne* is not controlling," Doc. 66, at 23, because the Act does not physically appropriate insulin "for the government's own use." *Id.* at 31. Instead, defendants claimed, the Act merely "regulates the manufacturer's use of the insulin," *id.*, in order to promote the public health, not to regulate economic activity, as the regulation in *Horne* did, *id. at* 23. Relying on regulatory takings and due process cases, defendants argued that the Act is thus a permissible exercise of the police power that simply requires manufacturers to use their assets for the benefit of others. *Id.* at 24; *see also id.* at 32 (the Act "adjusts the benefits and burdens of economic life to promote the

common good"). Defendants also argued that discovery into the "factual background" was necessary to demonstrate that the Act "is a legitimate use of police power." *Id.* at 24. Every aspect of this argument is contrary to Supreme Court precedent.

First and foremost, *Horne* makes clear that the Act causes physical takings because it strips manufacturers of "the entire 'bundle' of property rights in [their insulin products]—'the rights to possess, use, and dispose of' them." 135 S. Ct. at 2428 (quoting *Loretto*, 458 U.S. at 435). A regulation on the use of property, by contrast, does not deprive the owner of possession. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (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 a requirement that property be given away for free as "'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831.

It is irrelevant, moreover, that Minnesota does not take insulin "for its own use." Doc. 66, at 31. 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. *Loretto*, 458 U.S. at 432 n.9. Nor does it matter *why* the insulin is taken. *Loretto* 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*," *id.* at 426 (emphasis added). And *Horne* emphasized this aspect of the decision when it extended *Loretto* to physical appropriations of personal property. *See* 135 S. Ct. at 2427.

Horne also forecloses defendants' reliance on regulatory takings cases. *Horne* explained that 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*." *Id.* at 2428 (emphasis added) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002)). This same principle applies to cases involving due process challenges to restrictions on harmful uses of property, which were "merely [the] early formulation of the police power justification necessary to sustain (without compensation) any *regulatory diminution in value*." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992) (emphasis altered).

In light of the foregoing, there is no need for discovery into facts pertinent to a regulatory takings analysis: the Act's purpose is irrelevant to whether it causes *per se* physical takings.

2. Defendants' "Public Nuisance" Defense.

Defendants also argued that the Act can be upheld under a "nuisance" exception to the *per se* physical takings rule. Doc. 66, at 24-28. But in advancing this claim, defendants cited the Supreme Court's reasoning in rejecting *due process* and *regulatory* takings challenges.[13] For the reasons just discussed, therefore, the Court's analysis of these distinct types of claims is irrelevant to the physical taking claim at issue here. *See Horne*, 135 S. Ct. at 2428.

Furthermore, insulin is a life-saving medicine that defendants admit does not itself "create a nuisance." Defendants claim, however,

---

[13] *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-25 (1986) (regulatory taking); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976) (due process); *Atchison, Topeka & Santa Fe Ry. v. Pub. Utils. Comm'n*, 346 U.S. 346, 354 (1953) (due process); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 433-34 (1935) (remanding for determination whether imposing costs of grade separations on railroad was arbitrary, as relevant to due process inquiry); *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (due process); *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) (due process); *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (due process).

that insulin becomes a nuisance when it is sold at a price that some patients cannot afford. Doc. 66, at 24. Defendants cited no statute, regulation, or judicial decision showing that the pricing of an FDA-approved medicine can constitute a cognizable "nuisance" under Minnesota law.[14] And *Horne* makes clear that any governmental authority to regulate the production or sale of lawful goods does not include the power to demand that the manufacturer give the goods "without charge, for the Government's control and use." 135 S. Ct. at 2428.

3. Defendants' Licensing Defense.

Defendants also argued that manufacturers waived their property rights by agreeing to operate their businesses in compliance with state law, which includes the requirements of the Act. Doc. 66, at 30 (citing Minn. Stat. § 151.252, subd. 1(d)). Defendants thus analogized this case to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which held that the federal government could disclose health and safety data, including

[14] Minnesota's public nuisance statute prohibits the use of buildings for certain unlawful sales. *See* Minn. Stat. § 617.81, subd. 2(v)-(vii) (barring the "unlawful sale" of "controlled substances," "unlicensed sales of alcoholic beverages," or "unlawful sales or gifts of alcoholic beverages by an unlicensed person).

protected trade secrets, that pesticide manufacturers were required to submit to the government in order to obtain permits to sell pesticide products—without that disclosure constituting a taking of the manufacturers' property.

This analogy is groundless. The law in *Monsanto* did not cause *per se* physical takings; the data "*retain[ed] usefulness for Monsanto* even after they [were] disclosed." *Id.* at 1012 (emphasis added). *Monsanto* thus involved a regulatory takings claim, where Monsanto's awareness of the regulatory disclosure requirements was relevant to the company's "reasonable investment-backed expectations." *Id.* at 1005-07.

In holding that the disclosure provisions did not effect a regulatory taking, the Court further noted that the pesticide law gave Monsanto the enormously valuable right 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." *Id.* at 994. 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 a regulatory

approval that was necessary for Monsanto to have a marketable pesticide product.

There is no comparable "exchange" here. The federal government (through the FDA), not Minnesota, approves the manufacturers' insulin products for sale in the United States. The "benefit" Minnesota has conferred is simply the right to sell a *federally* approved and *federally* regulated product within the State's 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, in *Horne*, the Court refused to extend *Monsanto* to physical takings "by regarding basic and familiar uses of property as a 'Government benefit.'" *Id.* at 2130.

This Court's decision in *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), is not to the contrary. That case involved limits on the rates nursing homes could charge non-Medicaid residents in facilities that also served Medicaid patients. *Id.* at 445-46. This Court upheld those measures because they did "not involve a forced taking of property," but were instead conditions on "voluntary participation in [a state]

program." *Id.* at 446. Here, Minnesota is not placing conditions on manufacturers' "voluntary" participation in a program that subsidizes insulin purchases by eligible residents. The whole point of the Act is to force manufacturers to give their insulin away for free to persons who fall outside the state's safety net programs so that Minnesota will not have to provide increased subsidies to those programs.[15]

4. Defendants' "No Net Loss" Defense.

Finally, defendants argued that, "[e]ven if a taking occurred," PhRMA "failed to prove the insulin manufacturers have suffered a pecuniary loss." Doc. 66, at 35. Relying on *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 240 (2003), defendants claim that PhRMA cannot demonstrate a Takings Clause violation unless it shows that the

---

[15] Defendants also relied on two out-of-circuit cases. *See* Doc. 66, at 32-33. But *Sierra Medical Services Alliance v. Kent*, 883 F.3d 1216 (9th Cir. 2018), held that a state law mandating free ambulance services was a regulatory taking, not a *per se* taking, because (unlike the Act here) it did "not directly appropriate the Plaintiffs' ambulances or other personal property"; instead, it temporarily restricted use of the ambulances. *Id.* at 1225. *Franklin Memorial Hospital v. Harvey*, 575 F.3d 121 (1st Cir. 2009), relied on an analogy to rent control in holding that a state law requiring hospitals to serve indigent patients does not physically appropriate the hospital's property because the hospital "may choose to stop using its property as a hospital." *Id.* at 126. That analogy is inapposite here: the manufacturers cannot choose "to stop using" insulin as a medication for treating diabetes; that is its only use.

manufacturers would not have given away the same insulin under their own voluntary programs. *Brown* provides no basis for this novel—and perverse—requirement.

It is settled "that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *Horne*, 135 S. Ct. at 2432. The manufacturers' insulin indisputably has a market value of more than $0. The Act only applies to insulin that has a wholesale acquisition cost of more than $8 per milliliter, which is "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).

Nothing in *Brown* allows a state to avoid paying the market price for *per se* physical takings of marketable products. *Brown* is *sui generis*. It involved a state program that contributed interest earned on pooled funds deposited in Interest on Lawyer Trust Accounts (IOLTA) to charity. Under the relevant ethics rules, funds could be deposited in IOLTA accounts only if they could *not* earn interest if deposited separately. 538 U.S. at 224, 239-40. Thus, the interest that was taken only existed because of the program that took it. *Id.* at 230. "Because of

the way the IOLTA program operates," the Court held, "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, the Act does not create the insulin that is taken. Thus *Brown*'s reasoning—that a state owes no compensation when it takes property that its own laws or requirements create—does not apply.

In fact, defendants are advancing a very different theory than the net loss theory in *Brown*. They claim that when an owner exercises its right to give valuable property away on terms of its own choosing (and that the owner can alter at any time), the State can create a mandatory donation scheme, with administrative burdens and penalties for non-compliance, and then claim that the donations compelled under the State's eligibility criteria cause no compensable harm insofar as those criteria overlap with the owner's voluntary criteria.

That is an extraordinary and doctrinally groundless claim. When a manufacturer is compelled to provide its insulin to Minnesota residents under the Act, it is no longer exercising *its rights* as property owner; it is disposing of its valuable property under compulsion of law on terms set by the State. Defendants cite no authority for the

proposition that the actions that a property owner *would* take (in the absence of legal compulsion) make the actions it is *compelled* to take harmless. This Court should decline any invitation to be the first to adopt such a theory. *Cf. Horne*, 135 S. Ct. at 2432-33 (refusing to deviate from the market value principle based on government's claim that benefits from raisin market orders made it likely that raisin growers suffered no net loss).

* * *

In sum, the Act gives rise to uncompensated *per se* takings of personal property in violation of the Takings Clause. Defendants' various arguments to the contrary fail as a matter of law.

III. THE ACT SHOULD BE PERMANENTLY ENJOINED OR AT LEAST DECLARED UNCONSTITUTIONAL.

In light of the foregoing showings, this Court should remand for the entry of a permanent injunction. *Bank One, Utah*, 190 F.3d at 847-48 (reversing and remanding for entry of permanent injunction). Application of the four-factor test for such relief—(1) success on the merits, (2) irreparable harm to the plaintiff, (3) the relative balance of harms, and (4) the public interest, *id.* at 847 (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc))—is

straightforward here, and weighs decisively in favor of a permanent injunction. The only relevant disagreements between the parties concern "questions of law," so "nothing remains for the district court to resolve." *Id.* At a minimum, the Court should declare that the Act is unconstitutional.

For the reasons discussed in Part II above, PhRMA should succeed on the merits: the Act causes an ongoing series of violations of the Takings Clause. Because a constitutional violation usually cannot be fully remedied with the payment of damages, courts usually hold that "no further showing of irreparable injury is necessary." 11A Wright & Miller, *supra*, § 2948.1; *see also Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1321-22 (E.D. Ark. 2019) ("[D]eprivation of constitutional rights 'unquestionably constitutes irreparable injury'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) and citing *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977)), *aff'd in part & appeal dismissed in part*, 984 F.3d 682 (8th Cir. 2021), *petition for cert. filed*, No. 20-1434 (Apr. 9, 2021)). Of course, when the constitutional violation is the failure to pay just compensation at the

time that property is taken, an *adequate* post-deprivation compensation mechanism can remedy that violation. But, as shown in Part I, there is no adequate compensation remedy for the repetitive takings the Act causes, so the injury is irreparable.

Moreover, because the Act is unconstitutional and causes irreparable harm, the third and fourth factors also weigh in favor of a permanent injunction. As this Court has explained, "the question of harm to the [defendants] and the matter of the public interest drop from the case," because the "public interest will perforce be served by enjoining the enforcement" of the unconstitutional state law. *Bank One*, 190 F.3d at 847-48; *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) (harm to defendants is "ephemeral because the public has no interest in the enforcement of … an unconstitutional statute").

If Minnesota legitimately fears that some people in need of insulin may not be adequately served by manufacturers' voluntary assistance programs, Minnesota itself can prevent harms to those individuals in a number of ways—such as by regulating insurance practices concerning drug coverage, by expanding the scope of its own safety net programs,

and/or by purchasing insulin and providing it to those who fall outside the manufacturers' programs. But if the possibility of harm to residents from enjoining an *unconstitutional* law is accepted as a basis for denying injunctive relief, Minnesota will be allowed to achieve its goals "by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Alternatively, and at a minimum, this Court should declare that the Act is unconstitutional. That would permit continued enforcement of the Act, while affording the State the opportunity to determine how it wishes to comply with the Constitution.

CONCLUSION

For the foregoing reasons, the Court should reverse the dismissal of this case, hold that the Act is unconstitutional and remand with instructions that the district court permanently enjoin enforcement of the Act.

May 21, 2021

Respectfully submitted,

/s/ Joseph R. Guerra

John M. Baker
Mark L. Johnson
Katherine M. Swenson
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830

Joseph R. Guerra
Kathleen M. Mueller
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jguerra@sidley.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Federal Rule of Appellate Procedure 29(a)(5)'s type-volume limitation because it contains 12,801 words, as determined by the Microsoft Word 2016 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Joseph R. Guerra
Joseph R. Guerra

CIRCUIT RULE 28A(h) CERTIFICATION

I certify that the electronically filed version of this document has been scanned for viruses and has been determined to be virus-free.

/s/ Joseph R. Guerra
Joseph R. Guerra

CERTIFICATE OF SERVICE

I certify that I caused this document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on May 21, 2021. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Guerra
Joseph R. Guerra