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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Defendants' brief confirms the extraordinary—and impermissible—assertion of state power at issue in this case. They claim that if a commercially available product is important to public health and the State believes it is unreasonably priced, the State can simply compel manufacturers to give the product away for free, and federal courts are powerless to address those appropriations. Defendants claim that they are immune from suit in federal court; that federal courts cannot grant equitable relief in takings cases if there is a state-litigation option; that the multiplicity-of-suits doctrine does not apply; and that manufacturers' only recourse is to exhaust a state-litigation option because the State *might* repeal the Act in response to an adverse state-court ruling. These contentions are wrong.

First, defendants overread *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), and various decisions of this Court—none of which holds that injunctive or declaratory relief is categorically foreclosed whenever a State has an inverse condemnation procedure.

Second, defendants improperly relegate the Takings Clause to second-class status, repeatedly characterizing it as "unique" in order to

gut its protections. Contrary to defendants' claims, the multiplicity-of-suits doctrine applies to takings cases, and it justifies injunctive relief here, as the Act compels an extraordinary series of repetitive takings. Nor are there "unique" takings exceptions to the availability of declaratory relief or to the *Ex Parte Young* doctrine.

Third, defendants refuse to acknowledge the critical distinction the Supreme Court has drawn between regulatory and *per se* physical takings. That distinction forecloses defendants' associational standing argument. It also shows why defendants' request for discovery related to regulatory-takings defenses is specious. This Court can and should address the merits of PhRMA's *per se* takings claim; no remand is necessary.

For these reasons and others set forth more fully below, the decision below should be reversed and the case remanded with instructions to enjoin the Act or declare it unconstitutional.

ARGUMENT

I. PhRMA HAS STANDING.

A. Injunctive Relief Is Available For The Takings Here.

As PhRMA explained, Minnesota's inverse condemnation procedure does not afford insulin manufacturers an adequate remedy

for the repetitive (and essentially endless) series of *per se* takings that the State's extraordinary law effects. That procedure provides compensation only for takings that occur before an action is brought. Thus, manufacturers will have to repeatedly bring new suits to obtain just compensation for takings that will inevitably occur. That multiplicity of suits is not an adequate remedy capable of foreclosing injunctive relief. Defendants offer a series of arguments to try to escape this conclusion. None is availing.

1. Neither *Knick* Nor This Court's Decisions Foreclose Injunctive Relief Here.

Defendants claim that the mere existence of Minnesota's inverse-condemnation procedure forecloses injunctive relief. Brief of Defendants–Appellees ("Br.") 14-15. They cite *Knick's* statement that "[a]s long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed." 139 S. Ct. at 2179. Defendants' acontextual reading of this sentence is untenable.

Citing a series of decisions that stretched from 1874 to 1974, *Knick* explained that injunctions are unavailable when property owners have an *adequate* legal remedy. *See id.* at 2175-76. The Court expressly

stated that, "[a]s long as an *adequate* provision for obtaining just compensation exists, there is no basis to enjoin" a taking, and that federal courts will not invalidate an "uncompensated taking when the property owner can receive *complete relief*," *id.* at 2176, 2179 (emphases added). Accordingly, the Court did not categorically "disclaim[] the possibility" of injunctive relief. Br. 15. It stated that the availability of post-taking compensation remedies means that "equitable relief is *generally* unavailable," and that "barring the government from acting will *ordinarily* not be appropriate." 139 S. Ct. at 2176-77 (emphases added).

Knick plainly recognized, therefore, that federal courts *can* provide injunctive relief where (as here) an inverse condemnation procedure cannot provide a complete just compensation remedy. Indeed, the Supreme Court recently held that a complaint seeking *only* injunctive and declaratory relief against a State for a *per se* taking "states a claim for an uncompensated taking." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021). That holding cannot be reconciled with defendants' reading of *Knick*. Nor is such a disposition unprecedented. *See Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997)

(affirming grant of injunctive relief without discussing availability of compensation remedies). The categorical reading of a single sentence in *Knick* that defendants advance, and that the district court adopted, is mistaken.[1]

Nor do the cases from this Court that defendants cite, *see* Br. 15-17, establish that Minnesota's inverse condemnation procedure is an adequate remedy for *all* conceivable takings. Four of these cases involved one-time takings that could be remedied with damages in a single action.[2] Only *Foster v. Minnesota*, 888 F.3d 356 (8th Cir. 2018), arguably involved repetitive takings (an alleged failure to share annual payments from a settlement fund), *id.* at 357. But this Court treated the claim as based on a single event (execution of the settlement agreement

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[1] This same error underlies the decisions in *Virginia Hosp. & Healthcare Ass'n v. Kimsey*, 493 F. Supp. 3d 488 (E.D. Va. 2020), and *Cnty. of Butler v. Wolf*, No. 2:20-LC-677, 2020 WL 2769105 (W.D. Pa. May 28, 2020).

[2] *See Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918 (8th Cir. 2016) (takings based on single flooding event); *Cormack v. Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007) (taking of lease by ordinance banning fireworks sales); *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006) (taking of leased property by ordinance barring firearms sales); *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003) (taking of townhouse development project based on conditions placed on permit).

that released consumer claims). *Id.* at 358. More importantly, the Court did not address, much less reject, a request for injunctive relief; it held that the takings claim was barred on the merits by *res judicata*. *Id.* at 358-60.

These decisions do not establish that inverse condemnation is always an adequate remedy for a repetitive series of takings. The fact that the Court has never found the procedure inadequate before, Br. 13, 17, 24, simply reflects the unprecedented nature of the repetitive takings mandated by Minnesota's law.

2. There is No Adequate and Complete Legal Remedy for the Takings Here.

Defendants further argue that the manufacturers' inability to obtain complete relief in a single action does not render the procedure inadequate, and that the multiplicity-of-suits doctrine is inapplicable in any event. Both contentions are wrong.

a. Defendants' "Future Takings" Theory Is Mistaken.

Defendants note that "future takings" are not compensable in damages. Br. 18. This is irrelevant. Under Minnesota's law, insulin manufacturers have suffered takings of their property without prior or

simultaneous payment of just compensation, and they face inevitable repetitions of these constitutional violations in the future. Like any plaintiff faced with certain future violations of their constitutional rights, manufacturers are entitled injunctive relief to prevent such violations *unless* there is an adequate legal remedy. And, to be adequate, a legal remedy must be as "complete and as practical and efficient … as a remedy in equity." 11A Charles Alan Wright et al., *Federal Practice and Procedure*, § 2944 (3d ed 2013). The legal remedy here—a repetitive succession of inverse condemnation suits—is plainly not as complete and efficient as injunctive relief. It is thus inadequate.

The history of takings litigation confirms this. Trespass actions were initially deemed an inadequate legal remedy for takings because, like inverse condemnation here, they could not compensate for future takings; property owners were thus entitled to injunctive relief. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 97-98 (1999). It was not until courts began allowing compensation for inevitable future invasions of property that they could find that

property owners had an adequate legal remedy that foreclosed injunctive relief. *Id.* at 133-34.

Defendants argue that future damages for a continued occupation of a single piece of land are not the same as future damages for continued confiscation of new vials of insulin. Br. 30-31. This misses the point: the problem, both here and in the case of antebellum takings, was that inevitable future harms could not be compensated in a single action and instead required a multiplicity of suits. Awarding "permanent damages" for a taking of land solved the multiplicity problem by compensating for all future harms at once. But here, awarding full value for insulin already taken does *not* solve the problem; such damages cannot compensate for the inevitable future harms. Thus, like antebellum landowners, manufacturers cannot have their "damages assessed once and for all." 2 Philip Nichols, *The Law of Eminent Domain* § 478, at 1278-79 (2d ed. 1917). They are therefore entitled to injunctive relief.

b. Defendants' Multiplicity-of-Suits Contentions Are Wrong.

This same history refutes defendants' assertion that the multiplicity-of-suits theory does not apply to takings cases at all. Br. 25-

26. The theory *did* apply to takings cases before the Civil War, which is why courts began providing compensation in a single action for inevitable future harms. Brauneis, *supra*, at 97-98. Nor does *Hurley v. Kincaid*, 285 U.S. 95, 99 (1932), establish that having "to bring separate suits for separate takings" caused by a single Act "does not warrant equitable relief." Br. 26. *Hurley* involved a discrete taking, and the Court held that an adequate and complete damages remedy foreclosed injunctive relief. 285 U.S. at 104.[3]

Defendants' other bases for side-stepping the multiplicity-of-suits principle fare no better. They claim that PhRMA was required to plead facts showing "the existence or imminence of" a multiplicity of suits. Br. 27. But PhRMA's allegation that the State will repeatedly take insulin without paying compensation for it is established by the provisions of the Act itself. To the extent defendants are arguing that PhRMA had to allege that manufacturers *actually brought* multiple state-law suits, defendants cite no authority for this novel pleading requirement, which

[3] Kincaid argued that, by accepting bids to construct a levee that placed his land in a floodway, the government would prevent him from selling, leasing, borrowing against, or using his land. *See* 285 U.S. at 100-01 n.1.

would impermissibly re-impose the state-litigation requirement repudiated in *Knick*. *See* 139 S. Ct. at 2177-79 (overruling *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *see also Pakdel v. City of San Francisco*, No. 20-1212, 2021 WL 2637819, at *1 (June 28, 2021) (per curiam) ("exhaustion of state remedies is *not* a prerequisite" to a takings claim) (emphasis added).

Nor is PhRMA relying on "unwarranted fears" or "hypothetical" risks that multiple suits will be required. Br. 13, 26. PhRMA has shown that, under *existing law*, manufacturers have suffered and will inescapably suffer repetitive takings that cannot be compensated in a single lawsuit. That is not "hypothetical," and amply shows the inadequacy of inverse condemnation due to a multiplicity of suits.[4]

It is defendants who ask this Court to rely on mere possibilities. They suggest that, if a state court were to hold that the Act effects

[4] Multiple suits are merely theoretical where they can be consolidated. *Equitable Life Assurance Soc'y of U.S. v. Wert*, 102 F.2d 10, 15 (8th Cir. 1939); *see also* John Norton Pomeroy, Jr., 1 *Equity Jurisprudence*, § 251¾, at 380-81 (3d ed. 1905) (same). Here, however, joinder and consolidation cannot eliminate the need for multiple damages actions for future takings.

uncompensated takings, defendants "likely" will stop enforcing the law, or the Minnesota legislature might repeal it. Br. 27. These predictions are hard to square with defendants' claims concerning the allegedly harmful consequences of injunctive relief. Br. 29, 44, 50. In all events, because PhRMA has shown that multiple suits are required under existing law, defendants must show that "the sufficiency and completeness of the legal remedy [are] *certain*." 1 Pomeroy, *supra*, § 177, at 211 (emphasis added); *see also* 1 Fred F. Lawrence, *A Treatise on the Substantive Law of Equity Jurisprudence*, § 78, at 114 (1929) ("Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law"). Defendants' speculation about possible responses to an adverse state-court ruling plainly does not suffice.

Finally, defendants claim that the inconvenience to the public if the Act is enjoined outweighs the benefits to manufacturers of avoiding multiple suits. Br. 28-29. But the "inconvenience" discussed in defendants' multiplicity-of-suits cases were the burdens of litigating the claims in a single equitable action—burdens such as "delay," loss of "rights of trial by jury," or having to try many issues separately.

Armour & Co. v. Haugen, 95 F.2d 196, 199 (8th Cir. 1938); *see also Hale v. Allinson*, 188 U.S. 56, 80 (1903) (endorsing lower court's concerns about "long and expensive litigation," "separate and individual defenses," and "protracted" hearings); 2 Lawrence, *supra*, § 1024 at 1107 (referring to confusion of issues and "hamper[ing]" the "adjudication of the substantive rights"); *First State Bank v. Chi., R.I. & P.R. Co.*, 63 F.2d 585, 592 (8th Cir. 1933) (multiplicity of suits justified injunction where separate issues, if any, "may be 'conveniently tried together'").[5] Defendants identify no such burdens here.

3. Defendants' Arguments—Not PhRMA's—Would Work an Impermissible Change in Takings Law.

Finally, a ruling that Minnesota's inverse condemnation procedure is inadequate to remedy the Act's repetitive takings would not "undo takings jurisprudence" or "eviscerate *Knick*'s mandates." Br. 18. Such a ruling would apply established principles to the unique circumstances of this case. By contrast, denying relief here would sanction a misuse of takings principles.

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[5] Defendants also cite *Wert* and *Investors' Guaranty Corp. v. Luikart*, 5 F.2d 793, 794 (8th Cir. 1925). But in both cases, this Court concluded that joinder could eliminate the multiplicity of suits. *See Wert*, 102 F.2d at 15; *Luikart*, 5 F.2d at 797.

Defendants claim that this case is no different from others involving supposedly "continuous" takings. *Id.* This is incorrect. In the cases defendants cite, compensation could be provided in a single action for the alleged taking.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), creditors and shareholders claimed that a statute requiring a bankrupt railroad to provide service until approval of a final reorganization plan would erode assets and effect a taking. *Id*. at 118. The Court held that, if the losses during that interim period "should cause an 'erosion taking' that would require the payment of just compensation," the Tucker Act would provide a remedy. *Id.* at 136. The Court described the alleged taking in the singular and nowhere intimated that there might be multiple suits for multiple "erosion takings." *See also id.* at 128 (discussing "possible need for *a* suit in the Court of Claims") (emphasis added); *id.* at 149 n.35 (addressing alleged inadequacies of a Tucker Act remedy vis-à-vis the "erosion claim" and noting that interest would run from "the date of *the* taking") (emphasis added).

Similarly, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1266 (Fed. Cir. 2009), involved regulations that restricted sales of eggs suspected of carrying salmonella and required the destruction of hens for testing. The fact that these restrictions lasted two years did not mean there were multiple takings. Br. 20. The restrictions' duration was one factor in determining whether, under *Penn Central*'s multifactor test, any taking had occurred. *See* 559 F.3d at 1274.[6] The Court found no taking, *id.* at 1282-84, but if it had, compensation could have been awarded in a single action—which is the relief the lower court awarded when it (mistakenly) found that the regulations caused a taking. *Id.* at 1266.

Finally, in *National Fuel Gas Distribution Corp. v. New York State Energy Research. & Development Authority*, the plaintiff claimed that restrictions on its right to access its pipeline caused a physical taking. 265 F. Supp. 3d 286, 293 (W.D.N.Y. 2017). The alleged taking of one

[6] The court previously held that destruction of the hens was not a categorical taking and had to be analyzed as a regulatory taking. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1197-98 (Fed. Cir. 2004).

pipeline plainly does not involve repetitive takings of distinct properties.

In short, defendants' cases involved takings that could be compensated in a single action. Here, manufacturers cannot obtain complete compensation in a single action for the repetitive takings Minnesota's law mandates. Recognizing that inverse condemnation is not an adequate and complete remedy for *these* takings will not open the floodgates to injunctive relief in ordinary takings cases.

To the contrary, denying injunctive relief here would sanction an abuse of takings principles. As PhRMA explained, Op. Br. 37-39, requiring manufacturers to bring multiple just compensation suits results in the same "pointless set of activities" that were condemned in *Asociación de Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 19 (1st Cir. 2007), and by the plurality in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Defendants note that these cases involved transfers of funds, not insulin. Br. 23-24. But when a manufacturer (1) reimburses a pharmacy the cost of insulin, then (2) sues to recover that money as just

compensation, it is seeking the same "dollar-for-dollar" compensation deemed pointless in *Apfel* and *Flores Galarza*.

Defendants assert that such circularity is not pointless because the Act provides insulin quickly to those who need but cannot afford it. Br. 24. The payments in *Apfel*, however, were used to fund healthcare benefits for retired miners who needed those benefits. 524 U.S. at 514 (plurality opinion). What was "pointless" was requiring companies to fund those benefits and then seek reimbursement through a just compensation remedy when the government could have funded the benefits directly itself.

That reasoning applies here with respect to both pharmacy reimbursements and the insulin manufacturers give away directly. It is inequitable to make insulin manufacturers sue repeatedly for just compensation when the State could pay for insulin directly, as the federal government does for products and materials in times of emergencies. *See* Op. Br. 41-42 & n.10.

Defendants claim this is not an option "because there is no fair market for insulin." Br. 5.[7] If Minnesota believes insulin prices are set illegally, it has tools for addressing that alleged problem—tools it has in fact invoked.[8] Those tools do not include confiscating commercially available products and forcing manufacturers to bring an endless series of inverse condemnation actions to be paid. An inverse condemnation action is a remedy for an unconstitutional taking; it is not a weapon the government can use when it does not like the market price of important commercial goods.

The Supreme Court long ago explained that where a defendant has "an ultimate right to do [an] act sought to be restrained, *but only upon some condition precedent, and compliance with the condition was within the power of the defendant*, the injunction would almost universally be *granted* until the condition was complied with." *Osborne v. Mo. Pac. Ry.*, 147 U.S. 248, 259 (1893) (emphases added). Here,

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[7] Defendants base this claim on materials they submitted in opposing PhRMA's motion for summary judgment. *See* Appellees' App.33-36. The district court did not rely on them in dismissing the complaint under Rule 12(b)(1).

[8] *See Minn. ex. rel. Ellison v. Sanofi-Aventis U.S. LLC*, No. 3:18-cv-14999, 2020 WL 2394155 (D.N.J. Mar. 31, 2020).

Minnesota has the right to acquire insulin on the "condition precedent" of simultaneously paying just compensation for it. Minnesota could have paid for the insulin at the time of the taking but chose not to do so. It cannot avoid an injunction by claiming that a multiplicity of suits is an adequate legal remedy, or by insisting that manufacturers file inverse condemnation actions to see if the State *might* decide to repeal the Act.[9]

B. Declaratory Relief Is Available Here.

Even if injunctive relief were not available—and it is—PhRMA is entitled to a declaratory judgment that the Act violates the Takings Clause. Op. Br. 43-49. In claiming otherwise, defendants seize on *Knick*'s statement that "equitable relief is generally unavailable" if "state governments provide just compensation remedies." 139 S. Ct. at

[9] This disposition accords with the Court's affirmance of injunctive relief in *Babbitt v. Youpee*. To address "'disastrous'" problems caused by fractionated ownership of tribal property, Congress abolished certain inheritance rights. 519 U.S. at 237-40. Like the law here, Congress' solution was unconstitutional in all of its applications, and the Court echoed the Ninth Circuit's observation that Congress had to use other means, such as purchasing the land directly, to achieve its goals. *Id.* at 242. *See also* Br. of Pacific Legal Foundation *et al.* as Amicus Curiae at 9-10 (citing other cases where the Court entertained claims for injunctive relief based on facial takings challenges).

2176. But defendants' reading of this sentence, Br. 31-32, ignores the very next sentence of the opinion (and other parts of the analysis), which make clear that the Court was addressing limitations on injunctive relief. *See* 139 S. Ct. at 2176 ("there is no basis to *enjoin* the government's action effecting a taking") (emphasis added); *see also id.* at 2175 (earlier cases involved "requests for *injunctive relief*" where "the availability of subsequent compensation meant that *such an equitable remedy* was not available") (emphases added); *id.* at 2179 ("*injunctive relief* will be foreclosed") (emphasis added). *Knick* nowhere states that these same limitations apply to declaratory relief.

Nor is there a general prohibition on declaratory relief in cases "where injunctive relief is unavailable or inappropriate." Br. 33. Such a rule would contradict the plain language of the Declaratory Judgment Act, and cases awarding declaratory relief when an injunction was not appropriate. *See* Op. Br. 45-48. Defendants say those cases involved other constitutional provisions. Br. 34. But in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court expressly held that the government's disclosure of trade secrets "*will constitute a taking*" if those trade secrets were submitted to the government when the

governing statute promised confidential treatment. *Id.* at 1013 (emphasis added). The Court made this declaration even though it elsewhere held that the "District Court erred in enjoining the taking," because "an adequate remedy for the taking exists under the Tucker Act." *Id*. at 1019.

Defendants also note that, in cases challenging state tax laws or pending state-court prosecutions, declaratory relief is not available if injunctive relief is precluded. Br. 32-33. In those cases, however, "principles of federalism militated altogether against federal intervention in a class of adjudications." *Steffel v. Thompson*, 415 U.S. 452, 472 (1974) (distinguishing *Samuels v. Mackell*, 401 U.S. 66 (1971), and *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), on which defendants rely, Br. 33-34). No comparable limitation on declaratory relief is justified in takings cases, because allowing federal courts to provide "protection in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism." *Knick*, 139 S. Ct. at 2177 n.8; *see also* Op. Br. 45-46.

Defendants complain that "a declaration that the Act violates the Takings Clause" would "likely strip" them of their "ability to enforce the

Act" because, like the raisin handlers in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), manufacturers could refuse to turn over their property and raise the declaration as a defense to any fines imposed. Br. 35-36. Any such practical effect, however, is still "milder" than the coercive force of an injunction backed by contempt sanctions. *Steffel*, 415 U.S. at 467, 471. Moreover, defendants have ascribed the same "likely" effect to a state court ruling in an inverse condemnation action, Br. 27, and there is no "unique remedial structure" disabling federal courts from deciding the merits of takings claims, Br. 35. On the contrary, "if both federal injunctive and declaratory relief were unavailable" to a plaintiff faced with unconstitutional action by a state or local government, "exhaustion of state remedies is precisely what would be required," *Steffel*, 415 U.S. at 473—which *Knick* rejected for takings claims. *See Knick*, 139 S. Ct. at 2177 ("federal court need not await any subsequent state action" when property is taken without compensation).

Thus, even if *Knick*'s general warning against enjoining takings applied here—and it does not—a declaratory judgment on the takings question would still be entirely proper.

C. PhRMA Has Associational Standing.

Defendants contend that PhRMA lacks associational standing because individual manufacturers must participate in this suit. Br. 36-40. This contention ignores the critical distinction between regulatory and *per se* physical takings.

Regulatory takings involve "an 'ad hoc' factual inquiry" into factors "such as the economic impact of the regulation" and "its interference with reasonable investment-backed expectations." *Horne*, 576 U.S. at 360. Thus, individual property owners must participate in regulatory takings cases because these kinds of impacts will vary among members. *See Ga. Cemetery Ass'n, Inc. v. Cox*, 353 F.3d 1319, 1322 (11th Cir. 2003) (per curiam); *Comm. For Reasonable Regul. of Lake Tahoe v. Tahoe Reg'l Plan. Agency*, 365 F. Supp. 2d 1146, 1163 (D. Nev. 2005) (same); *Pharm. Care Mgmt. Ass'n v. Gerhart*, No. 4:14-cv-000345, 2015 WL 6164444, at *7 (S.D. Iowa Feb. 18, 2015), *rev'd in part on other grounds*, 852 F.3d 722 (8th Cir. 2017); *Rent Stabilization Ass'n*

of N.Y.C., Inc. v. Dinkins, 805 F. Supp. 159, 164 (S.D.N.Y. 1992), *aff'd* 5 F.3d 591 (2d Cir. 1993).[10]

No such individualized inquiries, however, are required for *per se* physical takings. A physical appropriation of property gives rise to a *per se* taking "*without regard to other factors*." *Horne*, 576 U.S. at 360 (emphasis added). Given this fundamental difference, individual manufacturers need not participate in this suit to demonstrate that the Act causes *per se* physical takings of their insulin.

Defendants ask this Court to ignore *Horne*'s clear distinction between *per se* takings and regulatory takings and to rely instead on a law review article that argues that "the Court's commitment to a *per se* theory is weak." John D. Echeverria, *What is a Physical Taking?*, 54 U.C. Davis L. Rev. 731, 735 (2020). But Supreme Court decisions control over the views of a law professor. And just this Term, the Court re-affirmed its commitment to the *per se*/regulatory takings distinction.

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[10] In *Washington Legal Foundation v. Legal Foundation of Washington*, the court also applied a regulatory takings analysis, and rejected associational standing because individuals were pursuing their own claims. *See* 271 F.3d 835, 849-50, 855-57 (9th Cir. 2001) (en banc), *aff'd sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003). Defendants also cite *Pennell v. City of San Jose*, 485 U.S. 1 (1988), but the Court found the association had standing there. *Id.* at 8 n.4.

See Cedar Point, 141 S. Ct. at 2072 (when a law "results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central has no place*") (emphasis added).

Finally, PhRMA's request for equitable relief does not preclude associational standing. *Hanover Cnty. Unit of the NAACP v. Hanover Cnty.*, 461 F. Supp. 3d 280 (E.D. Va. 2020), confirms that associations can seek equitable relief unless "the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof." *Id.* at 289. Here, individualized proof is not needed to show that the Act physically confiscates manufacturers' insulin. *See* Op. Br. 50. Defendants claim that each manufacturer's behavior is relevant to whether a taking can be enjoined. Br. 38 n.10. But this is an impermissible attempt to reintroduce the same public-policy arguments that the Court has deemed irrelevant to a *per se* takings analysis. *See Horne*, 576 U.S. at 360; *see also infra* § III.C. (discussing injunction).

II. DEFENDANTS ARE NOT IMMUNE FROM THIS SUIT.

Defendants' contention that they enjoy immunity under the Eleventh Amendment, Br. 40-44, is also groundless. Under the *Ex Parte Young* doctrine, state officials can be sued in federal court when "the

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md*, 535 U.S. 635, 645 (2002) (alterations omitted). That is precisely the basis of this suit.

Citing *Ladd v. Marchbanks*, 971 F.3d 574 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1390 (2021), defendants claim that a plaintiff could use a finding that "an uncompensated taking occurred" to require a State "to pay the plaintiff for the alleged taking," which results in "an improper workaround to the States' sovereign immunity." Br. 42-43. But in *Ladd*, the injunctive relief plaintiffs sought was an order directing state officials "to *initiate eminent domain proceedings*," which would lead directly to "a compensation award." 971 F.3d at 581 (emphasis added). In addition, they sought compensation for damage "already caused," not an injunction barring future takings. *Id.* None of that is true here.

Defendants claim that, because federal courts can only order state officials "to adhere to the Constitution," they are "limited to ordering payment of just compensation; not preventing a taking in the first instance." Br. 43. This is plainly wrong. As *Knick* explained, a takings

"violation is complete at the time of the taking" if compensation has not already been paid. *Knick*, 139 S. Ct. at 2177. Therefore, when a post-taking compensation remedy is unavailable or inadequate, courts can require adherence to the Constitution by enjoining enforcement of a law that violates the Takings Clause.

Nor would such an order interfere with Minnesota's sovereign rights. Br. 43. Minnesota has no "right" to take property without prior or simultaneous payment of just compensation. Such payment is "a condition upon which the power [to take property] may be exercised," *United States v. Jones*, 109 U.S. 513, 518 (1883), and Minnesota's law violates that condition. Indeed, defendants' immunity claim is contradicted by *Cedar Point*, where the Court concluded that the property owners had valid claims to enjoin a state law that effected unconstitutional takings. *See* 141 S. Ct. at 2074. *See also Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 529 n.4 (9th Cir. 2019) (Eleventh Amendment did not bar takings challenge seeking only injunctive and declaratory relief against state officials), *rev'd on other grounds sub nom. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

III. THIS COURT CAN AND SHOULD DECIDE THE MERITS AND ORDER EQUITABLE RELIEF.

Contrary to defendants' claim, Br. 44-46, there is no jurisdictional or other bar to appellate resolution of the merits of PhRMA's takings claim. This Court has discretion to address issues not decided by the district court, and such a disposition is warranted here. Defendants' contrary arguments once again rest on their conflation of regulatory and *per se* physical takings. There is no reason to remand this *per se* takings case so that the district court can address or require discovery on inapplicable regulatory-takings defenses.

A. There Is No Bar To Reaching The Merits.

This Court's decision in *Cavegn v. Twin Cities Pipe Trades Pension Plan*, 223 F.3d 827 (8th Cir. 2000), does not announce a jurisdictional bar to appellate consideration of issues not addressed by a district court. While *Cavegn* refers to an appellate court's "jurisdictional function," the decision rests on a prudential norm—*i.e.*, that appellate courts "do not *usually* address issues that have not been considered by a district court." *Id.* at 831 (emphasis added); *see also Bacon v. Liberty*

Mut. Ins. Co., 575 F.3d 781, 785 (8th Cir. 2009) (same).[11] The Supreme Court has recognized that the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Accordingly, in a post-*Cavegn* case, this Court properly concluded that it could decide "an issue of law" that, like PhRMA's taking claim, "was raised in Appellants' Motion for Summary Judgment" but not decided below. *Murray v. Am. Family Mut. Ins. Co.*, 429 F.3d 757, 765 (8th Cir. 2005). Defendants claim that, in *Murray*, the district court had "already evaluated the merits of the parties' disputes." Br. 46. But the lower court had not evaluated the merits of the "stacking" issue this Court resolved. 429 F.3d at 765. More fundamentally, defendants cannot explain how a district court's evaluation of some merits issues affects this Court's jurisdiction to resolve other, unaddressed merits issues.

[11] 28 U.S.C. § 1291 does not mention, much less prohibit, appellate resolution of issues not previously addressed by a district court.

Nor does the constitutional nature of PhRMA's claim preclude resolution of the merits. Br. 46-47. The rule that courts do not consider a constitutional issue "in advance of the necessity of deciding it" is a prohibition on advisory opinions (*i.e.*, deciding issues not necessarily presented). *See Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (quoted in *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008)). PhRMA seeks no such ruling here—the constitutional question is squarely presented. Similarly, the rule that courts avoid constitutional questions when cases can be resolved on other grounds, *United States v. Turechek*, 138 F.3d 1226, 1229 (8th Cir. 1998), is inapplicable here. Because defendants' standing and immunity defenses fail, the question is not *whether* the merits of the takings claim should be resolved, but which court should decide them. Constitutional avoidance principles do not require resolution in the district court.

B. This Court Should Resolve The Merits.

Defendants' efforts to avoid the merits are understandable: the Act clearly effects unconstitutional *per se* takings. Indeed, defendants likely hope that their decision to offer an abridged version of their

merits arguments will itself lead this Court to refrain from assessing the law's constitutionality. But as defendants' full briefing below revealed, their defenses rest on an improper effort to evade the Supreme Court's physical takings jurisprudence.

Defendants argue that they need discovery into "economic factors and social harms" concerning insulin, including the structure of the insulin market, the manufacturers' pricing practices, the "insulin-affordability crisis," and Minnesota's "licensing requirements." Br. 47-48. But the Supreme Court has "stressed the 'long-standing distinction' between government acquisitions of property and regulations," and has made clear that the physical appropriation of property is a *per se* taking "*without regard* to the claimed public benefit [of the law] or the economic impact on the owner." *Horne*, 576 U.S. at 360-61 (emphasis added). In other words, defendants want discovery to show that it is important for the State to confiscate insulin. Under the Takings Clause, however, the State's motivations do not allow it to confiscate these products without paying for them.

Defendants say it is not enough to "label[] an act as a *per se* taking." Br. 47. But PhRMA has not rested on labels. It has explained

that the Act effects *per se* physical takings because—like the laws in *Horne* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)—it strips manufacturers of the right to possess, use, or dispose of their private property. *See* Op. Br. 50; Doc. 27, at 36-41; Doc. 72, at 4-26. Defendants do not and cannot dispute that fundamental point. Instead, they rely (again) on the law review article that insists "that a literal *per se* rule for physical takings does not exist." Br. 47 (citing Echeverria, *supra*, at 733–34). But the contrary—and recently confirmed—views of the Supreme Court control.

Defendants also claim that "*Horne* is distinguishable and is not controlling." Br. 48. They do not explain that assertion here, but below they argued that *Horne* involved (a) economic regulation, not public health and safety; (b) raisins, not life-saving medicines; and (c) raisin growers, not licensed pharmaceutical manufacturers subject to heavy regulation. *See* Doc. 66, at 23, 28-30. These distinctions, however, all pertain to the "claimed public benefit [of the law] or the economic

impact on the owner"—which are irrelevant to whether a law effects a physical taking. *Horne*, 576 U.S. at 360.[12]

Finally, defendants quote Justice Kennedy's partial concurrence in *Eastern Enterprises* to try to show that all takings cases involve complex and "perplexing" issues. Br. 47. But Justice Kennedy was discussing "regulatory takings," and explained that cases "attempting to decide when a *regulation becomes a taking*"—*i.e.*, when it "goes too far"—"are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 540-41 (Kennedy, J., concurring and dissenting in part) (citing *Penn Central*). Here, the Act clearly effects unconstitutional *per se* physical takings. This Court can and should make that determination now, to avoid the delay and continuing constitutional violation that a remand will inescapably entail.

[12] Defendants also cite regulatory takings and due process cases, *see* Br. 48, which are irrelevant for reasons PhRMA previously explained. *See* Op. Br. 55-59 & nn.13 & 15. The only case PhRMA did not address—*Concrete Pipe & Prods. Of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993)—also involved a regulatory takings analysis. *See id.* at 643-44 (rejecting effort to "shoehorn" claim into the physical takings framework).

C. The Act Should Be Enjoined or, at a Minimum, Declared Unconstitutional.

Because there is no adequate remedy for the Act's repetitive violations of the Takings Clause, the case should be remanded with instructions to enjoin its enforcement or, alternatively, declare it unconstitutional. Op. Br. 62-65. Defendants' objections to this relief—relief that this Court has granted in the past, *see Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999)—reprise their other unavailing arguments.

Seeking again to accord the Takings Clause second-class status, defendants attempt to distinguish PhRMA's cases as involving different constitutional provisions. Br. 49. But the Takings Clause is different only because an *adequate* remedy can foreclose injunctive relief. Because no adequate remedy exists for the unconstitutional taking here, *supra*, § I.A.; Op. Br. 24-39, no further showing of harm is necessary, *see* Op. Br. 63 (explaining that a constitutional violation without an adequate remedy is irreparable harm).

Moreover, because the Act is unconstitutional, defendants cannot legitimately invoke harm to the State or the public interest to defeat injunctive or declaratory relief. *Bank One*, 190 F.3d at 847-48 (such

considerations "drop from the case" where law is unconstitutional); *see also* 1 Lawrence, *supra*, § 47, at 76 ("[n]o man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do"). Indeed, because the Act's purposes do not allow Minnesota to confiscate insulin without paying just compensation for it, those purposes cannot justify continued confiscations where there is no adequate legal remedy. Minnesota must instead pursue its health and safety goals through other, constitutional means, such as regulating insurance practices for prescription-drug coverage or purchasing insulin directly itself.

CONCLUSION

For the foregoing reasons and those set forth in PhRMA's opening brief, the Court should reverse the dismissal of this case, hold that the Act violates the Takings Clause, and remand with instructions that the district court permanently enjoin enforcement of the Act.

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Respectfully submitted,

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This brief complies with Federal Rule of Appellate Procedure 32(a)(7)'s type-volume limitation because it contains 6,494 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(f).

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