No. 21-1731

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Pharmaceutical Research and Manufacturers of America,

Plaintiff-Appellant,

vs.

Stuart Williams; Ronda Chakolis; Ben Maisenbach; James Bialke; Amy Paradis; Rabih Nahas; Samanatha 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
FOR THE DISTRICT OF MINNESOTA, NO. 0:20-CV-01497 (DSD/DTS)

PETITION FOR REHEARING OR REHEARING EN BANC

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STATEMENT SUPPORTING REHEARING

The Minnesota Board of Pharmacy members[1] respectfully petition this Court, under Rules 35 and 40 of the Rules of Appellate Procedure, for rehearing or rehearing en banc of the panel's opinion filed April 3, 2023.

Contrary to the Supreme Court's recent assurances in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), that governments "need not fear" that federal courts will invalidate their regulations as unconstitutional under the Takings Clause when just-compensation remedies are available, the panel held that federal courts can do just that. The panel's decision conflicts with Supreme Court precedent, creates an intra-circuit split on the adequacy of Minnesota's inverse-condemnation proceedings, expands when just-compensation procedures may be deemed inadequate, and creates a circuit split on the availability of equitable relief for alleged continuous takings of physical property.

Review is necessary to maintain uniformity of the Court's decisions and to resolve these questions of exceptional importance as the panel's decision conflicts with longstanding takings jurisprudence, undermines the sovereignty of the state, and hinders states' ability to enact programs to protect public health and safety.

[1] In the caption, new Board members have been substituted for those ceasing to hold office. Fed. R. App. P. 43(c)(2).

The panel's decision conflicts with longstanding Supreme Court takings precedent. The Court has repeatedly held that equitable relief is foreclosed to enjoin a taking authorized by law when a suit for compensation may be brought after the taking. *See, e.g.*, *Knick*, 139 S. Ct. at 2167-68, 2176, 2179; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 136, 155 (1974); *Hurley v. Kincaid*, 285 U.S. 95, 104 n.3 (1932). And because "nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable." *Knick,* 139 S. Ct. at 2176.

Minnesota provides just-compensation remedies through inverse condemnation. Prior to this panel's decision, this Court had never declared a state's inverse-condemnation procedure inadequate for takings claims and had specifically found Minnesota's procedures adequate. *See, e.g.*, *Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918, 923 (8th Cir. 2016); *Cormack v. Settle-Beshears*, 474 F.3d 528, 531 (8th Cir. 2007); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). The panel's decision conflicts with this Court's prior adequacy determinations and departs from how other circuits have determined the adequacy of just-compensation procedures.[2] Further, the decision conflicts with *Gordon v.*

[2] *See, e.g.*, *Sorrentino v. Godinez*, 777 F.3d 410, 414 (7th Cir. 2015), *Severance v. Patterson*, 566 F.3d 490, 498 (5th Cir. 2009); *Agripost, Inc. v. Miami-Dade Cty. ex rel. Manager*, 195 F.3d 1225, 1231 (11th Cir. 1999).

Norton, 322 F.3d 1213 (10th Cir. 2003), which held that compensation was an adequate remedy even though the plaintiffs alleged they suffered irreparable harm from continuing takings violations and sought only equitable relief. *Id.* at 1217-18.

Also, the question of state officials' sovereign immunity from takings claims in federal court is exceptionally important. Because claims seeking to enjoin lawful takings of private property for public use implicate a state's special sovereignty right to take, the *Ex parte Young* immunity exception is inapplicable under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). But the panel did not address *Coeur d'Alene* in rejecting the Board members' sovereign immunity defense.

When state actors may be sued for injunctive relief in federal court for alleged takings is exceptionally important. The Supreme Court has held that equitable relief is foreclosed to enjoin takings when a plaintiff may obtain just compensation. Because Minnesota state courts provide adequate remedies for takings, PhRMA's claims for equitable relief should be foreclosed. Rehearing is necessary to resolve these exceptionally important questions and maintain uniformity of the Court's decisions.

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BACKGROUND

In response to the insulin-affordability crises caused by insulin manufacturers and the resulting deaths of Minnesotans, the Minnesota Legislature enacted the Alec Smith Insulin Affordability Act to provide insulin to Minnesotans who need it to survive but cannot afford it. *See,* Minn. Stat. § 151.74. The Act established two programs that provide lifesaving insulin.[3] *Id*.

Under the Act's urgent-need program, Minnesotans who need insulin and have less than a seven-day supply may apply for free insulin by attesting to their pharmacies that they are eligible under the Act. *Id*., subds. 2, 3. The pharmacist then dispenses a 30-day supply of the prescribed insulin to the individual. *Id.*, subd. 3(c). The pharmacy may submit a claim to the insulin manufacturer for the insulin dispensed, which must reimburse the pharmacy's acquisition costs or replace the insulin. *Id*., subd. 3(d).

Under the continuing-safety-net program, insulin manufacturers subject to the Act must have patient-assistance programs available for eligible Minnesotans. *Id*., subds. 4-5. If an applicant is eligible, the manufacturer provides an eligibility statement that the applicant may submit to a pharmacy, valid for twelve months. *Id.*,

[3] Insulin manufacturers grossing less than $2,000,000 from Minnesota insulin sales and insulin products costing $8 or less per milliliter are exempt from the Act. Minn. Stat. § 151.74, subd. 1(c), (d).

subd. 5(b). When the individual submits the statement, the pharmacy orders a 90-day supply of insulin, which the manufacturer supplies at no charge. *Id.*, subd. 6.

The day before the Act became operational, Appellant Pharmaceutical Research and Manufacturers of America (PhRMA), a trade association for the three main insulin manufacturers, sued the Minnesota Board of Pharmacy members alleging that the Act effected a taking of the manufacturers' insulin without providing just compensation. Rather than seeking compensation, however, PhRMA sought to enjoin enforcement of the lifesaving Act.

The district court dismissed the complaint, holding that PhRMA could not obtain equitable relief for its takings claim because, if a taking occurred, the insulin manufacturers could obtain just compensation for any insulin taken through Minnesota's adequate just-compensation procedures.[4] This Court's panel reversed, holding—for the first time—that Minnesota's just-compensation procedures are inadequate and that PhRMA had alleged viable claims for equitable relief under the Takings Clause.[5] The panel also held that PhRMA properly alleged associational standing and that sovereign immunity did not bar the action.

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[4] The district court based its decision on the redressability element of standing. (Doc. 81 at 9-12). The Board members, however, argued for dismissal under Fed. R. Civ. P. 12(b)(6) to the district court, which seems to be the analysis preferred by Judge Gruender in his concurrence. (Doc. 16 at 26-32)

[5] The board members contest that the Act effects a taking and the panel properly declined to reach a decision on the merits. Even if the Act effects a taking, the district court properly dismissed PhRMA's claims for equitable relief.

ARGUMENT

I. THE PANEL'S HOLDING THAT EQUITABLE RELIEF IS AVAILABLE FOR TAKINGS CLAUSE VIOLATIONS WHEN JUST COMPENSATION PROCEDURES EXIST CONFLICTS WITH PRECEDENT AND RAISES ISSUES OF EXCEPTIONAL IMPORTANCE.

The panel's holding that PhRMA may pursue equitable relief for alleged takings violations conflicts with takings precedent and improperly expands when a state's just-compensation procedure may be determined inadequate. En banc consideration is necessary to maintain uniformity of the Court's decisions and resolve these exceptionally important questions.

A. Supreme Court Precedent Forecloses Equitable Relief for Compensable Takings.

The power to take private property for public use belongs to every independent government as an incident of sovereignty. *United States v. Jones*, 109 U.S. 513, 518 (1883). The Takings Clause recognizes this sovereign right, permitting the taking of private property provided the government gives just compensation. U.S. Const. amend. V; *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 315 (1987). The Takings Clause is unique because it is not designed to limit governmental interference with property rights, but to secure compensation if an interference amounts to a taking. *First Eng.*, 482 U.S. at 315.

For these reasons, the U.S. Supreme Court has repeatedly held that equitable relief is foreclosed to enjoin a taking when subsequent compensation remedies are

available. *See, e.g.*, *Knick*, 139 S. Ct. at 2167-68, 2176, 2179; *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702, 740-41 (2010) (Kennedy, J., concurring in part) ("It makes perfect sense that the remedy for a Takings Clause violation is only damages."); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Ruckelshaus*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); *Blanchette*, 419 U.S. at 136, 155 (reversing judgment enjoining enforcement of Rail Act on takings claim); *Hurley*, 285 U.S. 95, 104 ("[T]he failure to compensate him for the taking . . . affords no basis for an injunction if such compensation may be procured in an action at law.").

The Supreme Court recently reaffirmed this principle in *Knick*. The Court expressly and repeatedly disclaimed that a plaintiff could seek equitable relief to prevent a taking, rather than seek compensation after the taking. 139 S. Ct. at 2167-68, 2176, 2179. The Court assured, "[g]overnments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed." *Id*. at 2179.

Under Supreme Court precedent, equitable relief is foreclosed to PhRMA on its takings claim because—as previously determined by this Court—Minnesota

provides adequate just-compensation remedies to property owners through inverse-condemnation actions. *See, e.g.*, *Am. Fam. Ins.*, 836 F.3d at 923-24; *Koscielski*, 435 F.3d at 903. The panel, however, improperly determined that Minnesota's just compensation procedures are inadequate and that equitable relief is allowed when it is alleged that multiple suits will be necessary to compensate for potential future takings.

En banc consideration of when a plaintiff may seek equitable relief for a takings claim is necessary to secure or maintain uniformity of the Court's decisions.

B. The Panel's Holding That Minnesota's Just-Compensation Procedures are Inadequate Conflicts With This Court's Prior Decisions and Expands When Just-Compensation Procedures May be Deemed Inadequate.

For the first time, and contrary to this Court's precedent, the panel held that Minnesota's just-compensation procedures are inadequate.

This Court has recognized that a takings claimant bears the heavy burden of proving that the state remedy is inadequate. *Cormack*, 474 F.3d at 531. And, that state remedies are not inadequate even if they do not provide the same amount of relief as a § 1983 action. *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678, 681 (8th Cir. 1986). Similarly, this Court determined that the Takings Clause does not require that compensation "be meted out in a way more convenient to the landowner than to the sovereign." *United States v. 45.50 Acres of Land*, 634 F.2d 405, 408 n.2 (8th Cir. 1980) (*quoting United States. v. 101.88 Acres of*

Land, 616 F.2d 762 (5th Cir. 1980)). For example, in *45.50 Acres*, this Court held that a district court lacked jurisdiction to award damages for a separate potential future loss within a condemnation action and that the owner would need to bring a second action. *Id.* at 407-08. Although the Court recognized that requiring multiple legal proceedings to fully compensate a landowner for takings may cause the owner hardship, it still reversed the damages awarded for the separate taking. *Id.* at 408 n.2.

Prior to this panel's decision, federal courts generally only found states' just-compensation procedures inadequate when (1) no process was available, (2) a cap on damages would prevent full compensation, or (3) the process almost certainly would not justly compensate the claimant. *See, e.g., Severance*, 566 F.3d at 498; *Agripost, Inc*, 195 F.3d at 1231. Even when a state's procedure could not provide a plaintiff with the equitable relief sought for his takings claim, it was determined adequate. *Sorrentino,* 777 F.3d at 414.

Until the panel's decision in the current case, this Court had never declared any state's inverse-condemnation procedure inadequate. *See, e.g., Cormack*, 474 F.3d at 531; *Aaron v. Target Corp.*, 357 F.3d 768, 778 (8th Cir. 2004); *Harris*, 790 F.2d at 681; *Collier v. City of Springdale*, 733 F.2d 1311, 1317 (8th Cir. 1984). And, it had specifically declared Minnesota's just-compensation procedures adequate. *See, e.g.*, *Am. Family Ins.*, 836 F.3d at 923; *Koscielski*, 435 F.3d at 903.

This Court recognized that Minnesota state courts can determine whether a taking occurred and the monetary value of harm inflicted by the taking. *Am. Family Ins.*, 836 F.3d at 924. No intervening change has occurred in Minnesota's process since these cases that could support the panel's decision.

The panel's decision holding Minnesota's inverse-condemnation procedures inadequate conflicts with decisions of this Court. It is undisputed that the manufacturers would be fully compensated for any insulin that is found "taken" under the Act. Additionally, Minnesota provides for interest from the date of taking, attorney's fees, costs, and expenses. Minn. Stat. § 117.031, .045, .195. PhRMA failed to meet its heavy burden of proving Minnesota's procedures inadequate. It never alleged that it could not be fully compensated through Minnesota's procedures; rather, it claimed it should not have to use the process more than once. But this is the same type of inconvenience rejected by this Court in *45.50 Acres*. 634 F.2d at 408 n.2.

To reach its result, the panel relied on an amalgam of cases that did not involve takings claims, including various non-precedential cases from the early 1900s, and an inapposite Supreme Court case. The single takings case the panel cited to support its position was *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). *Apfel*, however, does not apply.

In *Apfel*, the Supreme Court addressed the constitutionality of the Coal Act, which mandated a coal operator to contribute money to a benefit fund. *Id*. at 503-04. The plurality determined that plaintiff's takings claim could continue in district court rather than the claims court. A majority then found the Act unconstitutional, but a different majority concluded that the Due Process Clause, not the Takings Clause, was implicated by the Act. *Id.* 539-74, 554-58.

Because of the divided majorities, *Apfel* is not binding on this Court. *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) (holding plurality opinion in *Apfel* does not constitute binding authority and agreeing with Justice Kennedy that takings analysis was not appropriate). Nor is it persuasive. In *Apfel,* the plurality specifically distinguished takings of physical property from "a direct transfer of funds," recognizing that compensation remedies were available for the former but not the latter. *Id.* at 521. There, the nature of the property allegedly taken, money, was determinative because it was clear that Congress had not contemplated that a plaintiff alleging the taking of money would be required to sue the government for return of the same sum of money. *Id*. at 521. By contrast, PhRMA alleged a taking of physical property—insulin—and monetary relief is available. This case does not involve the same pointless dollar-for-dollar exchange discussed in *Apfel*.

Further distinguishing it, *Apfel* did not rely on the multiplicity-of-suits doctrine. It found that monetary relief was not an available remedy. *Id.* Even if the doctrine applied to takings claims, the panel misapplied it here. Equitable relief generally is not available under the doctrine until the disputed legal issues are determined in at least one action at law. 1 John Norton Pomeroy, *Treatise on Equity Jurisprudence*, § 252 at 382 (3d ed. 1905). Also, to invoke the doctrine, the risk of multiple suits must be real; a possibility or fear of successive suits is insufficient. *Id.* at § 251 3/4 at 380-81; *Nat'l Priv. Truck Council, Inc. v. Okla. Tax Com'n*, 515 U.S. 582, 591 n.6 (1995); *Equitable Life Assur. Soc. of U.S. v. Wert*, 102 F.2d 10, 14-15 (8th Cir. 1939). Further, courts must weigh the equities and consider five different factors when determining whether to invoke the doctrine; preventing a multiplicity of suits alone is insufficient. *Hale v. Allinson*, 188 U.S. 56, 77-78 (1903); *Armour & Co. v. Haugen*, 95 F.2d 196, 198 (8th Cir. 1938).

None of those preconditions are met here. The insulin manufacturers have not brought a single inverse-condemnation action to decide the disputed legal issue. Such an action will inevitably resolve the parties' disputes (plus the amount of compensation due, if warranted), making further actions unnecessary. If the state court determines no taking occurred, there will not be multiple suits. If the court determines that a taking occurred, the state would pay just compensation and then may amend the law, withdraw the law, or exercise eminent domain to take the

insulin. *See First Eng.*, 482 U.S. at 321. But until a manufacturer brings an inverse-condemnation claim, the imminence of multiple suits is not real, it is merely an unlikely theoretical possibility, defeating the doctrine's use.

Finally, the panel failed to weigh the equities in determining that the multiplicity-of-suits doctrine applies. The equities clearly weigh against invoking the doctrine. If the law is enjoined, Minnesotans with diabetes who rely on the Act could suffer serious health consequences or die. By contrast, if not invoked, billion-dollar insulin manufacturers *may* have to bring an inverse-condemnation every six years, for which they will be fully compensated.

The panel's decision conflicts with precedent and expands when a state's just-compensation procedure may be determined inadequate. Under the panel's decision anytime a plaintiff alleges that a law will effect continued takings, he may seek equitable relief in federal court. The panel's holding simply cannot be squared with takings cases holding a government does not need to provide compensation before a taking occurs to avoid having its action invalidated. Such an expansion impinges on state sovereignty and is bound to cause conflict between the circuits and open the federal court floodgates to claims seeking equitable relief for takings.

C. The Panel's Decision Conflicts with Another Circuit.

The Tenth Circuit rejected arguments like those adopted by this panel and held that compensation was adequate to remedy alleged continuing takings.[6] *Gordon*, 322 F.3d at 1215. In *Gordon v. Norton*, the government introduced wolves near the plaintiffs' ranch under a wolf-recovery plan. *Id.* The wolves had repeatedly killed plaintiffs' cattle and dogs and it was expected that the wolves would continue to do so. *Id.* at 1215-16. Similar to PhRMA, the *Gordon* plaintiffs sued in federal district court, alleging a takings claim and seeking only equitable relief. *Id*. at 1215. The district court dismissed the claim for lack of jurisdiction. *Id.* On appeal, the plaintiffs argued that, even though compensation for a taking was available in the Court of Claims, the district court had jurisdiction because plaintiffs alleged irreparable harm from a continuing violation and sought only equitable relief. *Id.* at 1217. Again, like PhRMA, the plaintiffs relied on the plurality decision in *Apfel* to support its position. *Id.*

The Tenth Circuit appropriately rejected any reliance on *Apfel*, determining that it was not binding or applicable. *Id.* at 1217-18. It found *Apfel* distinguishable

[6] The Supreme Court and Seventh Circuit also held that injunctive relief was unavailable when continuous or repetitive takings were alleged. *Blanchette*, 419 U.S. 419 U.S. 102; *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992). The panel, however, purportedly distinguished these cases stating that in each case, a single action could compensate for the alleged taking. No such distinction can be made with *Gordon*.

because there the lawfulness of the government action was at issue, whereas it was not at issue in *Gordon*. *Id.* at 1217-18. It also determined *Apfel* was inapplicable because the *Gordon* plaintiffs alleged the taking of physical property, not the taking of money. The Tenth Circuit also rejected plaintiffs' argument that the district court had jurisdiction over takings claims when compensatory relief is inadequate. *Id.* Accordingly, the court held that because compensation was available in the Court of Claims, plaintiffs must file their claims there. *Id.* at 1218-19.

The *Gordon* decision is on point and well-reasoned. The panel's decision conflicts with *Gordon*, creating an exceptionally important question of when a federal district court can decide claims seeking to enjoin a taking.

II. WHETHER STATE OFFICIALS ARE IMMUNE FROM SUITS SEEKING TO ENJOIN LAWFUL TAKINGS IS AN EXCEPTIONALLY IMPORTANT QUESTION THAT THE PANEL FAILED TO FULLY ADDRESS.

The *Ex parte Young* exception to sovereign immunity relied on by the panel is a narrow exception that is narrowly construed. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). *Young* is inapplicable when the state is the real, substantial party in interest, *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011), and when special sovereignty interests are implicated, *Coeur d'Alene*, 521 U.S. at 281. Typically, courts need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks prospective relief to determine whether the *Ex parte Young*

exception applies. *Stewart*, 563 U.S. at 255. This Court, however, has recognized that it may question whether the suit and remedy it seeks will implicate special sovereignty interests such that the *Ex parte Young* exception will not apply. *Union Elec. Co. v. Mo. Dep't of Conservation*, 366 F.3d 655, 658 (8th Cir. 2004).

The Board argued that enjoining enforcement of a law that (allegedly) takes property for public use improperly implicates the state's special sovereignty interest and is a suit against the state as the real, substantial party in interest. That is because the state has a sovereign right to take private property for public use. *Jones*, 109 U.S. at 518. The Board members primarily relied on *Coeur d'Alene* to support their argument.

In holding that the *Ex parte Young* exception is applicable to enjoin takings, the panel mistakenly asserted that the Board primarily relied on *Ladd v. Marchbanks*, 971 F.3d 574, 578-81 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1390 (2021) and proceeded to distinguish *Ladd*. The panel, however, failed to address whether an injunction would implicate states' special sovereignty rights to take private property for a public purpose making *Ex parte Young* inapplicable under *Coeur d'Alene*.

The application of sovereign immunity to takings claims is a question of exceptional importance warranting en banc review.

CONCLUSION

For all the above reasons, the Board members respectfully request that the Court grant rehearing or rehearing en banc, vacate the panel opinion, and file a substitute opinion affirming dismissal.

Dated: April 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this petition contains 3,713 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 pt Times New Roman font.

/s/**Sarah L. Krans**
SARAH L. KRANS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this petition, certifies that the petition has been scanned for viruses and that the brief is virus-free.

/s/**Brenda Hanson**
BRENDA HANSON

CERTIFICATE OF SERVICE

I certify that I caused this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on April 17, 2023. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/**Sarah L. Krans**
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