No.

IN THE

Supreme Court of the United States

HINKLE FAMILY FUN CENTER, LLC; BRYAN HINKLE; DOUGLAS HINKLE; ALBUQUERQUE URBAN AIR, LLC; THOMAS GARCIA; BRIAN GARCIA; JUSTIN HAYS, PETITIONERS

v.

MICHELLE LUJAN GRISHAM, INDIVIDUALLY, ACTING UNDER THE COLOR OF LAW; KATHYLEEN M. KUNKEL, INDIVIDUALLY, ACTING UNDER THE COLOR OF LAW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

This Court has recognized that when state governments require landowners to allow entry of persons on a landowner's property that placement of that servitude infringes upon the right of a property owner to *exclude* the public from his property and that action by government constitutes a taking for which just compensation is owned. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). However, the Tenth Circuit and the District of New Mexico refused to acknowledge the correlative of this jurisprudence, which is that if the government enacts a servitude that prohibits a landowner from *inviting* the public to his property a taking requiring compensation has occurred and then compounded that error by ignoring the jurisprudence of this Court that clearly establishes that claims for a taking of property by state or local governments through inverse condemnations are immediately actionable under Section 1983 and qualified immunity does not apply.

Thus, the question presented is: Did the Tenth Circuit err in providing qualified immunity to Respondents for their actions to inversely condemn the property of the Petitioners to shutter their business and prohibit them from inviting the public to their property on pain of fines and imprisonment?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

Related cases to this proceeding are:

- *Hinkle Family Fun Center, LLC, Bryan Hinkle and Douglas Hinkle, Albuquerque Urban Air, LLC, Thomas Garcia and Brian Garcia, and Justin Hays v. Michelle Lujan Grisham and Kathyleen M. Kunkel*, No. 1:20-cv-01025-MV-LF, U.S. District Court for the District of New Mexico. Memorandum and Opinion Judgment entered Feb. 17, 2022.

- *Hinkle Family Fun Center, LLC, Bryan Hinkle and Douglas Hinkle, Albuquerque Urban Air, LLC, Thomas Garcia and Brian Garcia, and Justin Hays v. Michelle Lujan Grisham and Kathyleen M. Kunkel*, Case No. 22-2028, U.S. Court of Appeals for the Tenth Circuit. Judgment entered December 28, 2022. Panel Rehearing denied January 24, 2023.

RULE 29.6.

Petitioner Hinkle Family Fun Center, LLC ("Hinkle") is a New Mexico limited liability company with its principal place of business in Albuquerque, New Mexico. Hinkle states that no parent corporation or any publicly held corporation owns 10% or more of the stock of Hinkle.

Petitioner Albuquerque Urban Air, LLC ("Urban Air") is a New Mexico limited liability company with its principal place of business in Albuquerque, New Mexico. Urban Air states that no parent corporation or any publicly held corporation owns 10% or more of the stock of Urban Air.

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No case stands for the proposition that the government can indefinitely seize thru the inverse condemnation private property to shutter business thereafter exerting control over that property not just months but years later under the guise of a public health event and be afforded qualified immunity to excuse it from the obligation to provide the property owner with just compensation. This case provides yet another example of where this Court's jurisprudence for qualified immunity has become so warped that constitutionally protected rights and the will of Congress in passing 42 U.S.C. § 1983 means virtually nothing in a world where the excuse of the government for taking the property is that there was a pandemic at the time, even months after the emergency period of that pandemic had passed. The Tenth Circuit's holding almost recognizes this Court's jurisprudence in *Cedar Point*, that when the government enacts a servitude (in that case a positive servitude, in this case a negative servitude) that deprives a landowner of the right to exclude *or in this case to invite* the public from his property that a taking requiring just compensation has occurred. The Tenth Circuit's holding, while ostensibly recognizing that the taking may have occurred, which is a marked improvement on the holding of the District Court, proceeds to ignore this Court's clear and unequivocal jurisprudence in *Knick v. Twp. of Scott, Pennsylvania*, 204 L. Ed. 2d 558, 139 S. Ct. 2162, (2019), as well as plethora of cases from this Court and the Tenth Circuit itself, recognizing that the inverse condemnation taking of property requiring just compensation is a clearly established violation of the Fifth Amendment for which citizens may bring a case

under Section 1983 and the government enjoys no qualified immunity.

Thus, in essence the Tenth Circuit, while recognizing the obvious error of the District Court with regard to the availability of claims under Section 1983 for the inverse condemnation of a negative servitude imposed upon private property, proceeded to affirm the District Court's holding by finding that if the excuse for the inverse condemnation of private property was that there was a pandemic, then the government is entitled qualified immunity. This leaves this Court as the only avenue for citizens in the Tenth Circuit to clearly establish that public officials cannot simply take property without providing just compensation if they do so for a reason that is already establish in the law from this Court, the Tenth Circuit or weight of the body of law from other Circuits. This circular reasoning that slams the Courthouse door shut for inverse condemnations suits under Section 1983 in the future is simply untenable.

OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals for the Tenth Circuit in *Hinkle Family Fun Ctr., LLC v. Grisham*, 2022 WL 17972138, dated December 28, 2022, affirming the District Court's decision affirming qualified immunity is set forth in the appendix hereto pages 1a – 11a. The Decision denying the Petition for Panel Rehearing, dated January 24, 2023, is set forth in the appendix hereto page 54a.

The Memorandum Opinion and Order Granting the Defendants' Motion to Dismiss in *Hinkle Family Fun Ctr., LLC v. Grisham*, 586 F. Supp. 3d 1118, dated

February 17, 2022, is set forth in the appendix hereto pages 13a – 53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court decision granting qualified immunity was entered on December 28, 2022. This petition for writ of certiorari by Petitioners is filed within ninety (90) days from the date of the Order denying the Petitioner for Panel Rehearing on January 24, 2023. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States … except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: 1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, 2) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; and 3) to recover damages or to secure equitable or other relief under an Act of Congress providing for the protection of civil rights…

42 U.S.C. Section 1983

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section...

STATEMENT

A. Right to Just Compensation for Private Property Taken for Public Use

Petitioners brought 42 USC §1983 litigation against Respondents for the actions during the pandemic to require that businesses of the Petitioners remain closed to public well more than a year after the Covid Pandemic began to deprive the Petitioners of their Property interests in their livelihoods as purveyors of amusement and recreation that they accomplished on their private property. While the case was pending in the District Court, this Court issued its decision in *Cedar Point* clarifying that when the government inversely condemns a servitude to be imposed upon a

landowner's property for the public's benefit that a taking had occurred, and the government owed just compensation therefore. In light, of that decision Plaintiff moved to amend, which was denied by the District Court as capable of plausibly stating a claim for a taking upon which relief could be granted and on grounds of qualified immunity which the District Court found also warranted dismissal.

B. District Court Proceedings.

The Complaint was filed into the Federal District of New Mexico on December 8, 2020. The Memorandum Opinion and Order granting dismissal and denying amendment was entered on the district court docket on February 17, 2022. The notice of appeal was filed on March 18, 2022.

C. Tenth Circuit Decision.

The Tenth Circuit affirmed the District Court decision on December 28, 2022. The Appeals Court affirmed on the basis that no case from this Court or the Tenth Circuit, nor the weight of authority from other jurisdictions, clearly established that that the government could be required under Section 1983 to provide just compensation for private property inversely condemned to combat a public health pandemic and therefore Respondents were entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

While Petitioners did agree with the Tenth Circuits decision regarding a grant of qualified immunity for the Respondents from damages for the actions to deprive Petitioners of the fundamental liberty to engage in their chosen profession through *emergency* public health orders in the later stages of a pandemic, Petitioners understand the severe limitations that the Tenth Circuit's jurisprudence places upon citizens that seek justice for the unconstitutional actions of state governments that harm their liberty and do focus on that part of the decision in this Petition. However, the Tenth Circuit's decision substantially misapprehends and misses several important cases from this Court regarding takings jurisprudence and therefore the application of qualified immunity to the government's actions to temporarily seize control of businesses in New Mexico to close them is a strong basis for this Court to grant the petition.

Importantly, the Tenth Circuit's analysis is based upon a misapprehension the availability of bringing a Section 1983 to address a taking by the government of property without providing just compensation or damages. On this point the Chief Justice John Roberts writing for the Court has been clear stating that it "is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983." *Knick v. Twp. of Scott, Pennsylvania*, 204 L. Ed. 2d 558, 139 S. Ct. 2162, 2171 (2019). The Court also held in that opinion that "[w]e conclude that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a

Fifth Amendment claim under § 1983 at that time." *Id.* at 2177. It is unequivocal on this point, even for the Tenth Circuit, that Respondent's public health orders resulted in the inverse condemnation of the Petitioners' private property that was forcibly closed for well over a year for the perceived public benefit of combating the Covid Pandemic and therefore, under nearly all takings jurisprudence that a per se taking occurred that required just compensation.

Moreover, in that regard, Justice Clarence Thomas in his concurring opinion laudably addresses the concept of damages in for when a government takes property (which is always done in under the authority of police power to protect public health safety or welfare) without providing just compensation as is the case here stating:

> This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC* v. *Durham*, 578 U.S. ——, —— –, 136 S.Ct. 1409, 1409, 194 L.Ed.2d 821 (2016) (THOMAS, J., dissenting from denial of certiorari). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." *Ibid.* A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." *Id.*, at ——, 136 S.Ct., at 1410. If this requirement makes some regulatory programs "unworkable in practice,"

> Supp. Brief 5, so be it—our role is to enforce the Takings Clause as written.
>
> …
>
> Still, "[w]hen the government repudiates [its] duty" to pay just compensation, its actions "are not only unconstitutional" but may be "tortious as well." *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

Id. at 2180.

Moreover, the concept that Respondents, as reasonable officials, would not understand that depriving Appellants of the use of their property (even temporarily) was not a taking requiring compensation simply because the reason the government action was taken was different (*i.e.* protecting public safety thru flooding private property as a flood control measure versus protecting public health from the flood of an infectious disease by forcibly closing private property) is not sound reasoning, because it is not such a high level of generality that a reasonable official could not foresee the liability. In reality, what the Tenth Circuit's decision actually signals is that the virtues underlying this particular taking is high enough that the government is excused from the requirements of just compensation. But, this virtue analysis is not what should underlie a qualified immunity analysis and the concept of a temporary closure or use of private property for public welfare has been addressed by the

Court well before the Respondents' actions here stating:

> *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' " 482 U.S. at 315, 107 S.Ct. 2378. Because of "the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. *Ibid.* (quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)). The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." 482 U.S. at 321, 107 S.Ct. 2378

Id. at This was also addressed by Justice Ruth Bader Ginsbury stating "[w]e disagree and conclude that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 27, 133 S. Ct. 511, 515, 184 L. Ed. 2d 417 (2012). The Tenth Circuit's hair splitting regarding the nature or reason for the government to seize private property under police powers between public safety, public welfare, or public health essentially ignores decades of

jurisprudence to reinstate the abrogated decision that "[e]very restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417, 43 S. Ct. 158, 161, 67 L. Ed. 322 (1922).

The *Mahon* approach cannot simply be returned to by Tenth Circuit under the guise of qualified immunity because this Court has addressed that concept and issued holding addressing taking done as government action to protect public health (like was done here) stating:

> "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that *1024 "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'...." *Nollan*, *supra*, 483 U.S., at 834, 107 S.Ct., at 3147 (quoting *Agins v. Tiburon*, 447 U.S., at 260, 100 S.Ct., at 2141); see also *Penn Central Transportation Co., supra*, 438 U.S., at 127, 98 S.Ct., at 2660; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).
>
> The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring"

regulation is often in the eye of the beholder. It is quite possible, for **2898 example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[11] Compare, *e.g.*, *1025 *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, *e.g.*, *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts § 822, Comment *g*, p. 112 (1979) ("Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and

the Police Power, 74 Yale L.J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.[12]

*1026 When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* **2899 regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*' s affirmation of limits to the noncompensable exercise of the police power. Our cases provide

no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S., at 513–514, 107 S.Ct., at 1257 (REHNQUIST, C.J., dissenting).[13]

*1027 7 Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[14] This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even *1028 render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).

> See **2900 *Andrus v. Allard*, 444 U.S. 51, 66–67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[15]
>
> 8 Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), **no matter how weighty the asserted "public interests" involved**, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426, 102 S.Ct., at 3171

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1023–28, 112 S. Ct. 2886, 2897–900, 120 L. Ed. 2d 798 (1992)(emphasis added). Here, the actions of the Respondents shuttered the properties of the Appellants depriving them of all economic benefits of those properties and the Tenth Circuit should have instead reversed the District Court to allow the case to proceed from an amended claim for a taking without just compensation under the Fifth Amendment instead of becoming concerned that there was note a specific cases that addressed taking private property for the weight concern of combating a public health pandemic.

CONCLUSION

It is incumbent upon this Court, restore the balance of taking property for public use to combat a

public health crisis by requiring that the government that takes the property to provide the owing just compensation. Again, this Court's review is necessary if the boundaries of qualified immunity are to mean anything with regard to actions of the government to inversely condemn private property, and the matter is likely capable of being corrected summarily which Petitioner respectfully prays the Court consider.

Respectfully submitted,

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APPENDIX

United States Court of Appeals, Tenth Circuit.

HINKLE FAMILY FUN CENTER, LLC; Bryan Hinkle; Douglas Hinkle; Albuquerque Urban Air, LLC; Thomas Garcia; Brian Garcia; Justin Hays, Plaintiffs - Appellants,
and
Cliff's Amusement Park, Plaintiff,
v.
Michelle Lujan GRISHAM, individually, acting under the color of law; Kathyleen M. Kunkel, individually, acting under the color of law, Defendants - Appellees.

No. 22-2028

FILED December 28, 2022

(D.C. No. 1:20-CV-01025-MV-LF) (D. New Mexico)

Attorneys and Law Firms

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Holly Agajanian, Kyle P. Duffy, State of New Mexico Office of the Governor, Santa Fe, NM, for Defendants - Appellees.

Before HARTZ, McHUGH, and MORITZ, Circuit Judges.

ORDER AND JUDGMENT*Harris L. Hartz, Circuit Judge

Beginning in March 2020, New Mexico Governor Michelle Lujan Grisham and Kathyleen Kunkel, then-Secretary of the New Mexico Department of Health (collectively, Defendants), issued a series of executive orders and public health orders (the Orders) in response to the Covid-19 pandemic. Three recreational businesses and their owners (Plaintiffs) sued Defendants in their individual capacities under 42 U.S.C. § 1983, seeking to enjoin what they considered unconstitutional restrictions imposed by the Orders. The claims for injunctive relief were mooted when the restrictions were lifted. Plaintiffs then sought to amend their complaint to add a new theory of liability (a takings claim) and to seek damages from Defendants. The district court denied leave to amend, ruling that the proposed amendment would be futile because Defendants would not be liable on the new claims. That ruling is before us on appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. Amending the complaint would have been futile because Defendants were protected against liability by qualified immunity.

I. BACKGROUND

On March 11, 2020, as part of New Mexico's response to Covid-19, Governor Lujan Grisham issued Executive Order 2020–004, proclaiming a statewide Public Health Emergency in accord with N.M. Stat. Ann. § 12-10A-5 and invoking her powers under the All

Hazard Emergency Management Act, N.M. Stat. Ann. § 12-10-1 to -10. On March 23, 2020, Secretary Kunkel issued a Public Health Order (the March 23 order) authorized by Executive Order 2020–004. It required that "[a]ll businesses, except those entities identified as 'essential businesses[,]' ... reduce the in-person workforce at each business or business location by 100%"—that is, it required nonessential businesses to close immediately. Aplt. App. at 122. Hinkle Family Fun Center, LLC (Hinkle), Albuquerque Urban Air, LLC, and Cliff's Amusement Park (Cliff's) (collectively, the Businesses)—which offer multiple recreational activities, such as miniature golf, rides, climbing, paintball, trampolines, go-karts, carnival games, and video games—did not fit the March 23 order's definition of essential businesses; they complied with the order and closed by March 24, 2020.

On June 1, 2020, Secretary Kunkel amended the March 23 order to allow some nonessential businesses to open at 25% capacity. But the order stipulated that recreational facilities throughout the state "must remain closed." *Id.* at 130. The order defined recreational facilities to include "indoor movie theaters, museums, bowling alleys, miniature golf, arcades, amusement parks, concert venues, event venues, performance venues, go-kart courses, adult entertainment venues, and other places of indoor recreation or indoor entertainment." *Id.* A month later, on July 1, Governor Lujan Grisham issued an executive order requiring that all interstate travelers to New Mexico quarantine for two weeks following their arrival.

The original complaint in this action was filed on October 7, 2020, in the United States District Court for the District of New Mexico by Hinkle and its owners, Douglas and Bryan Hinkle. The next day an amended complaint added Albuquerque Urban Air and its owners, Thomas and Brian Garcia, as plaintiffs. And on October 27, 2020, a second amended complaint was filed, adding Justin Hays, the owner of Cliff's, as a plaintiff.1 The second amended complaint claimed that the March 23 order—as well as amendments to it that prolonged business closures—and the July 1 travel restriction violated rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs sought a temporary restraining order and a preliminary or permanent injunction halting the Orders, thus allowing them to resume operations; they also sought a declaratory judgment that the Orders were unconstitutional.

Although the State allowed the Businesses to open at limited capacity on November 30, Plaintiffs claim that the Businesses remained hampered by the capacity limits and also by the traveler-quarantine order of July 1, 2020. The quarantine requirement, say Plaintiffs, "effectively halted" tourism in New Mexico, reducing their customer base. Aplt. Br. at 5. The travel restriction remained in effect until February 2021. On July 1, 2021, the State permitted recreational businesses to resume normal operations.

In the meantime, on November 5, 2020, Defendants had moved to dismiss the second amended complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief

can be granted. On September 17, 2021, noting that the government had lifted each of the orders challenged by Plaintiffs, the district court sua sponte asked the parties to submit briefs on whether the claims in the second amended complaint were moot. In partial response, Plaintiffs asked the court for leave to amend their complaint a third time. They wished to add two claims: (1) a claim for damages and (2) a takings claim under *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

The district court denied the motion to amend as futile because each of the added claims would be subject to dismissal. *See Hinkle Fam. Fun Ctr., LLC v. Grisham*, 586 F Supp. 3d 1118, 1122 (D.N.M. 2022). It held that the claim for damages was futile because Defendants would be immune from suit under the doctrine of qualified immunity. *Id.* at 1127–29. And it held that the takings claim was futile (1) because Plaintiffs sued Defendants in their individual capacities and a takings claim cannot be brought against a state official sued in her individual capacity, and (2) because the Orders did not effect a *per se*, or physical, taking under *Cedar Point* or a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *See id.* at 1130–32. The court also dismissed the second amended complaint as moot because the disputed orders were no longer in effect. *See id.* at 1133–38. This appeal does not challenge the dismissal of the second amended complaint but only the court's denial of leave to amend their complaint a third time.

II. DISCUSSION

We review for abuse of discretion a denial of leave to amend a complaint. *See SCO Group, Inc. v. Intl. Bus. Machines Corp.*, 879 F.3d 1062, 1085 (10th Cir. 2018). "Although Fed. R. Civ. P. 15(a) provides that leave to amend shall be given freely, the district court may deny leave to amend where amendment would be futile. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004) (internal quotation marks omitted). We conclude that the district court did not abuse its discretion in denying the amendment because Plaintiffs' two new claims would indeed be subject to dismissal.

A. Qualified Immunity

A government official may be sued in an official or individual, sometimes termed personal, capacity. *See Kentucky v. Graham*, 473 U.S. 159, 165 & n.10 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 165 (citation and internal quotation marks omitted). "[W]hile an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-

capacity suit must look to the government entity itself." *Id.* at 166.

If sued for damages in an individual capacity, an official can assert the defense of qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (internal quotation marks omitted); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (qualified immunity advances the "public interest in encouraging the vigorous exercise of official authority" (internal quotation marks omitted)). "A § 1983 defendant's assertion of qualified immunity is an affirmative defense that creates a presumption that the defendant is immune from suit. To overcome this presumption, the plaintiff must show (1) the defendant's actions violated a constitutional or statutory right, and (2) that right was clearly established at the time of the defendant's complained-of conduct." *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021) (brackets, citation, and internal quotation marks omitted).

"A right is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Id.* (internal quotation marks omitted). We do not require that the facts of a prior case be "exactly parallel" to the disputed conduct, but "the contours of the right must be sufficiently clear so that a reasonable

official would understand that what he is doing violates that right." *Id.* (brackets and internal quotation marks omitted). The Supreme Court has "repeatedly told lower courts not to define clearly established law at a high level of generality" because doing so "avoids the crucial question of whether the official acted reasonably in the *particular* circumstances that he or she faced." *Cummings v. Dean*, 913 F.3d 1227, 1239–40 (10th Cir. 2019) (brackets and internal quotation marks omitted). A plaintiff must demonstrate "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Id.* at 1240 (internal quotation marks omitted).

B. Application to This Case

The proposed third amended complaint is brought against Defendants "Individually, Acting Under the Color of Law." Aplt. App. at 450. We cannot read it as other than a complaint against Defendants in their individual capacities. In response to the request for leave to amend, Defendants asserted qualified immunity as an affirmative defense, arguing that the "proposed claims for compensatory and punitive damages against Defendants in their individual capacities are barred by qualified immunity." *Id.* at 478. We agree with Defendants that they are entitled to qualified immunity on the damages claim. When the Orders that Plaintiffs challenge issued and were in effect, there was no clearly established law forbidding those orders as unconstitutional. To be sure, Plaintiffs

have cited authority supporting a constitutional right to engage in one's chosen profession. But none of the cited cases arose in the context of a public-health emergency, and none of them purported to set limits on what governments can constitutionally impose on businesses when governments perceive the need for restrictions to contain a contagion. Relying on them would define the right at too high a level of generality. This is not to say that businesses have no constitutional rights in that circumstance. It is not even to say that the restrictions imposed on Plaintiffs were constitutional. All we are saying is that in the absence of clearly established law forbidding the Orders, Defendants cannot be subjected to liability for damages even if, on later examination, we might conclude that the Orders did not pass constitutional muster.

Although Defendants have clearly argued in their briefs in district court and this court that they are entitled to qualified immunity with respect to claims against them for damages, it is not clear that they were raising a qualified-immunity defense with respect to personal liability for damages on the takings claim in the proposed third amended complaint. Nevertheless, "our general rule [is] that we may affirm on an unpreserved ground if doing so is fair to appellant." *United States v. Iverson*, 818 F.3d 1015, 1022 (10th Cir. 2016).2 Here, it is fair to affirm the district court's decision that it would be futile to amend the complaint to add a takings claim on the ground that Defendants would be protected from that claim by qualified immunity. They are entitled to qualified immunity because during the time the Orders were imposed there

was no clearly established law stating that restrictions like those imposed on the Businesses by the Orders constituted a taking within the meaning of the Constitution. Plaintiffs had every opportunity and incentive to present the court with such authority because of its relevance to the merits of their takings claim. Yet they have cited no case that recognized a takings claim when businesses were closed, in whole or in part, by a government order purportedly justified by the need to protect public health from a communicable disease. Nor are we aware of any such authority—certainly none from the Supreme Court or this court.

III. CONCLUSION

Plaintiffs undoubtedly suffered as a result of the Orders issued by Governor Lujan Grisham and Secretary Kunkel. But the district court did not abuse its discretion in denying them leave to amend their complaint a third time. We **AFFIRM** the decision of the district court.

Footnotes

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be

cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1The status of Cliff's itself as a plaintiff was unclear. It did not appear in the captions of the second amended complaint or the proposed third amended complaint, although it was listed as a plaintiff within each pleading. In any event, it is not listed as an appellant in the notice of appeal.

2As noted above, one of the grounds relied on by the district court for rejecting the takings claim was that such a claim cannot be brought against government officials in their individual capacities. Although we adopt what we believe to be an easier path to resolving the issue, there is substantial support for the district court's approach. We are not aware of any circuit court that has explicitly held that a takings action can be brought against a state official in an individual capacity. Some circuits and judges have rejected or expressed doubt about such claims. *See Langdon v. Swain*, 29 F. App'x 171, 172 (4th Cir. 2002) ("takings actions sound against governmental entities rather than individual state employees in their individual capacities"); *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) (denying petition for rehearing to address takings claim against government officials in their individual capacities and noting the absence of authority "that suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment"); *Asociacion De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 37 (1st Cir. 2007) (Howard, J., concurring in judgment) ("I am not entirely convinced that federal takings claims may ever

properly lie against state officials acting in their individual capacities"). Others have indicated (at least implicitly) that such claims might proceed but have denied relief, usually because of a qualified-immunity defense. *See Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1373–74 (8th Cir. 2022) (reaching "appellants' claim for damages against Governor Walz in his individual capacity" on a takings theory but concluding that the claim that public-health business closures constituted a taking was barred by qualified immunity); *Laborers' Int'l Union of N. Am., Loc. 860 v. Neff*, 29 F.4th 325, 335 (6th Cir. 2022) (qualified immunity barred a takings claim against officials in their individual capacities); *Asociacion De Subscripción*, 484 F.3d at 36 (granting qualified immunity); *Spencer v. Benison*, 5 F.4th 1222, 1234 (11th Cir. 2021) (granting summary judgment on an individual-capacity takings claim because plaintiff failed to establish a causal link between property encroachment and official's order); *Garvie v. City of Ft. Walton Beach*, 366 F.3d 1186, 1189 n.2 (11th Cir. 2004) (leaving "open the question of whether the plaintiffs would be able to make out Fifth Amendment Takings Clause ... claims against the individual governmental defendants," but no such individuals were sued).

586 F.Supp.3d 1118
United States District Court, D. New Mexico.

HINKLE FAMILY FUN CENTER, LLC, Bryan Hinkle, and Douglas Hinkle, Plaintiffs,

v.

Michelle Lujan GRISHAM, Individually, Acting Under the Color of Law, and Kathyleen M. Kunkel, Individually, Acting Under the Color of Law, Defendants.

No. 20-CV-01025-MV-KK
Signed 02/17/2022

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

MARTHA VÁZQUEZ, Senior United States District Judge

THIS MATTER comes before the Court on Defendants' Motion to Dismiss Plaintiffs' 2nd Amended Complaint ("Motion to Dismiss") [Doc. 17] and Plaintiffs' Opposed Second Motion to File Third Amended Complaint ("Motion to Amend") [Doc. 37].

The Court, having considered the motions and the relevant law, finds that Defendants' Motion to Dismiss is well-taken and will be granted, and Plaintiffs' Motion to Amend is not well-taken and will be denied.

BACKGROUND

Facts

Since its emergence last year, the novel coronavirus 2019, or Sars-CoV-2, the virus that causes COVID-19, has spread exponentially through the world, and New Mexico has been no exception. Doc. 17 at 2. The ease and rapidity with which COVID-19 spreads and its potentially severe symptoms create a frightening potential for mass deaths and an overloaded healthcare system. *Id.* at 4. As of February 4, 2022, over 75 million people have been infected with COVID-19 in the United States, with over 880,000 related deaths, and the New Mexico Department of Health has reported over 480,000 positive COVID-19 cases and 6,500 related deaths in New Mexico. February 4, 2022 Public Health Order, at 1 ("February 2022 PHO"), https://cv.nmhealth.org/public-health-orders-and-executive-orders/ (hereinafter referred to as "NM Health Website").

As COVID-19 reached the state of New Mexico, on March 11, 2020, Governor Michelle Lujan Grisham declared a Public Health Emergency under the Public Health Emergency Response Act and invoked her authority under the All Hazards Emergency Management Act. *See* Executive Order 2020-004, NM

Health Website. At that time, the Centers for Disease Control and Prevention ("CDC") advised that "COVID-19 spreads easily through close person-to-person contact, and [that] the risk of transmission increases if individuals interact with more people, come within six feet of one another, and spend longer periods of time together." Doc. 17 at 3. In keeping with this advice and pursuant to the Governor's declaration, on March 23, 2020, the New Mexico Department of Health ("DOH"), issued a public health order ("March 2020 PHO"), in which it explained that "social distancing [was] the sole way New Mexicans [could] minimize the spread of COVID-19" and [then] constitute[d] the most effective means of mitigating the potentially devastating impact of this pandemic in New Mexico." Doc. 15-2. To ensure social distancing and thereby further the stated goal of mitigating the spread of COVID-19, the March 2020 PHO closed all businesses and non-profit entities, except those deemed essential, and placed restrictions on mass gatherings. *Id.* On June 1, 2020, the DOH issued a public health order ("June 2020 PHO") amending, *inter alia*, the March 2020 PHO to allow certain non-essential businesses to open with maximum occupancy requirements. Doc. 15-3. Under the June 2020 PHO, "recreational facilities" were required to remain closed. *Id.* at 6. The June 2020 PHO expired by its own terms on June 30, 2020. *Id.*

On July 1, 2020, Governor Lujan Grisham issued Executive Order 2020-054 ("July EO"), indicating that "[m]any of the current confirmed positive cases of COVID-19 in New Mexico have resulted from interstate and international travel to New Mexico via

airplane," and that because "some individuals infected with COVID-19 are asymptomatic or have very mild symptoms, travelers may be unaware they are carrying the virus." Doc. 15-5. For this reason, the July 2020 EO required, with certain exceptions, "persons arriving in New Mexico from out of state [to] self-isolate" for a period of at least 14 days "or for the duration of their presence in the State, whichever is shorter." *Id.* at 1-2.

Following emerging CDC guidance, the DOH issued a public health order on July 13, 2020 ("July 2020 PHO"), indicating that both "social distancing *and* the consistent and proper use of face coverings in public spaces [were] the most effective ways New Mexicans [could] minimize the spread of COVID-19." Doc. 15-4 at 2 (emphasis added). Accordingly, the July 2020 PHO amended, *inter alia*, the June 2020 PHO, continued occupancy limitations for certain businesses, ordered that "recreational facilities" remain closed, and required that, with certain exceptions, "all individuals shall wear a mask or multilayer cloth face covering in public settings except when eating, drinking, or swimming." *Id.* at 6-9. The July 2020 PHO expired by its own terms on July 30, 2020.

Meanwhile, efforts were underway to develop a vaccine against COVID-19. In December 2020, the FDA granted emergency use authorizations ("EUA") for the Pfizer/BioNTech ("Pfizer") two-dose mRNA vaccine for individuals 16 and older and for the Moderna two-dose mRNA vaccine for individuals 18 and older. *See* FDA News Release (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-

covid-19-issuing-emergency-use-authorization-first-covid-19; FDA News Release (Dec. 18, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid. In February 2021, the FDA granted EUA for the Johnson & Johnson vaccine for individuals 18 and older. FDA News Release (Feb. 27, 2021), https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine. In May 2021, Pfizer's vaccine received EUA for individuals 12 and older, and then in August 2021, full FDA approval for individuals 16 and older. *See* FDA News Release (May 10, 2021), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use; FDA News Release (August 23, 3021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine. In October 2021, the FDA authorized the emergency use of Pfizer's vaccine for children five through 11 years of age. *See* FDA News Release (Oct. 29, 2021), https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age. In November 2021, the FDA amended the EUA for both the Moderna and Pfizer vaccines, authorizing use of a single booster dose for all individuals 18 years of age and older after completion of primary vaccination with any FDA-authorized or approved COVID-19 vaccine. *See* FDA News Release (Nov. 19, 2021),

https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-expands-eligibility-covid-19-vaccine-boosters. In December 2021 and January 2022, the FDA again amended the EUA for the Pfizer vaccine, expanding authorization of booster doses to 12 to 17 years of age, at least five months after completion of primary vaccination with the Pfizer vaccine. *See* FDA News Release (Dec. 9, 2021), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-expands-eligibility-pfizer-biontech-covid-19-booster-dose-16-and-17; FDA News Release (Jan. 3, 2022), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-multiple-actions-expand-use-pfizer-biontech-covid-19-vaccine.

With the first EUAs for covid vaccines, "New Mexico put into motion one of the most efficient vaccine rollouts in the United States." Simon Romero, *How New Mexico Became the State with the Highest Rate of Full Vaccinations*, The New York Times (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/us/new-mexico-covid-vaccines.html. "Going into the pandemic with a dearth of financial resources compared with richer states, and vulnerabilities like having fewer hospital beds per capita than nearly every other state, the authorities in New Mexico saw the vaccine as their most powerful weapon to stave off an even more harrowing crisis." *Id.* By April 2021, New Mexico had reached the second highest vaccination rate in the United States. *Id.*

As the number of vaccinated New Mexicans grew and scientific studies showed that the vaccines were safe and effective in preventing severe illness, Governor Lujan Grisham and the DOH began to lift restrictions on businesses and travel into the state, and to shift pandemic mitigation strategies toward vaccine and mask mandates. Specifically, on November 27, 2020, the State announced that, "[i]n an effort designed to provide local communities the flexibility to operate more day-to-day activities," it would "transition to a tiered county-by-county COVID-19 risk system on Dec. 2, enabling local communities to shed burdensome restrictions as soon as public health data show the virus is retreating within their borders." Office of the Governor Press Release (Nov. 27, 2021), https://www.governor.state.nm.us/2020/11/27/state-announces-tiered-red-to-green-system-for-n-m-counties-in-next-phase-of-covid-19-response. Under the "red to green" framework, a succession of public health orders rescinded prior public health orders and allowed, *inter alia*, outdoor and indoor recreational facilities to reopen and operate at reduced but increasing capacities commensurate with each county's decrease in COVID-19 case incidence rates and percentage of positive COVID-19 test results and increase in vaccination rates. *See generally*, Public Health Orders (Nov. 30, 2020 to June 30, 2020), NM Health Website. Additionally, noting that "the infection rate of COVID-19 in New Mexico has decreased since the distribution of vaccines was initiated," Governor Lujan Grisham issued Executive Order 2021-006 ("February 2021 EO") on February 10, 2021, rescinding the July 2020 EO and

ending the quarantine requirements for individuals traveling into the State. Executive Order 2021-006, NM Health Website.

In April 2021, Governor Lujan Grisham announced that when "60 percent of eligible New Mexicans ha[d] been fully vaccinated," the State would "graduate out of the color-coded county risk system and remove most pandemic-related restrictions on commercial activities." Office of the Governor Press Release (Apr. 28, 2021), https://www.governor.state.nm.us/2021/04/28/new-mexico-to-loosen-red-yellow-green-criteria-sets-vaccination-goal-for-removal-of-restrictions/. She indicated that "this target" was "made possible by New Mexico's nation-leading vaccination effort." *Id.* In keeping with that announcement, effective July 1, 2021, the State "retire[d] its color-coded, county-by-county system and all COVID-19 health restrictions on commercial and day-to-day activity." Office of the Governor Press Release (June 18, 2021), https://www.governor.state.nm.us/2021/06/30/n-m-to-lift-pandemic-restrictions-thursday/. Accordingly, on July 1, 2021, "all pandemic-related occupancy restrictions on all forms of commercial activity [were] lifted," and "[a]ll businesses across the state," including recreational facilities, have since been able "to operate at 100 percent of maximum capacity." Office of the Governor Press Release (June 30, 2021), https://www.governor.state.nm.us/2021/06/30/n-m-to-lift-pandemic-restrictions-thursday/.

Quickly following the reopening of New Mexico, the "highly transmissible" Delta variant emerged, soon

accounted for virtually all new infections, and caused a "significant increase in new COVID-19 cases." August 17, 2021 Public Health Order ("August 2021 PHO") at 1, NM Health Website. In response to the rising tide of cases, rather than restrict businesses or travel into the state, the State imposed vaccine and/or testing mandates on certain categories of individuals, namely, school staff, congregate care facility workers, hospital workers, and employees of the Office of the Governor. *Id.* The August 2021 PHO grounded these vaccine/testing mandates on scientific evidence that: "the currently available COVID-19 vaccines are safe and the most effective way of preventing infection, serious illness, and death"; "widespread vaccination protects New Mexico's health care system as vaccines decrease the need for emergency services and hospitalization"; and "the refusal to receive the COVID-19 vaccine not only endangers the individual but the entire community, and further jeopardizes the progress the State has made against the pandemic by allowing the virus to transmit more freely and mutate into more transmissible or deadly variants." *Id.* at 1-2. At the same time, Governor Lujan Grisham re-implemented the statewide requirement that face masks be worn in all public indoor spaces, regardless of vaccination status. *Id.* Noting that face masks "are effective in limiting the spread of the more transmissible 'Delta' variant," and that "proper use of face coverings in public spaces" is one of "the most effective ways New Mexicans can minimize the spread of COVID-19 and mitigate the potentially devastating impact of this pandemic in New Mexico," Governor Lujan Grisham

and the DOH extended the mask requirement in a series of public health orders. *See* Public Health Orders (Sept. 15, 2020 - Feb. 4, 2022), NM Health Website.

While New Mexico was still experiencing a "significant increase in new COVID-19 cases" as a result of the Delta variant, the CDC identified yet another new variant of concern, "Omicron." NMDOH Press Release (Dec. 13, 2021), https://cv.nmhealth.org/2021/12/13/state-identifies-first-omicron-covid-19-case/. On December 13, 2021, the DOH announced its first identified case of the Omicron variant in New Mexico. *Id.* In the face of the newly discovered variant, Governor Lujan Grisham and the DOH issued a public health order mandating that certain individuals, including health care and congregate care workers, receive booster vaccines, and a public health order extending the mask mandate. *See* December 10, 2021 Public Health Order, October 10, 2021 Public Health Order, NM Health Website. The February 2022 PHO, which is currently in effect, continues to require that masks be worn "in all indoor public settings except when eating or drinking," but does not require the closure of, or impose occupancy restrictions on, recreational facilities or any other type of business. February 2022 PHO, NM Health Website.

Procedural History

On October 7, 2020, Plaintiffs Hinkle Family Fun Center, LLC, Brian Hinkle, and Douglas Hinkle commenced the instant action by filing their Verified Complaint for Civil Rights Violations Under the

Fourteenth Amendment to the United States Constitution and Request for Temporary Restraining Order ("TRO"). Doc. 1. Plaintiffs named Governor Lujan Grisham and Kathyleen Kunkel, then-Secretary of the State of New Mexico Department of Health, "individually" and "acting under the color of law," as Defendants. *Id.* On October 8, 2020, the Court entered an Order finding no grounds to issue the requested TRO on an *ex parte* basis without notice to Defendants but did order an expedited briefing schedule on the TRO request. Doc. 3.

On October 8, 2020, Plaintiffs filed an amended complaint, adding Albuquerque Urban Air, LLC, Thomas Garcia, Brian Garcia, and Justin Hays as Plaintiffs. Doc. 4. On October 27, 2021, Plaintiffs filed their Second Amended Complaint ("SAC"), adding Cliff's Amusement Park and Justin Hays as Plaintiffs. Doc. 15. In the SAC, Plaintiffs claim that, in enacting the March 2020 PHO, June 2020 PHO, and July 2020 PHO, all of which required recreational facilities (including Plaintiffs Hinkle Family Fun Center, Albuquerque Urban Air and Cliff's Amusement Park) to remain closed, and the July 2020 EO, which restricted travel into New Mexico, Defendants violated Plaintiffs' substantive due process, procedural due process, and equal protection rights under the Fourteenth Amendment of the United States Constitution. Doc. 15 at 5-9. As a result of these alleged violations, Plaintiffs request a declaratory judgment that the March 2020 PHO, June 2020 PHO, July 2020 PHO, and July 2020 EO (collectively, the "Challenged Orders"), in "requir[ing] businesses to remain closed[,

are] unconstitutional," and a TRO, preliminary injunction, and permanent injunction prohibiting "Defendants from enforcing" the Challenged Orders "in the arbitrary and capricious manner and fashion ... that keeps businesses like Plaintiffs' closed and unable to even open under similar conditions and restrictions as other businesses." *Id.* at 9-10.

After completion of briefing on Plaintiffs' request for temporary relief in accordance with the schedule set in the Court's October 8, 2020 Order, Plaintiffs advised the Court by email message that they intended to file a motion for preliminary injunction separate and apart from the request for interim relief set forth in the SAC. Plaintiffs asked the Court to hold in abeyance its decision on their request for interim relief until such briefing was completed.

On November 5, 2020, Defendants filed the instant Motion to Dismiss, Doc. 17, to which Plaintiffs filed a response in opposition on November 18, 2020. Doc. 19. Defendants' reply followed on December 3, 2020. Although on June 8, 2021 Plaintiffs filed an opposed motion to amend the SAC, they withdrew that motion on July 6, 2021. Doc. 33.

Noting that none of the Challenged Orders remains in effect, and that all businesses in New Mexico, including recreational facilities, have been permitted to operate at full capacity since July 1, 2021, the Court entered an Order on September 23, 2021, indicating its concern that Plaintiffs' claims are moot and that, as a result, this Court no longer has subject matter over the instant action. Doc. 36. To address this concern, the Court ordered briefing from the parties as

to this discrete issue. *Id.* Briefing from both parties followed. Doc. 38; 39.

After the Court raised the specter of mootness, on September 23, 2021, Plaintiffs filed their Motion to Amend, seeking leave to file a third amended complaint. Doc. 37. Specifically, Plaintiffs seek to add a request for relief in the form of damages on their Fourteenth Amendment claims, and to add an additional claim, namely, that the Challenged Orders constitute a "taking" in violation of the Fifth Amendment of the United States Constitution. Doc. 37. Defendants filed a response in opposition to Plaintiffs' Motion to Amend on October 7, 2021, Doc. 40, and Plaintiffs' reply followed on October 21, 2012. Doc. 41.

DISCUSSION

The SAC is currently the operative document in this matter. According to Defendants, the SAC should be dismissed for lack of jurisdiction because Plaintiffs' claims are moot or, in the alternative, for failure to state a claim. Plaintiffs seek leave to amend the SAC, which, if granted, would render moot Defendants' arguments in favor of dismissal, as a third amended complaint would replace the SAC as the operative document in this matter. For the reasons set forth herein, the Court finds that it would be futile to grant Plaintiffs leave to amend the SAC, and that, because the claims set forth in the SAC are moot, the SAC must be dismissed for lack of jurisdiction.

I. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that, when a party seeks leave to amend, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Court, however, need not grant leave to amend "where amendment would be futile." *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Jefferson Cty.*, 175 F.3d at 859. Accordingly, this Court has discretion to deny Plaintiffs' Motion to Amend if the claims that they seek to add to their SAC are insufficient. *Id.* As explained herein, the Court finds that amendment would be futile because Defendants would be entitled to qualified immunity on any request for damages in connection with Plaintiffs' due process claims, and because Plaintiffs' proposed takings claim would be subject to dismissal in its entirety for failure to state a claim.

A. Qualified Immunity Would Bar a Damages Claim Against Defendants

The SAC seeks declaratory and injunctive relief for Defendants' alleged violations of Plaintiffs' constitutional rights. Plaintiffs seek leave to amend to add a request for "actual and punitive damages" for those alleged violations. Doc. 37-1 at 11. But, as Defendants argue, any claims for damages are

cognizable only against them in their individual capacity. *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011) ("Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief."). And, as set forth herein, Defendants would be entitled to qualified immunity on any claims against them in their individual capacity.

"The doctrine of qualified immunity shields [governmental officials] from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Tahlequah, Okla. v. Bond*, — U.S. ——, 142 S. Ct. 9, 11, 211 L.Ed.2d 170 (2021) (citation omitted). "A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he [or she] is doing violates that right." *Rivas-Villegas v. Cortesluna*, — U.S. ——, 142 S. Ct. 4, 7, 211 L.Ed.2d 164 (2021) (citation omitted). Although the Supreme Court's "case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 7-8. Moreover, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 8. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Plaintiffs have provided no precedent1, and the Court has found none, to suggest that Defendants violated any clearly established right by enacting the Challenged Orders – two of which imposed temporary restrictions on recreational facilities and one of which imposed temporary restrictions on travel – in an effort "to address th[e] extraordinary health emergency" created by the COVID-19 pandemic. *South Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 140 S. Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (denying application to enjoin enforcement of California order that, to limit spread of COVID-19, placed temporary numerical restrictions on public gatherings). Indeed, the Supreme Court has expressly held that "the precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and that where, as here, "local officials are actively shaping their response to changing facts on the ground," "[t]he notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable." *Id.* at 1614.

Further, far from placing "beyond debate" any established right to be free from temporary, pandemic-related restrictions, controlling Supreme Court precedent instead instructs that: the "Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States to guard and protect"; when "those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad";

and, unless those broad limits are "exceeded," "they should not be subject to second-guessing by an unelected federal judiciary." *Id.* at 1613-14 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905); *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974); *Garcia v. San Antonio MTA*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)). Thus, while there is no established precedent to suggest that Defendants' limitations were unconstitutional, there *is* established precedent to demonstrate that, in enacting the Challenged Orders, Defendants acted within the limits of their Constitutionally entrusted duty to guard and protect the safety and health of the people of New Mexico. *See Bojicic v. DeWine*, 569 F. Supp. 3d 669, 692, No. 21-cv-630 (N.D. Ohio Oct. 27, 2021) (noting that when the Director of the Ohio Department of Health issued orders closing non-essential businesses, "*Jacobson* endorsed the constitutionality of her having done so"). Given this binding precedent, "it is simply irrational to assert that a reasonable health official would have known that imposing business closings in response to a pandemic clearly violated Supreme Court precedent." *Id.*

Indeed, "courts around the country have addressed qualified immunity for government officials at the 12(b)(6) stage regarding Covid-19 measures and found government officials to be immune from suit in their personal capacities." *Pleasant View Baptist Church v. Beshear*, No. 20-cv-166, 2021 WL 4496386, at *8 (E.D. Kty. Sept. 30, 2021) ("After examining the applicable precedent, particularly in light of a global

pandemic, Pleasant View cannot demonstrate that Governor Beshear's issuance of [an executive order temporarily halting in person learning] violated a clearly established constitutional right, and qualified immunity will be granted on that basis."). *See, e.g.*, *Bojicic*, 569 F.Supp.3d at 692 (dismissing all monetary claims against all defendants on basis of qualified immunity, and explaining that "[t]he numerous decisions upholding such orders clearly demonstrate that a reasonable person in the Health Director's position would not have 'known' that enacting the orders at issue here would violate the law"); *Benner v. Wolf*, No. 20-cv-775, 2021 WL 4123973, at *5 (M.D. Pa. Sept. 9, 2021) (dismissing plaintiffs' federal damages claims on the basis of qualified immunity and explaining that, "[w]hen Defendants imposed the challenged COVID-19 restrictions, no Supreme Court precedent, Third Circuit precedent, or robust consensus or persuasive authority had held that similar restrictions violated clearly established law"); *Northland Baptist Church of St. Paul, Minn. v. Walz*, 530 F.Supp.3d 790, 807 (D. Minn. 2021) (finding that it was "not clear that Governor Walz had fair warning that the [executive orders limiting the number of people allowed in buildings] violated Plaintiffs' rights, if they in fact do so," and, accordingly, dismissing claims against Governor Walz in his individual capacity on basis of qualified immunity); *Case v. Ivey*, 542 F.Supp.3d 1245, 1284-85 (M.D. Ala. 2021) (granting qualified immunity to Governor Ivey in motion to dismiss context following litigation challenging her proclamation of a national emergency and subsequent orders intended to combat

COVID-19); *Hartman v. Acton*, 499 F. Supp. 3d 523, 538 (S.D. Ohio 2020) (granting qualified immunity to Ohio Department of Health director in motion to dismiss context following issuance of stay at home order in response to COVID-19 pandemic).

Consistent with these decisions, the Court finds that "existing precedent did not clearly establish Plaintiffs' rights at the time of the alleged violations so as to put [Defendants'] conduct [in issuing the Challenged Orders] beyond debate." *Northland Baptist Church*, 530 F.Supp.3d at 807. Accordingly, Defendants would be entitled to qualified immunity on Plaintiffs' proposed claims against them in their individual capacity. For this reason, it would be futile to grant Plaintiffs leave to amend the SAC to add a claim for money damages against Defendants.

B. Plaintiffs Cannot State a Takings Claim

Plaintiffs also seek leave to amend the SAC to add a new cause of action for "unlawful taking under the United States Constitution Fifth Amendment." Doc. 37-1 at 9. Specifically, Plaintiffs claim that, by enacting the Challenged Orders, Defendants imposed "a negative servitude prohibiting the entry of the public to Plaintiffs' business," and request "just compensation for the property taken by the Defendants acting individually under the color of law through the imposition of Public Health Orders." *Id.* at 6, 9.

As an initial matter, as Defendants argue, "takings actions sound against governmental entities rather than individual state employees in their

individual capacities." *Langdon v. Swain*, 29 F. App'x 171, 172 (4th Cir. 2002); *see also Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) (holding that an individual cannot "commit, and be liable in damages for, a 'taking' under the fifth amendment").2 Any proposed takings claim against Defendants in their individual capacity thus would be subject to dismissal. *Langdon*, 29 F. App'x at 172. It follows that it would be futile to allow Plaintiffs to amend the SAC to add a takings claim against Defendants in their individual capacity.

It would be equally futile to allow Plaintiffs to amend the SAC to name Defendants in their official capacity for purposes of their proposed takings claim. "There are two distinct types of takings: per se physical takings and regulatory takings." *KI Florida Props., Inc. v. Walton Cty.*, No. 20-cv-5358, 2021 WL 5456668, at *3 (N.D. Fla. Oct. 15, 2021). Physical takings, which involve governmental appropriation of "private property for itself or a third party," are governed by a "simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, ––– U.S. ––––, 141 S. Ct. 2063, 2071, 210 L.Ed.2d 369 (2021). In contrast, where the government "instead imposes regulations that restrict an owner's ability to use his [or her] own property, a different standard applies." *Id.* Specifically, "[t]o determine whether a use restriction effects a taking," the court generally applies "the flexible test" set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), which balances "factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the

character of the government action." *Cedar Point*, 141 S. Ct. at 2072.

In *Cedar Point*, the Supreme Court clarified that whether a taking is a *per se* physical taking or a regulatory taking does not depend on "whether the government action at issue comes garbed as a regulation," but rather on "whether the government has physically taken property for itself or someone else – by whatever means – or has instead restricted a property owner's ability to use his own property." *Id.* Accordingly, "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Id.* Applying this standard, the *Cedar Point* Court held that an "access regulation" that granted "union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year," "appropriates a right to invade the growers' property and therefore constitutes a *per se* taking." *Id.*

In their Motion to Amend, Plaintiffs argue that, under *Cedar Point*, the Challenged Orders effected a *per se* physical taking by "impos[ing] a servitude that required businesses be outright closed such that the public could not access the private property or later restricting the manner or hours in which the public could access that private property." Doc. 41 at 2. This argument, however, fundamentally misunderstands the holding and rationale of *Cedar Point*. As described above, the *Cedar Point* Court drew a bright-line distinction between a regulation that results in a physical appropriation of property and one that restricts an owner's ability to use its property. Only the

former is a *per se* physical taking; the latter is a regulatory taking, generally subject to the *Penn Central* balancing test. And while Plaintiffs in fact quote from and emphasize the very language in *Cedar Point* drawing this distinction, *see* Doc. 41 at 2, Plaintiffs fail to grasp that this language places the Challenged Orders squarely outside the camp of a *per se* physical taking.

The *Cedar Point* Court found that the regulation at issue before it was a *per se* physical taking precisely because, "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Cedar Point*, 141 S. Ct. at 2072. In contrast, the Challenged Orders at issue here "did not authorize an intrusion, even temporarily," or "take the property for use by the [state], the public, or anyone else." *KI Florida Props.*, 2021 WL 5456668, at *5. Indeed, quite to the contrary, the Challenged Orders explicitly restrained Plaintiffs' use of their property. Thus, far from supporting their position, *Cedar Point* makes clear that the Challenged Orders did not effect a *per se* physical taking. *See KI Props.*, 2021 WL 5456668, at *5 (holding that, under *Cedar Point*, ordinance temporarily restricting plaintiffs from accessing their beachfront property did not effect a *per se* physical taking); *Skatemore, Inc. v. Whitmer*, No. 21-cv-66, 2021 WL 3930808, at *5 (W.D. Mich. Sept. 2, 2021) (holding that *Cedar Point* and its rationale did not apply where executive ordinances temporarily closed businesses, including plaintiffs' bowling establishments).

Nor does the Court find that the Challenged Orders effected a regulatory taking requiring compensation.3 "A regulatory taking occurs when private property rights are eliminated or diminished through government regulation." *KI Props.*, 2021 WL 5456668, at *5. There are two types of regulatory takings: categorical takings, "in which the property owner is deprived of all economically viable use of the property," and non-categorical takings, which include "anything less and [are] subject to analysis under the [*Penn Central*] balancing test." *Id.* Categorical takings are limited to those "in which a regulation permanently deprives property of all value." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). Plaintiffs do not allege that the Challenged Orders permanently deprived their property of all value and, indeed, acknowledge that they are no longer subject to any restrictions on the use of their property. *See* Doc. 37-1 at 4. "A temporary restriction on use like the one at issue here does not necessarily require compensation," but rather is subject to the *Penn Central* balancing test. *Skatemore*, 2021 WL 3930808, at *4.

Under *Penn Central*, the Court weighs "(1) the economic impact of the regulation on the property, (2) the property owner's reasonable investment-backed expectations for development, and (3) the character of the government regulation." *KI Props.*, 2021 WL 5456668, at *5. "The *Penn Central* test is driven by justice and fairness, and the outcome depends largely upon the particular circumstances of the case." *Id.*

(citation omitted). While Plaintiffs' allegations may be sufficient to establish that the Challenged Orders had a significant economic impact on them, they fall short of establishing that the remaining two factors tip the balance in their favor. As to their investment-backed expectations, while "Plaintiffs understandably expected to conduct business as usual when 2020 began, the pandemic forced everyone to adjust their expectations." *Skatemore*, 2021 WL 3930808, at *4. "Plaintiffs cannot plausibly contend that they expected to continue operating normally when doing so posed an obvious risk of spreading a contagious and dangerous virus." *Id.* "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (citations omitted).

Perhaps most importantly, "the character of the government action here strongly weighs against a finding that the [Challenged Orders] require compensation." *Skatemore*, 2021 WL 3930808, at *4. The circumstances in which Defendants enacted the Challenged Orders "are extraordinary and unprecedented." *KI Props.*, 2021 WL 5456668, at *5. In the throes of the pandemic, Defendants "acted pursuant to a state declaration of emergency to protect public health, and for a limited time." *Id.* Thus, this is "a situation in which government officials 'reasonably concluded that the health, safety, [ ] or general welfare

would be promoted by prohibiting particular contemplated uses of land.' " *Skatemore*, 2021 WL 3930808, at *4. As noted above, "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *Hill v. Colorado*, 530 U.S. 703, 715, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citation omitted). It follows that "[a] prohibition simply upon the use of property for purposes that are declared ... to be injurious to the health [ ] or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668-69, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

Accordingly, the balance of the *Penn Central* factors weighs against a finding that the Challenged Orders effected a regulatory taking requiring compensation. Plaintiffs' proposed takings claim, even if alleged against Defendants in their official capacity, thus would be subject to dismissal for failure to state a claim. In reaching this conclusion, the Court is in accord with the many other courts that have dismissed "complaints alleging that closure orders and other business restrictions implemented in response to the pandemic constituted a taking under the Fifth Amendment." *Skatemore*, 2021 WL 3930808, at *5 (citing *TJM 64, Inc. v. Harris*, 526 F.Supp.3d 331, 334-35 (W.D. Tenn. 2021)) (dismissing a Fifth Amendment takings claim challenging closure of limited-service restaurants); *Daugherty Speedway, Inc. v. Freeland*, 520 F.Supp.3d 1070, 1076 (N.D. Ind. 2021) (same for closure of a racetrack); *Lebanon Valley Auto Racing Corp. v. Cuomo*, 478 F. Supp. 3d 389, 403 (N.D.N.Y.

2020) (same)); see also *KI Props.*, 2021 WL 5456668, at *5 (holding that orders temporarily restricting plaintiffs' access to their beach property in an effort to safeguard the community against COVID-19 was not an unconstitutional taking). Because Plaintiffs would not be able to state a takings claim, it would be futile to grant leave to amend the SAC to add such a claim against Defendants in their official capacity.

* * *

As the Court has concluded that it would be futile to grant Plaintiffs leave to amend the SAC either to add a damages claim against Defendants in their individual capacity or to add a takings claim against Defendants (in any capacity), Plaintiffs' Motion to Amend will be denied. Accordingly, the SAC remains the operative document in this matter.

II. Mootness

In their Motion to Dismiss, Defendants argue that the SAC should be dismissed for failure to state a claim. Before reaching the merits of that motion, however, this Court "must be sure of its own jurisdiction." *Krach v. Holcomb*, No. 20-cv-184, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)). "For this reason, an objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage of the litigation, even after trial and entry of judgment." *Krach*, 2020 WL 2197855, at *2

(citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)).

Here, because none of the Challenged Orders remains in effect, the Court asked the parties to brief the issue of whether this Court lacks subject matter jurisdiction. Doc. 36. Plaintiffs argue that this Court continues to have jurisdiction over this matter. Doc. 38. Defendants disagree. Doc. 39. Guided by the principles that follow, the Court finds that the rescission, amendment, and/or expiration of the Challenged Orders render this case moot, thereby depriving this Court of jurisdiction.

A. Standard

"Article III of the Constitution permits federal courts to decide only 'Cases' or 'Controversies.' " *New Mexico Health Connections v. United States Dep't of Health & Human Servs.*, 946 F.3d 1138, 1159 (10th Cir. 2019) (quoting U.S. Const. art. III, § 2). "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016) (citation omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* "Mootness deprives federal courts of jurisdiction." *Id.*

A case becomes moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* In determining whether a case is moot, the "crucial question is whether granting a

present determination of the issues offered will have some effect in the real world." *Id.* at 1165-66. In other words, "a case becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Id.* at 1166.

There are two exceptions to the doctrine of mootness – "situations in which a case remains subject to federal court jurisdiction notwithstanding the seeming extinguishment of any live case or controversy." *Id.* The first exception to mootness is where a case involves disputes that are "capable of repetition, yet evading review." *Id.* This "exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* "[T]he plaintiff bears the burden of establishing the issue is a wrong capable of repetition yet evading review." *Ind v. Colorado Dep't of Corr.*, 801 F.3d 1209, 1215 (10th Cir. 2015). "The exception is narrow and is only to be used in exceptional situations." *Id.* (citation omitted).

The second exception to mootness is "a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010). This exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Id.* (citation omitted). Thus, "this exception exists to counteract the possibility of a defendant

ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Id.* (citation omitted).

Notably, however, a defendant's voluntary cessation may moot a case "if two conditions are satisfied: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocable eradicated the effects of the alleged violation." *Id.* (citation omitted). The party asserting mootness has the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (citation omitted).

This burden, however, "is not insurmountable, especially in the context of government enforcement." *Brown*, 822 F.3d at 1167; *see also Rio Grande Silvery Minnow*, 601 F.3d at 1116 ("In practice, [this] burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case."). "Thus, even when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute." *Rio Grande Silvery Minnow*, 601 F.3d at 1116. In the context of governmental action, "most cases that deny mootness rely on *clear showings* of reluctant submission [by government actors] and a desire to return to the old ways." *Id.* at 1117 (emphasis in original). Accordingly, the Tenth Circuit has held that, where a legislature has repealed or amended a statute after a judicial challenge has been commenced, "the voluntary-cessation exception has no application where there is no evidence in the record to indicate that

the legislature intends to reenact the prior version of the disputed statute." *Id.* (citation omitted).

Similarly, "the withdrawal or alteration of administrative policies can moot an attack on those policies." *Id.* (citation omitted). "And the mere possibility that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy." *Id.* (citation omitted). To the contrary, "a case ceases to be a live controversy if the possibility of recurrence of the challenged conduct is only a speculative contingency." *Id.* (citation omitted).

B. The Instant Case

It is undisputed that the Challenged Orders are no longer in effect. Specifically, the March 2020 PHO was amended by the June 2020 PHO; the June 2020 PHO expired by its own terms on June 30, 2020; the July 2020 PHO expired by its own terms on July 30, 2020; and the July EO was rescinded by the February 2021 EO. Doc. 15-3; Doc. 15-4; February 2021 EO, NM Health Website. Further, on July 1, 2021, Defendants lifted "all pandemic-related occupancy restrictions on all forms of commercial activity" and, since that date, "all businesses across the state," including Plaintiffs' recreational facilities, have been able "to operate at 100 percent of maximum capacity." Office of the Governor Press Release (June 30, 2021), https://www.governor.state.nm.us/2021/06/30/n-m-to-lift-pandemic-restrictions-thursday/. Similarly, on February 10, 2021, the Governor ended the quarantine

requirements for individuals traveling into the State. February 2021 EO, NM Health Website.

Thus, as of February 10, 2021, there have been no restrictions on travel into the State, and since at least July 1, 2021, there have been no restrictions that require Plaintiffs' businesses to remain closed while others are permitted to be open, that shut down Plaintiffs' businesses without notice and an opportunity to be heard, or that ease restrictions on some businesses but not others. *See* Doc. 15 at 5-9. And in the absence of any such restrictions, the substantive due process, procedural due process, and equal protection issues presented by Plaintiffs are no longer "live." Because neither the Challenged Orders nor any other orders are currently in effect that restrict the operation of their recreational facilities or the ability of their potential clientele to patronize those facilities, Plaintiffs "no longer suffer[ ] actual injury that can be redressed by a favorable judicial decision." *Brown*, 822 F.3d at 1166. Accordingly, the instant case has become moot.

Plaintiffs argue that the first exception to the doctrine of mootness applies here, namely, that the dispute at issue is capable of repetition, yet evading review. Doc. 38 at 2. In support of this argument, Plaintiffs note that "the Governor's emergency declarations remain in effect along with Public Health Orders (PHO) that limit or prohibit public attendance to events such as the State Fair," and that it "is entirely plausible and highly likely that if the Delta Variant continues to pose complications[,] the next set of PHO's will again include requirements that limit or prohibit

attendance by the public to the businesses of these Plaintiffs." *Id.* at 2. The Court is not convinced.

First, Plaintiffs fail to address, much less establish, whether the Challenged Orders were in their duration too short to be fully litigated prior to their cessation or expiration. Accordingly, Plaintiffs fail to meet the first requirement of the "capable of repetition" exception to the mootness doctrine. Further, Plaintiffs have done no more than point to the fact that Defendants "still claim[ ] the power to issue orders of the sort" challenged here and speculate, without providing any basis for that speculation, as to the content of future orders. *County of Butler v. Governor of Penn.*, 8 F.4th 226, 231 (3rd Cir. 2021). This is not sufficient to meet the second requirement of the "capable of repetition" exception, namely, that Plaintiffs show a *reasonable likelihood* that they will be subject again to the same limitations imposed in the Challenged Orders. *Id.*

As detailed above, at the beginning of the pandemic – before there were vaccines – the science-driven data indicated that COVID-19 spread easily through close person-to-person contact, and that the risk of transmission increased if individuals interacted with more people, came within six feet of one another, and spent longer periods of time together. Given this data, Defendants determined that social distancing was the *only* way to minimize the spread of COVID-19, and at that time, was the *most effective means* of mitigating the potentially devastating impact of the pandemic in New Mexico. In accordance with these determinations, Defendants enacted a series of orders that first closed

non-essential businesses, and then gradually allowed such businesses to open with occupancy restrictions, along with an order that required a period of quarantine for travelers entering New Mexico. Those early orders included the Challenged Orders, pursuant to which Plaintiffs' recreational facilities were required to remain closed.

As the science evolved and the vaccines were developed, approved, and made available to the public, it became clear that the consistent and proper use of face masks was *one of the most effective ways* to minimize the spread of COVID-19, and that the vaccines are safe and *the most effective way* of preventing infection, serious illness, and death, even in the face of the Delta and Omicron variants. In accordance with the science, Defendants refocused their pandemic mitigation strategies away from restricting businesses and travel, and toward the vaccination rollout, which they saw as "their most powerful weapon," and mask mandates. Indeed, as early as November 2020, Defendants announced the transition to the tiered county-by-county COVID risk system, with the specific purpose of enabling local communities to shed burdensome restrictions as soon as the virus began to retreat within their borders. Under the "red to green" framework, a succession of public health orders rescinded prior public health orders and allowed, *inter alia*, outdoor and indoor recreational facilities to reopen and operate at reduced but increasing capacities commensurate with each county's decrease in COVID-19 case incidence rates and percentage of positive COVID-19 test results and

increase in vaccination rates. In February 2021, the Governor ended the quarantine requirements for travelers, thus making it possible for businesses, like Plaintiffs, to once again welcome out-of-state clientele.

Tying reopening to vaccination rates, once 60 percent of eligible New Mexicans had been fully vaccinated, the State ultimately retired its color-coded, county-by-county system and all COVID-19 health restrictions on commercial and day-to-day activity. Thus, as of July 1, 2021, all pandemic-related occupancy restrictions on all forms of commercial activity were lifted, and all businesses across the state, including recreational facilities, have since been able to operate at 100 percent of maximum capacity.

Quickly following the reopening of New Mexico, the highly transmissible Delta variant emerged, soon accounted for virtually all new infections, and caused a significant increase in new COVID-19 cases. In response to the rising tide of cases, Defendants did not reverse course and reimpose restrictions on businesses or travel into the state. Rather, in keeping with their science-driven determinations that vaccines and masks are the most effective means of limiting the spread of COVID-19, Defendants imposed vaccine and/or testing mandates on certain categories of individuals. And even with the startling ascendency of the Omicron variant and the skyrocketing numbers of infections and hospitalizations it has caused, Defendants have not reversed course and reimposed restrictions on businesses or travel into the state. Rather, Defendants have extended the mask requirement, and have

mandated that certain individuals receive booster vaccines.

Thus, despite "complications" from not only the Delta variant but also the Omicron variant, Plaintiffs' prediction that future public health orders will "again include requirements that limit or prohibit attendance by the public to the businesses of these Plaintiffs" has not come to pass. To the contrary, the trajectory of Defendants' response to COVID-19 has consistently moved away from restrictions on businesses and travel and toward vaccine and mask mandates. Given this trajectory, coupled with the scientific basis for that trajectory showing that masks and vaccines, rather than business closures, are the most effective means of containing the spread of COVID-19, there is no reasonable expectation that Defendants will reverse course and subject Plaintiffs to restrictions akin to those imposed under the now-defunct Challenged Orders. *See Hawse v. Page*, 7 F.4th 685, 692-93 (8th Cir. 2021) (finding moot challenge to pandemic-related order limiting religious gatherings to fewer than 10 persons, noting that the "disputed order was superseded in May 2020 in light of changing public health conditions," that circumstances, including the "emerging availability of vaccines," have "evolved substantially since then," and that, "[a]lthough the emergence of the Delta variant of the coronavirus led the County on July 26, 2021, to require the use of face coverings at indoor and enclosed public buildings and spaces, there are no gathering restrictions in effect"); *Illinois Republican Party v. Pritzker*, No. 20-cv-3489, 2021 WL 4077624, at *3 (N.D. Ill. Sept. 7, 2021) (finding moot challenge to pandemic-

related gathering limits despite plaintiffs' argument that no guarantee existed that the government would not impose new gathering limits in response to a surge in COVID-19 cases, where the gathering limits ended five months earlier, and where the Governor, "to address the most recent surge, instead of imposing gathering limits," "reimposed an indoor mask mandate and required vaccinates for [certain individuals]"); *Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (finding that plaintiffs failed to establish that the Governor "might reimpose another gathering restriction on places of worship" where the "trend in Louisiana has been to reopen the state, not close it down," and that while "no one knows what the future of COVID-19 holds," it is "speculative, at best, that the Governor might reimpose the two-person restriction or a similar one"); *Martinko v. Whitmer*, 465 F. Supp. 3d 774, 777 (E.D. Mich. 2020) ("Plaintiffs' assertion that there is a good chance that these restrictions will come back is pure speculation and does not suffice to avoid the conclusion that their request for [ ] relief is moot."). Accordingly, the "capable of repetition" exception does not apply here.

Because they are inapposite, the cases cited by Plaintiffs do not alter this conclusion. Specifically, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court rejected the argument that challenges to New York's gathering limitations were moot. —— U.S. ——, 141 S. Ct. 63, 208 L.Ed.2d 206 (2020). "[I]n that case, the governor had not removed all capacity limitations, and the possibility that a stricter restriction could apply remained likely." *Illinois Republican*

Party, 2021 WL 4077624, at *3 (citing *Roman Catholic Diocese*, 141 S. Ct. at 68 ("The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained.")). Similarly, in *Tandon v. Newsom*, the relevant officials had changed the restrictions on gatherings "shortly after" the plaintiffs filed their challenge, "the previous restrictions remained in place," and "officials with a track record of 'moving the goalposts' retain[ed] authority to reinstate those heightened restrictions at any time." —— U.S. ——, 141 S. Ct. 1294, 1296, 209 L.Ed.2d 355 (2021). In contrast here, all restrictions on business operations, including Plaintiffs' recreational facilities, ended as of July 1, 2021, and Defendants have "no track record of 'moving the goalposts' in a way that places [Plaintiffs] under a constant threat of renewed [restrictions on their facilities]." *Hawse*, 7 F.4th at 693. Accordingly, in this case, "despite the surge in cases, no credible threat exists as to the[ ] reinstatement" of the restrictions that Plaintiffs challenge in this action. *Illinois Republican Party*, 2021 WL 4077624, at *3.

Nor do Plaintiffs argue, or does the Court find, that the "voluntary cessation" exception to the doctrine of mootness applies here. For the reasons discussed above, Defendants have assured the Court that the challenged restrictions cannot reasonably be expected to recur. Further, "none of the circumstances surrounding the voluntary lifting of restrictions indicate[s] the type of manipulative behavior the

voluntary-cessation exception is meant to address." *Let Them Play MN v. Walz*, 21-cv-79, 556 F.Supp.3d 968, 978 (D.Minn. Aug. 24, 2021). Defendants are cognizant of the "economic toll" that the earlier restrictions took on businesses, Doc. 39 at 6, and have shifted their strategy away from such restrictions toward mask and vaccine mandates, not "to evade judicial review in this case," but rather to use the most effective means to stem the spread of COVID-19, in keeping with CDC guidance and the state's progress on vaccine administration. *Let Them Play MN v. Walz*, 556 F.Supp.3d at 978. There is thus no evidence to indicate that Defendants intend to reimpose business and travel restrictions; accordingly, the alteration of Defendants' earlier policies moots Plaintiffs' attack on those policies. *Rio Grande Silvery Minnow*, 601 F.3d at 1117.

Admittedly, "there is always some uncertainty about the future course of the pandemic." *Let Them Play v. Walz*, 556 F.Supp.3d at 978 (citation omitted). The emergence of the Delta and Omicron variants have "presented new concerns and inspired new public-health measures." *Id.* Nonetheless, the fact "that the government once imposed a particular COVID restriction does not necessarily mean that litigation over a defunct restriction presents a live controversy in perpetuity." *Hawse*, 7 F. 4th at 692. "[F]inding a live controversy would require both scientific and political speculation – *i.e.*, that the pandemic will proceed in a particular way, and that [New Mexico's] political branches will decide to reimpose the particular restrictions challenged in this case." *Let Them Play v. Walz*, 556 F.Supp.3d at 978–79. Faced with no more

than such a "speculative contingency," *Rio Grande Silvery Minnow*, 601 F.3d at 1117, the "better answer" is to find Plaintiffs' claims to be moot. *Let Them Play v. Walz*, 556 F.Supp.3d at 578–80. Accordingly, neither Defendants' voluntary cessation of the Challenged Orders, nor the "mere possibility" that Defendants might change course on their current pandemic strategies, works to enliven the moot controversy presented in this action.4 *Rio Grande Silvery Minnow*, 601 F.3d at 1117.

CONCLUSION

As set forth herein, it would be futile to grant Plaintiffs leave to amend the SAC either to add a damages claim against Defendants in their individual capacity or to add a takings claim against Defendants (in any capacity). Accordingly, the Court will not grant Plaintiffs leave to amend the SAC. Further, no live controversy remains in this action because none of the Challenged Orders remains in effect, and neither the "capable of repetition" exception nor the "voluntary cessation" exception to the doctrine of mootness applies here. Accordingly, the Court must dismiss this action for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiffs' 2nd Amended Complaint [Doc. 17] is **GRANTED** and Plaintiffs' Opposed Second Motion to File Third Amended Complaint [Doc. 37] is **DENIED**.

Footnotes

1Indeed, in their reply brief, Plaintiffs do not mention, much less provide any response in opposition to, Defendants' argument that they would be entitled to qualified immunity on Plaintiffs' proposed damages claims.

2In their reply brief, Plaintiffs fail to acknowledge that they have brought this action against Defendants only in their individual capacity, much less address the ramifications of that choice for their proposed takings claim.

3In seeking to amend the SAC to add a takings claim, Plaintiffs rely solely on the theory that the Challenged Orders effected a per se physical taking under *Cedar Point* and do not address whether, in the alternative, the Challenged Orders effected a regulatory taking requiring compensation. Nonetheless, the Court finds it prudent to address all alternatives in deciding whether leave to amend should be granted.

4The Court is aware that another Court in this District reached a contrary conclusion. *See* *ETP Rio Rancho Park v. Lujan Grisham*, 21-cv-92, 564 F.Supp.3d 1023, 1069 (D.N.M. Sept. 30, 2021) (holding that "because the emergency remains ongoing and the State continues to issue PHOs," the issue in the case before it, namely restrictions on trampoline parks, remained live). Several months have passed since the *ETP* decision, and while the emergency does indeed remain ongoing, none of the subsequent orders issued by Defendants has imposed business restrictions. Given the record as it has developed since *ETP*, the Court finds that the

weight of authority counsels against finding that the controversy here remains live.

1/24/23

United States Court of Appeals, Tenth Circuit.

HINKLE FAMILY FUN CENTER, LLC; Bryan Hinkle; Douglas Hinkle; Albuquerque Urban Air, LLC; Thomas Garcia; Brian Garcia; Justin Hays, Plaintiffs - Appellants,

and

Cliff's Amusement Park, Plaintiff,

v.

Michelle Lujan GRISHAM, individually, acting under the color of law; Kathyleen M. Kunkel, individually, acting under the color of law, Defendants - Appellees.

No. 22-2028

D.C. No. 1:20-CV-01025-MV-LF) (D. New Mexico)

Before HARTZ, McHUGH, and MORITZ, Circuit Judges.

ORDER

Appellants' petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk