No. _____

In the Supreme Court of the United States

ERICA BOJICIC, dba Evolve Dance Company, *et al.*,
Petitioners,

v.

RICHARD MICHAEL DEWINE, individually and in his official capacity as GOVERNOR OF THE STATE OF OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS B. RENZ
1907 West State Street, Suite 162
Fremont, Ohio 43420

ROBERT J. GARGASZ
Counsel of Record
1670 Cooper Foster Park Road
Lorain, Ohio 44053
(440) 960-1670
rjgargasz@gmail.com

Counsel for Petitioners

QUESTION PRESENTED

Is the government required to prove with evidence that its action taken during an emergency which intrudes on private property rights was a necessity in order to be relieved of its duty of compensation for a taking under the Fifth Amendment?

LIST OF PARTIES

PETITIONERS

Erica Bojicic, dba Evolve Dance Company, LLC;

Kenneth Edward Ican, dba Rock City Dance, Inc.;

David A. Ross, II, dba DA Ross Holdings, LLC, dba Crystal Ballroom;

Emily Mertens, dba Ballroom Dance Experience, dba Movement Enterprises, LLC;

Jeffrey Goltiao, dba Dance Edge;

Randy Clinger, dba UA Fitness, LLC;

Jerry Satava, dba Hudson Ballroom Company, dba In-Flight Ballroom Company, dba Mambo Kings Inc.;

Lisa Ferrara, dba Your Next Move, LLC;

Sergi Bakalov, dba Columbus Dance Sport, LLC;

Joshua L. Tilford;

Darcy Sines, dba Miss Darcys Academy of Dance and Art, LLC;

Michael Scoggins, dba Ohio Ballroom;

Amanda Shane, dba Count Me In, LLC.

RESPONDENTS

Richard Michael DeWine, individually and in his official capacity as the Governor of the State of Ohio;

Stephanie B. McCloud, in her individual capacity;

Lance Himes, in his individual capacity;

Amy Acton, in her individual capacity;

Sovereign State of Ohio;

Joseph Mazzola, individually and in his official capacity as Health Commissioner, Director of Franklin County Public Health;

Peter Schade, individually and in his official capacity as Health Commissioner, Director of Erie County Health;

David P. Covell, individually and in his official capacity as Health Commissioner, Director of Lorain County Health;

Terry Allan, individually and in his official capacity as Health Commissioner, Director Cuyahoga County Board of Health;

Melba R. Moore, individually and in her official capacity as Health Commissioner, Director of the Cincinnati Health Department offices;

Mysheika Roberts, individually and in her official capacity as Health Commissioner, Director of the Columbus Public Health;

Eric Zgodzinski, individually and in his official capacity as Health Commissioner, Director of the Toledo-Lucas County General Health Department;

Kirkland Norris, individually and in his official capacity as Health Commissioner, Director of the Stark County Public Health with offices;

Donna Skoda, individually and in her official capacity as Health Commissioner, Director of the Summit County Public Health;

Bruce Vanderhoff, in his official capacity as the Director of the Ohio Department of Health;

Ron Graham, individually and in his official capacity as Health Commissioner, Director of Lake County General Health District.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

LIST OF DIRECTLY RELATED CASES

Bojicic v. DeWine, No. 21-4123, 2022 U.S. App. LEXIS 23652 (6th Cir., 2022).

Bojicic v. DeWine, Case No. 3:21-CV-00630-JGC, 569 F. Supp. 3d 669 (N.D. Ohio 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Erica Bojicic, *et al.,* respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of the district court are reported at *Bojicic v. DeWine*, 569 F. Supp. 3d 669 (N.D. Ohio 2021) (dismissal order), appearing at Appendix C; and *Bojicic v. DeWine*, No. 3:21-CV-00630-JGC, 2022 U.S. Dist. LEXIS 2344 (N. D. Ohio, Jan. 5, 2022) (denial of motion to stay sanctions proceeding), appearing at Appendix B. The opinion of the court of appeals is reported at *Bojicic v. DeWine,* No. 21-4123, 2022 U.S. App. LEXIS 23652 (6th Cir., Aug. 22, 2022), and appears at Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The **FIFTH AMENDMENT** of the Constitution of the United States provides that private property shall not be taken for public use without just compensation, stating in relevant part: "nor shall private property be taken for public use, without just compensation."

The **NINTH AMENDMENT** provides that non-enumerated rights are retained by the people, stating:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The **ELEVENTH AMENDMENT** provides that States are immune from suit by citizens of another State or of foreign citizens or subjects, stating:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The **FOURTEENTH AMENDMENT** provides that States may not deny citizens the rights ensconced in the Constitution, stating in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representative regulations involved — three Director's Orders from the Ohio Department of Health dated March 21, 2020; March 22, 2020; and May 22, 2020 — are set forth in pertinent part in Appendices D, E, and F, respectively.

STATEMENT OF THE CASE

Petitioners ask the court to consider whether police powers exercised during a public emergency equate to a special character or an overriding public purpose under regulatory takings analysis so as to foreclose any claims for compensation for government intrusion into private property rights under the Fifth Amendment. The circuit courts have reached different conclusions on this exact issue which is important to the administration of justice and preservation of individual rights.

Petitioners challenged statewide orders closing dance studio businesses during the Covid-19 public emergency. On March 21, 2020, Petitioners' businesses were specifically ordered closed.[1] On March 22, 2020, Petitioners' businesses were shut down as nonessential, and gatherings of over 10 people were prohibited.[2] On May 22, 2020, Petitioners' businesses were ordered reopened *only* if they operated under onerous "safety" regulations, including the wearing of masks and "social distancing" of six feet,[3] which further destroyed Petitioners' businesses. Petitioners' dance studios were restricted, destroyed and taken without compensation by Ohio officials. Dance studio owners were deprived of the right to work and the beneficial use of their property, and faced an indefinite closure and/or restriction. The orders were enforced with civil and criminal penalties.

The complaint in the district court was dismissed on Rule 12 motions to dismiss and a motion for judgment on the pleadings. *Bojicic v. DeWine*, 569 F. Supp. 3d 669, 696 (N.D. Ohio 2021). The government

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[1] Appendix D, 71a.
[2] Appendix E, 73a-74a.
[3] Appendix F, 79a-81a.

Respondents presented no evidence for their defense, and the district court relied upon rational basis analysis — which does not require any evidence from the government to justify its actions — to make its conclusions. The district court dismissed Petitioners takings claim, stating that "Where a state 'reasonably conclude[s] that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land,' the state is not required to provide just compensation to the citizens affected by the regulation." *Bojicic*, 569 F. Supp. 3d at 689-690 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978)). App. C, 57a.

The Sixth Circuit reversed on that specific issue, stating that a mere invocation of police power will not categorically invalidate a takings claim, *Bojicic v. DeWine*, 6th Cir. No. 21-4123, 2022 U.S. App. LEXIS 23652, at *24 (Aug. 22, 2022). However the Sixth Circuit then ruled that the "character" of the government action barred compensation all the same, stating "First, the action was taken to protect public health by reacting quickly in the face of a fast-spreading and novel virus. ... Second, the shutdown orders were in effect for only a little over two months." *Id.*, at *26-27. The Sixth Circuit erred in its ruling. In its first point, the appeals court merely reiterated the government's reason for the action, *i.e.,* a valid police power, which is a precedent, not a bar, to a takings claim. Its second point does not invalidate a takings claim either, because temporary takings are still compensable takings. *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23, 32 (2012).

Courts are charged with a fact-based analysis of takings claims under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Courts should

not be permitted, let alone encouraged, to accept any plausible reason for a government regulation whether in an emergency or not, without any evidence whatsoever, as a complete defense to a taking under the Fifth Amendment.

Courts at this point feel quite comfortable disparaging any plaintiff who questions the governmental motives related to Covid-19 regulations. Consider this statement from the Sixth Circuit in the below appeal:

> The Plaintiffs criticize this conclusion [that the action was taken to protect public health] as demonstrating "unconscious or implicit bias towards the official government narrative on the dangers posed by Covid-19 and the unscientific methods for its containment." *This extraordinary assertion is presented without any factual support.* And beyond the fact that it presupposes conspiratorial bad faith on the part of a variety of state officials, it ignores the fact that these orders were issued at the very beginning of the pandemic, when no government official could possibly have had the kind of information about the efficacy of its particular actions that the Plaintiffs demand.

Bojicic, 6th Cir. No. 21-4123, 2022 U.S. App. LEXIS 23652, at *26 (emphasis added). App. A, 19a-20a.

The standard of review for appeals from decisions made upon a motion to dismiss or motion for judgment on the pleadings is *de novo*. *Edwards v. United States*, 371 F.Supp.2d 859 (W.D. Ky. 2005). Neither the district court nor the Sixth Circuit required any evidence to prove the assertions made

by government defendants. The Sixth Circuit accepted the government's version of the facts whole cloth. The Sixth Circuit twisted Petitioners' argument that implicit or unconscious bias may be present in these Covid-19 cases into what it deemed to be an extraordinary assertion presented without any factual support, and a presupposition of conspiratorial bad faith. *Bojicic*, 6th Cir., at *26. Neither the Petitioners nor the court knows what information the government officials had at the beginning of the Covid-19 emergency, because no one was allowed to look at any evidence. Even a blind man can see the double standard here.

The plausibility pleading standard established under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), taken in conjunction with the holdings of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) and *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022), discussed below, poses serious legal difficulties for legitimate civil rights claims, and contravenes Supreme Court jurisprudence in regulatory takings cases. Allowing this precedent to stand requires civil rights plaintiffs to disprove nearly every conceivable defense of the government for its action without access to discovery. Now, the government and a split of circuit courts seek to expand this impossible pleading standard to regulatory takings claims when the challenged government actions are ensconced in a proclaimed emergency. This precedent opens wide the door to government regulatory overreach.

There is no doubt that these issues are important and unsettled. The Court should grant this petition.

REASONS FOR GRANTING THE WRIT

Neither a public purpose nor police power invalidates a takings claim. Government defendants must prove necessity to avoid their obligation to compensate property owners for takings under the Fifth Amendment.

I. A public purpose is always a condition antecedent to a Fifth Amendment Taking.

The government is never permitted take private property without a proper public purpose.

If a government action intrudes on property rights without a proper public purpose, then an action will lie in due process. A due process violation, *i.e.,* where the government acted with improper purpose or outside of its police power, has an analysis separate and different from an analysis for a takings action. In a due process claim, a strict scrutiny test will apply if fundamental rights are infringed upon or if the plaintiff is a member of a protected class. *Burdick v. Takushi*, 504 U.S. 428 (1992) (voting rights); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (resident aliens are a protected class). The rational basis test applies to all other rights claimed under a cause of action for violation of due process, for example, challenges to government regulations.

Despite courts' assurances that they have not made it impossible to challenge government regulations, the burden of proof on plaintiffs pressing claims for due process violations can be monumental. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. at 488, sets a high bar for plaintiffs: "It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular

legislative measure was a *rational* way to correct it." (emphasis added.) Justice Douglas, dissenting, also stated the inevitable result of such burden of proof — the "day is gone," he said, when Fourteenth Amendment challenges to state licensing laws could succeed *Id*.

Tiwari v. Friedlander, 26 F.4th 355 (6th Cir. 2022), gave lip service to plaintiffs' property rights, but then proceeded to prove Justice Douglas' dissent in *Williamson* to be prophetic. The *Tiwari* court approved Kentucky's certificate-of-need law with the general rational basis test and ruled exactly as Justice Douglas predicted. Despite plaintiffs laying out a "powerful case," Kentucky's law passed the rational basis test, barely. See *Tiwari* at 363-364; petition for certiorari filed July 12, 2022, No. 22-42.

Government interferences with private property rights done with improper purpose and without police power are due process violations, not takings. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 548 (2005). Due process analysis, with its rational basis evidentiary hurdle, does not apply to takings claims. *See also First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987) which stated that at least since *Jacobs v. United States*, 290 U.S. 13 (1933), claims for just compensation are grounded in the Constitution itself. "This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English,* at 315.

Petitioners lay out the previous explanation of the basics of the rational basis test in due process cases for three reasons. First, to demonstrate how difficult it is to challenge government regulations in

the cases where rational basis analysis *does* apply. Second, to point out that this analysis does *not* apply at all to takings claims. The third reason is to provide a background for the explanation below of how courts are improperly applying the rational basis test when evaluating regulatory takings.

Multiple courts believe the rational basis analysis applies in a takings matter. It does not. The district court in the instant matter held that the Petitioners were engaged in "fallacy" in an "attempt to treat a health-related order issued under the police power as a taking." *Bojicic,* 569 F. Supp. 3d at 690. App. C, 56a. To support this holding, the district court cited a criminal forfeiture case as an example of police power superseding a takings claim, *United States v. Droganes*, 728 F.3d 580, 591 (6th Cir. 2013). The district court quoted *Penn Central*, where the Supreme Court quoted a zoning case based upon a Fourteenth Amendment due process analysis. See *Penn Central,* at 125, citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). The district court also relied on *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019)(unpublished); the *Lech* court improperly held that police power superseded takings claims. None of these legal analyses is applicable to the instant takings claim.

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In a takings claim, the plaintiff admits the legitimacy of the government action and seeks compensation for intrusion on property rights.

A public purpose is antecedent to any government taking of private property under the Fifth Amendment. In a takings action against the government, the property owner concedes a proper government purpose, and claims the right to be compensated for the taking of private property.

Because the Fifth Amendment Takings clause is self-executing, *First English*, 482 U.S. at 315, once a taking has been found, compensation must follow:

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. See *Williamson County* [*Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172] at 194; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 297, n. 40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *United States v. Jones*, 109 U.S. 513, 518 (1883). This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

First English, 482 U.S. at 314-315.

The Supreme Court has ruled that regulatory takings claims may be brought into federal courts. "Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim ...." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2179 (2019). A takings claim mostly admits the public good and seeks compensation.

Once a public purpose is acknowledged, the Penn Central *case lays out the proper analysis for regulatory takings claims.*

The regulatory takings analysis differs greatly from the analysis used in a due process claim such as *Tiwari v. Friedlander*. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124, requires a multifactor test to determine whether compensation is owed for the taking of private property under an economic regulation:

> In engaging in these essentially *ad hoc*, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and

> burdens of economic life to promote the common good.

Id. (internal citations omitted).

Each factor must be analyzed. While some factors can weigh more heavily toward the government or the plaintiffs, no one factor can be relied upon to categorically deny compensation for certain types of takings claims. Economic impact and investment expectations are fact-based inquiries that are unlikely to be properly evaluated at the pleadings stage.

The character prong of the multifactor *Penn Central* test is a descriptor for the character of the government intrusion into private property rights; it is not a descriptor of the government's motive for its actions. Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm. & Mary Bill Rts. J. 1145 (2021) at 1153 *et seq*. The character factor is not an opportunity for the government defendant to describe its police power, intention, or public purpose for its action in taking the plaintiffs' private property. Nor is it an opportunity for the court to surmise a rational basis or public purpose on behalf of the government defendant. The *Penn Central* character factor is an examination of the nature of intrusion into private property rights caused by the government action. *Id.*

II. Rational basis analysis is not the appropriate standard of review in a regulatory takings case.

The Penn Central *multifactor test has been repeatedly confirmed as law.*

The *Penn Central* multifactor test is used in regulatory takings cases where there has been no direct seizure or physical invasion of private property. The test has been affirmed as the polestar providing important guideposts that lead to the ultimate determination whether just compensation is required. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). This Court has repeatedly declined to review cases where the *Penn Central* case has been directly challenged, *e.g., Smyth v. Conservation Comm. of Falmouth*, 94 Mass. App. Ct. 790, 119 N.E.3d 1188 (2019) cert denied, 140 S.Ct. 667 (2019) (asking the court to excise the "character" factor from *Penn Central* regulatory taking analysis). But this Court has also declined to review cases where the *Penn Central* factors are incorrectly applied, *e.g., Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), cert denied 563 U.S. 988 (2011) (Appeals court failed to weigh all the *Penn Central* factors), leading to confusion and inconsistency in application among the courts.

The three factor fact-based *Penn Central* inquiry does not incorporate the levels of scrutiny used in a due process claim, because regulatory takings are takings subject to analysis under Fifth Amendment jurisprudence. As this Court stated in *First English*, a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the Fifth Amendment with respect to compensation.

Today's courts mistakenly apply the rational basis standard applicable to certain due process claims when they equate the "character" factor in the Penn Central *multifactor analysis with "police power."*

Courts across the country have disregarded the standards delineated in the *Penn Central* and Fifth Amendment jurisprudence. The district court for the Northern District of Indiana lists several cases where *Penn Central* is ignored, and proceeds itself to adopt a similar reason to deny a taking claim:

> Unsurprisingly, courts across the country agree that the final *Penn Central* factor, the character of the disputed government action during the COVID-19 pandemic, weighs heavily in Defendants' favor. See *e.g. Baptiste v. Kennealy*, 2020 U.S. Dist. LEXIS 176264, at *57-58, 2020 WL 5751572, at *22 (D. Mass. Sept. 25, 2020) (discussing the landlord-tenant relationship during the pandemic may burden landlords, but it also invariably protects tenants and others who "would be at greater risk of COVID-19 infection if displaced tenants caused or contributed to the overcrowding of other dwellings and homeless shelters, or were required to live on the streets"), *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020) ("The character of Defendants' actions and the context in which Defendants find themselves, here facing a national public health emergency, cut strongly against a finding that the COVID-19 Closure Orders amount to regulatory takings"), *Blackburn v. Dare Cty.*, 2020 U.S. Dist. LEXIS 168522, at *18-21, 2020 WL 5535530, at *8 (E.D.N.C. Sept. 15, 2020) ("[Defendant's] concededly legitimate exercise of its emergency management powers under North Carolina law to protect public health in the 'unprecedented' circumstances presented by

> the COVID-19 pandemic, [] weighed against loss of use indirectly occasioned by preventing plaintiffs from personally accessing their vacation home for 45 days, [] does not plausibly amount to a regulatory taking of plaintiffs' property"), *Luke's Catering Serv., LLC v. Cuomo,* 2020 U.S. Dist. LEXIS 165907, at *34, 2020 WL 5425008, at *12 (W.D.N.Y. Sept. 10, 2020) ("Rather, the character of the government action here is a temporary and proper exercise of the police power to protect the health and safety of the community, which weighs against a taking"), *Pcg-Sp Venture I LLC v. Newsom,* 2020 U.S. Dist. LEXIS 137155, at *31-32, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020) ("the Orders convert public health burdens into economic burdens, and reflect a judgment that the common good is best promoted by the protection of vulnerable members of society from a lethal and contagious disease, rather than the protection of some proprietary interests").

Daugherty Speedway v. Freeland, 520 F.Supp. 3d 1070, 1078 (N.D.Ind. 2021).

The cases above conflate police power with the character prong of the *Penn Central* analysis, and categorically deny takings claims by subjecting the claims to the rational basis burden of proving either government mal-intent or complete lack of any plausible reason for the regulation. Most of these claims are dismissed at the pleadings stage without discovery, that is, with a paucity of facts with which to take up the fact-based *Penn Central* analysis.

III. Police power government action does not categorically invalidate a takings claim.

A proper use of police power does not in and of itself invalidate a claim for a taking, yet courts deny relief solely on this basis.

Neither the Fifth Amendment nor takings jurisprudence deems that a taking exists only if the government action exceeds the bounds of its authority. Many courts incorrectly conclude that if the government is properly exercising its police power, then there has been no taking. See *e.g., Lech,* 791 F. App'x at 713 (no taking when officers destroyed the Lechs' home while attempting to enforce the state's criminal laws); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008) (holding that the Government seized prescription drug inventory lawfully as part of its power to investigate and prosecute suspected crimes, and the distributor was not entitled to compensation under the Takings Clause when the inventory was returned after its expiration date); *Johnson v. Manitowoc County,* 635 F.3d 331 (7th Cir. 2011) (The Fifth Amendment taking claim failed because the actions were taken under the state's police power); *Eggleston v. Pierce County,* 64 P.3d 618 (Wash. 2003) (No compensation when property owner's home was rendered uninhabitable by the execution of a criminal search warrant and preservation order); *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (Damage caused to appellant's convenience store when police officers fired tear gas into it to subdue a felony suspect was not a compensable taking); *Kelley v. Story Cty. Sheriff,* 611 N.W.2d 475 (Iowa 2000) (damage caused to plaintiff's property when law enforcement officers executed an arrest

warrant did not amount to a taking of private property). Takings jurisprudence does not permit governments to hide their intrusions into private property under the banner of police power, yet courts have so held.

The power of eminent domain is a police power. If the use of police power invalidates every takings claim, then the Takings Clause is meaningless.

The power of eminent domain is coterminous with police powers. The Fifth Amendment's "public use" requirement is thus coterminous with the scope of a sovereign's police powers. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). In the instant matter, the Sixth Circuit agreed that the use of police power does not categorically preclude compensation for a taking:

> In short, no appellate court seems to have applied the police-power language so broadly as to categorically declare that no state response to a public-health emergency could be a taking. True, this police-power exception has been applied in the context of criminal forfeitures and abating nuisances. But to hold that a regulation intended to benefit public health can *never* be a compensable taking would be an unwarranted extension of existing precedent.

Bojicic, 6th Cir. No. 21-4123, 2022 U.S. App. LEXIS 23652, at *25. App. A, 19a.

Proper analysis of Petitioners' takings claims ended there. The Sixth Circuit then proceeded, however, to equate police power with the character of

the government action test under *Penn Central*. The court claimed "character" is dispositive:

> But the third factor—the character of the government action—weighs even more heavily in the Defendants' favor. This factor is dispositive for two reasons. First, the action was taken to protect public health by reacting quickly in the face of a fast-spreading and novel virus.

Bojicic, 6th Cir. No. 21-4123, 2022 U.S. App. LEXIS 23652, at *26-27. App. A, 19a. Protecting public health is simply police power, that is, a reason for its regulations. A plausible reason for a regulation is not a bar to a takings claim. Again, the Sixth Circuit accepted the government's rationale for its actions at face value, without analysis of any evidence.

The character test of *Penn Central* is designed to ask whether the government action required some surrender of a fundamental aspect of property rights, or was the action merely a shifting of economic benefits and burdens. Given that the plaintiffs were faced with indefinite closure, there being no end date on the initial order, and complete loss of income for more than two months, the regulation did require surrender of property rights. The effects of the forced closures lasted well after the closure order was lifted, and some effects have been permanent. Next the court determined that the "character" of the regulation was "temporary" when it stated: "Second, the shutdown orders were in effect for only a little over two months." *Id.* The temporary nature of the regulation, again, does not answer the question asked by the character factor of the *Penn Central* analysis. Temporary takings are still takings. *See, e.g., Kimball Laundry Co. v. United States,* 338 U.S.

1, 6 (1949), where temporary takeover of an ongoing laundry business during wartime was a compensable taking, and *Arkansas Game & Fish Commission*, 568 U.S. at 38, which held that the temporary nature of an invasion does not automatically exempt it from compensation. The duration of a regulation bears on compensation amount, not on whether the government is liable. See *Penn Central*, 438 U.S at 124.

The Circuit Courts are split on the issue of police power categorically invalidating takings claims.

While the Sixth Circuit in *Bojicic* stated that acting pursuant to police powers *will not preclude* a takings claim, other federal courts have reached a different conclusion, including one in the ambit of the Sixth Circuit. In *TJM 64 Inc.*, 475 F.Supp.3d at 839, the district court held that using police power would likely trump a takings claim:

> Defendants, in promulgating the July 8, 2020 Order were acting pursuant to their broad police powers to address public health concerns during a national, state, and local pandemic. ... Defendants' promulgation of the July 8, 2020 COVID-19 Closure order was not for a "public use" but was instead a valid exercise of the broad police powers bestowed upon state and local officials to prevent detrimental public harms by restricting Plaintiffs' use of their property. It is unlikely that such action would require compensation under the Takings Clause.

The Tenth Circuit has held that "when the state acts pursuant to its police power, rather than the

power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause." *Lech,* 791 F. App'x at 717. The Seventh and the Federal Circuits have also held that government police power actions would invalidate takings claims in *Johnson v. Manitowoc County*, 635 F.3d 331 (7th Cir. 2011) and *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008).

The Fifth Circuit follows this Court in stating that action pursuant to police power *can* amount to a taking. As stated in the *John Corp. v. City of Houston*, 214 F.3d 573, 578 (5th Cir. 2000):

> The Supreme Court's entire "regulatory takings" law is premised on the notion that a city's exercise of its police powers can go too far, and if it does, there has been a taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

This split of authority needs a binding resolution that preserves Fifth Amendment property rights.

It is improper to use Article III standing, statutory immunity, and Eleventh Amendment sovereign immunity to deny takings claims.

Courts rarely consider standing requirements in takings claims, because it is plain to see when the government has interfered with property rights through regulation. The harm must be proximately caused by the government. *Penn Central*, at 124. In

other words, "There need be only a governmental act, the natural and probable consequences of which effect such an enduring invasion of plaintiffs' property as to satisfy all other elements of a compensable taking." *Barnes v. United States*, 210 Ct.Cl. 467, 476, 538 F.2d 865 (1976). Accordingly, Article III standing analysis is inapplicable to a takings claim, and was *improperly* applied to the instant matter.[4]

Further, takings claims are not based in tort. The taking of property without proper exercise of eminent domain is not a tort but is considered an appropriation. *Crooks v. State,* 343 So.3d 248, 264 (La.App. 3 Cir. 2022). State immunity statutes limiting governmental tort liability do not apply to takings cases. The viability of a constitutional takings claim thus is unaffected by tort immunity, which is not constitutional but statutory. "[W]e cannot defer to the legislature when infringement of a constitutional right results from legislative action." *Brewer v. State,* 341 P.3d 1107, 1111 (Alaska 2014), fn. 12 (quoting *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice,* 948 P.2d 963, 972 (Alaska 1997). Likewise, Eleventh Amendment sovereign immunity does not preclude compensation for takings. *Allen v. Cooper*, 555 F. Supp. 3d 226 (E.D.N.C. 2021); and a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. *Knick,* 139 S.Ct. at 2170. It is "clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English*, 482 U.S. at 316, fn. 9.

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[4] This improper application is evident at *Bojicic*, 6th Cir., at *8; Bojicic, 569 F. Supp.3d at 681.

Lastly, the Fifth Amendment Takings Clause is not trumped by Eleventh Amendment sovereign immunity. The Fifth Amendment applies to the states through the Fourteenth Amendment:

> But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. ... Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Hughes v. Washington, 389 U.S. 290, 298 (1967) (Justice Stewart, concurring).

IV. The government should be required to show necessity for the actions taken as an affirmative defense to a takings claim.

Using necessity as an affirmative defense places the burden of proof where it belongs, on the government defendants, not the court or the plaintiff.

Assertions that a taking is not compensable due to a public emergency should prevail only if the government can show that its action was necessary to avoid a real and imminent danger related to the emergency that would be caused by the owner's use of the property, and that the restriction was narrowly tailored to further the government purpose of avoiding danger in the face of a public emergency. *See Evaluating Emergency Takings: Flattening the Economic Curve*, *supra* at 1147.

When courts mistakenly apply the rational basis scrutiny to takings claims, they require such a low level of proof for government defendants that no actual proof is required of the government to defend its action. In fact, the rational basis plausibility standard found in *United States v. Carolene Prods. Co.,* 304 U.S. 144 (1938), puts the court in the awkward position of surmising plausible reasons for the government's actions, and in effect making the government's case for them. A supposed rational basis for government action need not be supported by any evidence presented to the court. *Midkiff v. Adams Cnty. Reg'l Water Dist.,* 409 F.3d 758, 770 (6th Cir. 2005). The government defendant need not present any reason for its action, and not giving any reason at all will suffice if the *court* can conceive of a plausible reason for the regulation. *Walker v. Bain,* 257 F.3d 660, 668 (6th Cir. 2001).

Use of the rational basis analysis in takings claims forecloses an avenue of relief guaranteed by the Fifth Amendment.

Because plaintiffs are entitled to pursue relief guaranteed by the Fifth Amendment, the government must not be permitted to hide behind the mere assertion of a rational basis for its actions in a public emergency situation. Further, when a court or government defendant supplies a rational basis, unsupported by any evidence, combined with the plausibility pleading standards in *Ashcroft,* 556 U.S at 678, and *Twombly*, 550 U.S. at 570, takings claims are improperly subjected to fact-based decisions made by the court at the pleading stage as if the *Penn Central* factors were matters of law. These are not questions of law, and plaintiffs are regularly denied the opportunity to develop facts through

discovery and create a record for appeal. *See, e.g., Daugherty Speedway v. Freeland,* 520 F. Supp. 3d 1070; *Blackburn v. Dare Cty.,* 2020 U.S. Dist. LEXIS 168522, 2020 WL 5535530; and *Luke's Catering Serv., LLC v. Cuomo,* 2020 U.S. Dist. LEXIS 165907, 2020 WL 5425008; all dismissed on Rule 12 motions.

The Government should be required to show necessity as an affirmative defense.

Police power is not an exception to the just compensation requirement, whether within or without a public emergency. *Pennsylvania Coal Co.,* 260 U.S. at 415-416. There are situations where the government can assert a necessity defense to avoid liability for taking or destroying property in an emergency. *Brewer*, 341 P.3d at 1117; *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1377 (Fed.Cir. 2013).

The necessity defense requires both an actual emergency and an imminent danger met by a response that was actually necessary. *TrinCo*, 722 F.3d at 1376. The *Brewer* court, citing *TrinCo*, explained the necessity defense. Supreme Court precedent requires "that the doctrine of necessity may be applied only when there is an imminent danger and an actual emergency giving rise to actual necessity." *Brewer*, 341 P.3d at 1117. Examples of actual emergency and imminent danger included nearby raging fires and wartime bombings.

> [The *TrinCo* court] noted that in *Bowditch*, the City of Boston was not liable when its firefighters demolished a building "at a place of danger in the immediate vicinity [of a fire], to arrest the spreading of the fire," and "the measure . . . stopped the progress of the

> fire." It noted that in *Caltex*, the United States was not liable for the Army's destruction of privately owned oil facilities in Manila "in the face of their impending seizure by the enemy," where Japanese troops were marching into the city and their planes were bombing the area. It cited another wartime seizure case, *Mitchell v. Harmony* [54 U.S. 115 (1851)], involving the Army's confiscation and loss of a trader's goods during the war with Mexico: "[F]or a taking to be justified during wartime the 'danger must be immediate and impending' or the 'necessity urgent . . . such as will not admit delay' because 'it is the emergency that gives the right [to the Government to take private property], and emergency must be shown to exist before the taking can be justified.'"

Brewer, 341 P.3d at 1117 (citing *Bowditch v. Boston*, 101 U.S. 16 (1879); and *United States v. Caltex, Inc.,* 344 U.S. 149 (1952)). Again, the necessity defense requires an actual emergency and an imminent danger met by a response that was actually necessary. Because it is an affirmative defense, evidence must be offered to prove the elements of the defense.

The Constitution is not suspended when the government declares a state of disaster. *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020). Constitutional rights continue to exist, even in times of war, and a pandemic is not a war. Imminent and impending dangers and actual emergencies as defined in current case law are situations of grave imminent danger to life and limb, such as fire and bombing. Even then, the government must show necessity for its actions

or compensate for the taking. Respondents in the instant matter are required to prove the same necessity for their actions or compensate for the takings. While Petitioners recognize the Ninth Amendment has traditionally been viewed as limited in scope, allowing such unlimited government intrusions into property rights as imposed by the public officials of the State of Ohio on its citizens would result in the final and complete judicial invalidation of that Amendment. Further, allowing this precedent to stand obliterates an explicit and long-recognized right to redress for governmental taking of property; it invalidates one of the most important checks and balances in the U.S. Constitution.

Unfortunately, arguments of necessity have worked their way into analysis of takings claims, as a kind of "super public use" justifying denial of compensation without more. Proper public purpose is not a defense to a takings claim. *Everything* the government does should be done for the health, welfare, and safety of the public. This erroneous legal analysis unjustly denies relief in the face of constitutional violations, and invites governments to deem everything an emergency. *Evaluating Emergency Takings*, *supra*, at 1169, citing *Brewer*, 341 P.3d at 1109.

With such permissive treatment by the courts, the government will be encouraged to declare and perpetuate states of emergency and accrue greater control with little or no accountability.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal

> modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Spevack v. Klein, 385 U.S. 511, 515 (1967).

CONCLUSION

Petitioners ask this honorable court not to deny a takings claim because "the government had a good reason to do it." A good reason to do it may be enough to allow the taking to occur, but the explicit language of the Fifth Amendment, along with controlling case law, demand that such a taking *must* be compensated.

For the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT J. GARGASZ
Counsel of Record
1670 Cooper Foster Park Road
Lorain, Ohio 44053
Telephone: (440) 960-1670
Email: rjgargasz@gmail.com

THOMAS B. RENZ
1907 West State Street
Suite 162
Fremont, Ohio 43420