

No. 22-493

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In the Supreme Court of the United States

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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

—◆—  
**SUPPLEMENTAL BRIEF OF PETITIONER  
PURSUANT TO SUPREME COURT RULE 15.8**

—◆—  
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## INTRODUCTION

Supreme Court Rule 15.8 provides: “any party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to ... [any] intervening matter not available at the time of the party’s last filing.”

After Petitioners filed their petition on November 18, 2022, the United States District Court Judge in *Bojicic v. DeWine*, Case No. 3:21-CV-00630-JGC, held a status conference via zoom on January 9, 2023. He informed the parties that he was unaware Petitioners had filed a petition for certiorari until Friday, January 6, 2023, and he desired the Supreme Court to be aware of his position on qualified immunity as a argument against the merits of the peition for a writ of certiorari.

## DISCUSSION

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

It is the position of Judge Carr that because there is a split in the circuits with respect to the existence of a compensable taking where government officials order a shutdown of businesses, the matter is not settled law, and thus the officials sued in this instance are entitled to qualified immunity. He is of the opinion that this means respondents “are not accountable for anything, and the plaintiffs will take nothing at the end of the day.”<sup>1</sup> As stated in the

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<sup>1</sup> App. 25:22-23.

transcript of the conference, appended, Judge Carr wishes to call to the attention of this Court his statements regarding governmental immunity as an argument against the merits of the petition for writ of certiorari. See App. 14 *et seq.*, notably App. 17-18.

Petitioners continue to rely on the case law detailing the inapplicability of governmental immunity in takings cases, which position was provided in their petition docketed November 21, 2022, and set forth therein on pages 20-22.

#### CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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–App. 1 –

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

ERICA BOJICIC, etc., et al.,	Case No. 3:21-cv-00630-JGC Toledo, Ohio
Plaintiffs,	
vs.	<b>Monday, January 9, 2023</b> <b>1:33 p.m.</b>
MICHAEL DEWINE, etc., et al.,	
Defendants.	

*(Proceedings held via Zoom videoconference)*

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE JAMES G. CARR  
SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter:  
Stacey L. Kiprotich, RMR, CRR  
United States District Court  
1716 Spielbusch Avenue, Suite 120  
Toledo, Ohio 43604  
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Proceedings recorded by mechanical stenography,  
transcript produced by computer-aided transcription.

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1 **Monday, January 9, 2023**

2  
3 **(Proceedings commenced at 1:35 p.m.)**

4  
5 THE COURT: Okay. Stacey is with us.  
6 So whom do I have for the plaintiffs in the  
7 litigation, the respondent attorneys?

8 MR. ALKIRE: Mr. Alkire is present. Richard  
9 C. Alkire, Your Honor.

10 THE COURT: Okay.

11 MR. GARGASZ: Attorney Robert J. Gargas.

12 THE COURT: Okay.

13 MR. RENZ: Attorney Tom Renz, Your Honor.  
14 And I apologize I don't have a camera on this device,  
15 and I'm traveling.

16 THE COURT: No problem.

17 And then for the health department folks?

18 MR. SCIALDONE: Frank Scialdone on the  
19 various health department folks.

20 THE COURT: Okay.

21 MR. PITUCH: Judge, Kevin Pituch is here for  
22 the Lucas County Health Department.

23 THE COURT: Anybody else at all? That's it.  
24 Okay. According to my count, correct me if I'm wrong,  
25 there are two motions pending: One is a motion to dismiss



1 the Rule 11 motions and then—I guess to overrule them or  
2 deny them; and then a motion basically to – the practical  
3 effect is to vacate the hearing because, according to the  
4 motion, it would intrude upon the attorney-client privilege  
5 and the work product doctrine were I to require the  
6 parties to proceed.

7 I learned on I believe it was Friday that a motion  
8 for certiorari had been filed about five weeks ago, and I  
9 first learned about that on Friday by way of a motion I  
10 think filed a day or two before then.

11 Now I will jump over to the question of how come I  
12 wasn't notified sooner. I'll cut to the chase. I have read  
13 the motion for certiorari. It indicates that the plaintiffs  
14 seek to be compensated by the defendants for violating  
15 the takings clause. Apparently, the Circuit is split as to  
16 whether or not what occurred during the shutdown  
17 constitutes a takings.

18 I want to ask whoever will respond for the respon-  
19 dent attorneys or themselves or counsel, why does it  
20 matter if the Supreme Court were to agree with you that  
21 the defendants, to the extent that they were involved in  
22 the act in taking the property, how does your prevailing in  
23 that petition – securing the grant of certiorari and then  
24 winning in front of the Supreme Court – how does it affect  
25 the interest of either the plaintiffs or the defendants in

1 the underlying litigation as to which final judgment has  
2 been entered? How can one profit or one be mulcted?

3 MR. ALKIRE: On behalf of the respondents, and  
4 also without usurping one of counsel’s ability to also  
5 join in, on their behalf, I would say, Your Honor, if  
6 the petition for writ of certiorari were granted and the  
7 matter were briefed and the matter succeeded in the  
8 United States Supreme Court, it would be remanded  
9 and the matter would proceed in your court.

10 So I’m concerned that –

11 THE COURT: Well, there’s – there is a final  
12 binding judgment of dismissal in which the judgment  
13 was affirmed. That judgment of dismissal includes an  
14 unprecedented decision by me that those defendants  
15 are – all of them are entitled to immunity, and the  
16 effect – the fact that the Circuit didn’t reach it seems  
17 to me to be a “so what.”

18 MR. ALKIRE: I respectfully disagree with that  
19 analysis, Your Honor, and believe that –

20 THE COURT: How so?

21 MR. ALKIRE: I would suggest to the Court that  
22 the matter could be remanded to you for a hearing on  
23 its merits if the United States Supreme Court agrees  
24 with the constitutional argument.

25 THE COURT: I disagree. I have found that

1 those defendants are entitled to qualified immunity.  
2 That issue was not reversed by the Circuit sub silentio  
3 that it does not stand as a final and binding decision.

4 MR. ALKIRE: But Ms. Acton’s aspect of the  
5 matter has not been reversed – well, was dismissed  
6 and is the subject of this petition. So the case could  
7 come back to you against Ms. Acton alone.

8 THE COURT: How so? I found that she’s  
9 immune. All the –

10 MR. ALKIRE: I understand. Part and parcel of this  
11 petition for writ of certiorari is the interplay between the  
12 11th Amendment and the 14th Amendment and, indeed,  
13 the takings clause of the Fifth Amendment. And I believe  
14 that there is a potential for this matter to come back to  
15 you as a takings matter as it relates to Ms. Acton.

16 THE COURT: Well, Ms. Acton has been found –  
17 either way, I have found that she and all the defendants  
18 enjoy immunity, and that is a judgment that is final, I  
19 believe binding, and remains undisturbed by what the  
20 Sixth Circuit did and the Supreme Court could do because  
21 that’s a judgment that remains unaltered and in effect.

22 MR. ALKIRE: I understand what you’re saying,  
23 Your Honor, and at this point, I’ve said what I have to say.  
24 I wonder if Mr. Gargasz has anything he would like to add.

25 THE COURT: You haven’t answered my question.

1           MR. ALKIRE: I apologize for that, Your Honor.  
2 I believe that the final – that the petition for writ of  
3 certiorari raises and opens up for the Court’s  
4 determination – your determination – whether there  
5 was a taking under the Fifth Amendment.

6           THE COURT: Why does that matter? The law is  
7 clear that a public official can, in fact, violate the  
8 Constitution, but can be assessed damages only if the  
9 official knew or had reason to know that he or she  
10 was violating clearly established law. And the mere  
11 fact that you are pointing or they are pointing to a  
12 circuit split on its own indicates, well, at the time,  
13 the law was not clearly established.

14           MR. ALKIRE: I don’t have a response to that  
15 at this moment, Your Honor.

16           THE COURT: Well, I want a response because  
17 that’s my first question.

18           That judgment remains in force. And they can-  
19 not recover anything because of the protection that  
20 I’ve found that all of the defendants enjoy is the  
21 qualified immunity. And I think that it would be almost  
22 frivolous to argue, especially in the face of a certiorari  
23 petition that says on its face that the law is undecided.  
24 There is a circuit split. Tell us what the law is.

25           MR. ALKIRE: The effect of the Court’s ruling, if

1 | it were in favor of the petitioner, Your Honor, would be to  
2 | have this matter remanded to you for further proceedings.

3 |       THE COURT: The further proceedings would be  
4 | to dismiss – dismiss – you know, confirm the dismissal.

5 |       They cannot collect from Ms. Patrick or any-  
6 | body. That’s black letter immunity law which they –

7 |       MR. ALKIRE: But, Your Honor –

8 |       THE COURT: Excuse me.

9 |       MR. ALKIRE: I’m sorry, Your Honor. I didn’t  
10 | mean to interrupt you. I apologize.

11 |       THE COURT: Please don’t.

12 |       That is black letter immunity law, longstanding  
13 | since at least *Harlow versus Fitzgerald*. In order for a  
14 | public official to be held accountable for damages, that  
15 | official must be found not just to have violated the Con-  
16 | stitution, but also to have done so in the face of clearly –  
17 | that’s the—clearly established law. And the law—the pe-  
18 | tition for certiorari itself manifestly indicates that the  
19 | law is not clearly established because there’s a circuit split.

20 |       And to be sure, perhaps, since the Sixth Circuit  
21 | apparently doesn’t think so, perhaps the Supreme  
22 | Court could, if it were to grant the petition, say, “Yes,  
23 | what happened, violated the Constitution.”

24 |       But, candidly, that’s a “so what” because the  
25 | plaintiffs cannot recover as a matter, in my view, of

1 indisputable well-established immunity law. They  
2 cannot recover anything from any defendant.

3 MR. RENZ: Your Honor, if I could speak here, if  
4 that’s okay, Richard.

5 MR. ALKIRE: Yeah, please, if it’s all right with  
6 His Honor.

7 THE COURT: Of course.

8 MR. ALKIRE: Thank you, Your Honor.

9 MR. RENZ: So, Your Honor, our position on the  
10 case is that, under the Fifth Amendment, that that  
11 the immunity wouldn’t apply. We intend to make  
12 some of those arguments going forward. But I think  
13 that the question before us at present –

14 THE COURT: Well, those – excuse me. Excuse  
15 me, Mr. Renz.

16 MR. RENZ: Yeah.

17 THE COURT: Those are not arguments that  
18 were ever presented to me or the Circuit, so far as I  
19 can recall. So it seems to me you’ve waived those ar-  
20 guments in this case. Some other case, maybe not,  
21 but in this case, I think you have.

22 MR. RENZ: Well, Your Honor, the plain lan-  
23 guage of the Fifth Amendment provides for compen-  
24 sation. So unless that immunity law that you’re  
25 suggesting has overridden the Fifth Amendment, I

1 don't see how it makes sense.

2 THE COURT: That's –

3 MR. RENZ: I mean, that's just the wrongly  
4 defined precedent as it applies here. So if you were –

5 THE COURT: Well –

6 MR. RENZ: – if this were remanded and you  
7 were –

8 (Court Reporter admonishment)

9 THE COURT: Finish up.

10 MR. RENZ: I said if this were to be remanded  
11 back to you and you were to decide that, in light of the  
12 Supreme Court's decision that it should be remanded,  
13 that the immunity were to apply, we would appeal it  
14 again because I disagree with that position, respectfully.

15 THE COURT: Well, but I believe that, in this  
16 case, you have waived that argument because you  
17 did not present it to me in the first instance.

18 MR. ALKIRE: I think it was presented to you,  
19 Your Honor, on page 12 of Document No. 35 which  
20 was filed on May 31st, 2021.

21 THE COURT: Well, I disagree.

22 MR. ALKIRE: Under a section entitled  
23 Governmental Immunity.

24 THE COURT: Okay. Why don't you read me the  
25 provision that you are talking about.

1           MR. ALKIRE: Well, it says: “Governmental  
2 Immunity. Roman Numeral V. Putting Ohioans out  
3 of business without an opportunity for a hearing ‘is  
4 one of the rare situations where the unconstitution-  
5 ality of the application of a statute to a situation is  
6 plainly obvious’ such that ‘a clearly established right’  
7 is violated, and even qualified immunity is to be  
8 denied.” And then that section goes on to page 13 –

9           THE COURT: Excuse me, Mr. Gargas, where is  
10 your citation to case authority for that?

11           MR. ALKIRE: It was Mr. Alkire. And the case  
12 citation was *United Pet Supply, Inc. versus City of*  
13 *Chattanooga, Tennessee*, Your Honor.

14           THE COURT: And what does that say?

15           MR. ALKIRE: Well, it stands for the quotation  
16 that preceded it in that sentence I just read.

17           THE COURT: Read it to me again, please.

18           MR. ALKIRE: Yes, Your Honor. “Putting  
19 Ohioans out of business without any opportunity for  
20 a hearing ‘is one of the rare situations where the  
21 unconstitutionality of the application of a statute to a  
22 situation is plainly obvious’ such that ‘a clearly  
23 established right’ is violated, and even qualified  
24 immunity is to be denied.”

25           THE COURT: At what – what –



1 MR. ALKIRE: 76 –

2 THE COURT: – Court was that? Sixth Circuit?

3 MR. ALKIRE: That was Sixth Circuit,  
4 Your Honor. *United Pet Supply, Inc. versus City of*  
5 *Chattanooga*, 768 F.3d 464 at page 488.

6 THE COURT: Read it to me again, please.

7 MR. ALKIRE: Sure, Your Honor.

8 “Putting Ohioans out of business without an  
9 opportunity for a hearing ‘is one of the rare situations  
10 where the unconstitutionality of the application of a  
11 statute to a situation is plainly obvious’ such that” –

12 THE COURT: In other words, that quote—but to  
13 what – what was appended to the quote that you re-  
14 placed with the words “Putting Ohioans out of business”?

15 MR. ALKIRE: I’m not sure what your question  
16 is, Your Honor.

17 THE COURT: Well, in that decision, that quote  
18 related to whatever the issue was that was before the  
19 Sixth Circuit then was not this issue.

20 MR. ALKIRE: That’s true, Your Honor. That’s  
21 true.

22 THE COURT: So it’s your language – in your  
23 view, it’s your contention that this fits within that  
24 quote, and I’m saying it does not.

25 MR. ALKIRE: Yeah. I’m just suggesting

1 that –

2 THE COURT: Well –

3 MR. ALKIRE: – in response to – I’m sorry,  
4 Your Honor. I will shut up.

5 THE COURT: Go ahead, go ahead.

6 MR. ALKIRE: I’m just suggesting that the  
7 issue of governmental immunity was addressed by  
8 Messrs. Renz and Gargasz in the briefing that they provid-  
9 ed this Court back in 2021 as it relates to the motions to  
10 dismiss and the judgment on the pleadings, and I’m –

11 THE COURT: And I found –

12 MR. ALKIRE: – just citing what I was able to pick  
13 up, Your Honor, as I prepared for this hearing because  
14 I sure didn’t want to be sitting in front of you unprepared.

15 THE COURT: Well, Mr. Gargasz, the problem  
16 is –

17 MR. ALKIRE: My name is Mr. Alkire,  
18 Your Honor.

19 THE COURT: Mr. Alkire. I’m sorry, Mr.  
20 Alkire.

21 MR. ALKIRE: That’s okay.

22 THE COURT: Mr. Alkire, my apologies, but that  
23 scrap of law, which is good law, but I don’t know  
24 what the good law because it does refer to the clearly  
25 established, and this is not a situation where the law

1 is clearly established. And, yes, it is a rare situation  
2 in which a public official is found to have violated  
3 clearly established law.

4 MR. ALKIRE: Yeah. I appreciate your position  
5 on that, Your Honor.

6 THE COURT: Well, it's more than that because  
7 the next thing I want to call to your attention: I believe  
8 that the effect of the petition for certiorari is simply re-  
9 questing that –I think you have an–your clients have an  
10 obligation under the Ohio Rules of Professional Conduct  
11 to inform the Court, under the duty of candor, that ba-  
12 sically no decision that they reach–that the Court might  
13 reach, even if it adopts whatever your view is, your  
14 clients' view is on the Fifth Amendment, it doesn't matter.  
15 There's no exception under any of the amendments. The law  
16 is clear that if a public official violates a constitutional  
17 right, that official can be held liable on damages only if he  
18 or she knew or had reason to know he or she was violating  
19 clearly established law. And the law–your own petition  
20 makes clear that the law is not clearly established. And  
21 there is no case–and that case certainly does not provide  
22 a basis to me, “Oh, yes, Judge, there is a case in which  
23 the Supreme Court has held immunity doesn't apply, even  
24 when the official did not realize and had no reason to  
25 realize he or she was violating clearly established law.”

1 I want to repeat: The plaintiffs, even if they  
2 were to get in, and even if their position were to pre-  
3 vail, they run headlong into the fact that, number  
4 one, in this case, immunity – I believe that my judg-  
5 ment on the lack – of the inability of the plaintiffs to  
6 recover because of immunity is final and binding;  
7 that nothing the Supreme Court does in this case can  
8 change that. By the parties own admission in the pe-  
9 tition, the law in this area is not clearly established.

10 And I believe that your clients have a duty of  
11 candor – and you are the one who spends apparently  
12 a lot of time defending people charged with profes-  
13 sional misconduct. I believe they have a duty of  
14 candor to inform the Supreme Court that there is no  
15 longer a case or a controversy. The case is over inso-  
16 far as the plaintiffs cannot recover anything because  
17 the law in this area was not clearly established. You  
18 admit that, they admit that in the petition there's a  
19 circuit split, and that's the paradigmatic situation in  
20 which the law is not clearly established.

21 MR. RENZ: Your Honor, if I may.

22 THE COURT: If I may finish, please.

23 I want to make myself indisputably clear that I  
24 believe that your clients must inform the Supreme  
25 Court that neither party – the situation of neither

1 party can be affected either beneficially or adversely  
2 because of the doctrine of qualified immunity.

3 First, it is a fixed determination in this Court,  
4 which was not overruled, and my judgment was affirmed.  
5 You have not sought certiorari. You have not appen-  
6 ded to your petition, number one, “We believe this is  
7 what the Fifth Amendment requires; and, number two,  
8 it requires it so obviously that they are not entitled to im-  
9 munity.” That’s not part of the petition. It’s not in play.  
10 And, once again, I believe your clients have a duty to  
11 notify the Court that that is so. They may disagree  
12 with me, but I don’t think there’s any ground – legal  
13 ground, sustainable or even plausible legal ground on  
14 which they can disagree with me on the issue of the  
15 applicability of immunity. The law is not clearly  
16 established. None of these defendants can or ever  
17 could be accountable in damages to the plaintiffs.

18 MR. RENZ: Your Honor, can I speak?

19 THE COURT: Go ahead. Yep.

20 MR. RENZ: So in regards to that, you know, we  
21 just saw *Roe v. Wade* overturned, and whether we like  
22 that decision or not, it occurred. By that logic, we, as  
23 officers of the court, would never be able to challenge  
24 anything that the Court had already decided. We  
25 would never be able to challenge precedent because, if

1 we challenged precedent, it would be something that  
2 would be sanctionable (indiscernible) –

3 (Court Reporter clarification)

4 MR. RENZ: I guess – and I’m sorry I can’t  
5 quote myself, but essentially I said: According to that  
6 logic, any time that we would challenge established  
7 precedent, we would be conducting sanctionable  
8 conduct. And I think that in this case just because  
9 one circuit got it wrong, by no means means that the  
10 law wasn’t clearly established.

11 THE COURT: It was not clearly established.

12 There is no constitu – there is no decision by the United  
13 States Supreme Court that says in this situation or any-  
14 thing like it that takings occurs and that therefore going  
15 forward from such decision, which does not exist – that’s  
16 the whole point. And you’re not saying in your petition “By  
17 the way, we–the Judge erred in finding that these defen-  
18 dants were immune because the law that we are asking you  
19 to clarify was clearly established.” It’s a non sequitur.

20 And, Mr. Renz, you are missing the point. I’m  
21 talking about this case. I’m not talking about a case  
22 in which the law–you’re talking about a hypothetical  
23 that doesn’t exist.

24 The fact is, by your own admission in the petition  
25 for certiorari, the law is clear that these defendants were,

1 are, and always have been immune from any damage  
2 award – from having a damage award be imposed upon  
3 them. At the time they acted, the position which you  
4 are advocating was not, quote, “clearly established.”  
5 They could have spent an infinite amount of time look-  
6 ing for a case that says, “Watch it. If you do that, you im-  
7 plement the governor’s directive” – and I guess that’s  
8 all we’re talking about. I guess you acknowledge that as  
9 to all the others the law is clearly established, but not as  
10 to former Health Director Patrick – “but if you implement  
11 the governor’s directive to you, you are violating a clearly  
12 established takings doctrine in–” whatever case. You  
13 didn’t cite that case to me in the briefing when you had an  
14 opportunity. It doesn’t exist, and you wouldn’t be in the  
15 court now trying to get certiorari. And my whole point:  
16 Even if you prevail, your clients cannot recover, and I  
17 think you have an affirmative duty to notify the Court  
18 that that is so, and I would (inaudible) if I were you –

19 (Court Reporter clarification)

20 THE COURT: I would be very careful not to give  
21 a substantial amount of reflection and to decline to do  
22 that. I think you have an affirmative obligation because  
23 there is no law that exists so far as I’m aware, and you cer-  
24 tainly have cited no case. And this case, some day if it were  
25 to come up in a proper circumstance, that might resolve

1 it, but it can't. You're asking the Supreme Court of the  
2 United States to give you an advisory opinion that cannot  
3 in the end, in any way whatsoever, benefit your clients.

4 MR. RENZ: Your Honor, I have no hesitation  
5 about informing them of your opinion. I do disagree  
6 with it, but we will inform them because I believe that  
7 it is my duty that if it's your position to say that, that  
8 we will do that, and I do take my ethics quite seriously.

9 MR. ALKIRE: And let me represent you, here,  
10 Mr. Renz.

11 Your Honor, I believe that that was done on  
12 pages 3 through 7 of the petition, and the Supreme  
13 Court is well aware of what had happened and what  
14 you ruled, as your decision was specifically noted,  
15 and as was, of course, the Sixth Circuit's, and the  
16 Court is on notice as to the nuances of both.

17 THE COURT: Quite candidly, I think that is  
18 completely insufficient.

19 MR. ALKIRE: Well –

20 THE COURT: I think you – I really do. I'm  
21 being very serious about it.

22 MR. ALKIRE: I understand. I hear you,  
23 Your Honor. With that, I respectfully disagree.

24 THE COURT: Well, you know as well as any-  
25 body that the duty of candor is to be applied liberally



1 and in the favor of fully informing the tribunal. And  
2 the fact that in, what, I can't remember how many  
3 pages, 20 some pages or whatever, there is reference  
4 to the decision below and the fact that – I can't recall  
5 – but whether – I don't think the phrase “qualified  
6 immunity” appears in your petition, and I don't think  
7 that's sufficient to put the Court on notice.

8 I'm being very candid with you. Okay? It doesn't  
9 matter to me one way or the other. I'm simply saying, at  
10 the end of the day, given the present status of the law,  
11 the plaintiffs cannot benefit and the defendants cannot  
12 be adversely affected in terms of a monetary judgment  
13 by whatever decision the Supreme Court might  
14 reach were it to take in the petition for writ of certiorari.

15 And I think it's incumbent upon your clients,  
16 clearly and unequivocally, to call the Court's attention  
17 to that fact before the 19th or whenever it is they are  
18 going into conference, I really do. I mean, I think that  
19 there's an indisputable ethical responsibility to say, “By  
20 the way, there is no case or controversy.” Because at the  
21 time the lower Court–I–made my decision, at the time,  
22 even more importantly–most importantly that the – Ms.  
23 Patrick and the other officials acted, there was nothing in  
24 the law that said that what they were doing violates the  
25 Fifth Amendment. There were theories. Your clients

1 have theories. Other may have theories. Theories don't  
2 count. Arguments don't count. The only thing that counts  
3 on the question of immunity in this case is whether or  
4 not any of those officials were on notice, on the basis of  
5 prior Supreme Court precedent, that if they issued and if  
6 they enforced those orders, they were violating a clearly  
7 established constitutional right that the proprietors of  
8 the dance studios had, and that doesn't exist. You know  
9 it doesn't exist. It doesn't exist. If it existed, it would have  
10 been called to my attention, which it was not because it  
11 doesn't exist in the 17-page opposition to the various  
12 motions to dismiss whenever it was they came up.

13 MR. GARGASZ: Respectfully, Your Honor –  
14 Attorney Gargasz – how can you say the Fifth Amend-  
15 ment, the apex law of the United States of America,  
16 does not exist? It most certainly exists. That law –

17 THE COURT: Mr. Gargasz –

18 MR. GARGASZ: That law –

19 THE COURT: Go ahead.

20 MR. GARGASZ: – and the entire Bill of  
21 Rights, that Fifth Amendment is the only one that  
22 demonstrates that if the government takes the  
23 property – they may have an ability to do – they have  
24 to pay money for it.

25 THE COURT: That's right.

1 MR. GARGASZ: That’s what you missed, Judge.  
2 You went through this whole litigation as if this was a  
3 police power, which was completely wrong. And all the  
4 lawyers on the other side that were arguing for winning  
5 was based on police power, and you took it hook, line and  
6 sinker. You didn’t even see that this was a taking. You  
7 didn’t even do the analysis under the *Penn Central*.

8 THE COURT: Mr. Gargasz.

9 MR. GARGASZ: No, no, Judge. Hey, you asked a  
10 question. I’m trying to answer it for you.

11 The Fifth Amendment to the United States Consti-  
12 tution is the best law, the highest law, okay, and I don’t need  
13 a case to say that the apex law in the Constitution doesn’t  
14 exist. You, sir, are the guardian of the citizens. So when  
15 my clients, the dance studios, are shut down by a guy acting  
16 as a king or a tyrant, what are you doing, Judge? What are  
17 you doing? How about candor from the judicial branch, you  
18 know, shouldn’t we have candor here too? Do you disagree–

19 THE COURT: Mr. Gargasz.

20 MR. GARGASZ: – that the apex –

21 THE COURT: Mr. Gargasz, I am giving you  
22 candor. I could have remained silent. But I’m simply  
23 saying the fact that there is a constitutional right  
24 does not – and its violation does not entitle the party  
25 whose right was violated – rights were violated to a

1 judgment, unless the person who violated that right  
2 knew or had reason to know that he or she was  
3 violating clearly established law.

4       Everybody has the right, if he or she is an inmate,  
5 to be free from cruel and unusual punishment, but that  
6 inmate can recover only, for example, if the medical  
7 setting – the medical provider in that institution was  
8 deliberately indifferent to a serious medical condition.

9       And the Court interprets the situations in which the  
10 right applies, and it puts the rest of us on notice that,  
11 indeed, this is what that language means. And to be sure,  
12 had they read that and understood that they were taking,  
13 according to you, the property, whether permanently or  
14 not, but if they had read that and then said, “Well, what  
15 does this mean? If I shut them down, does this con-  
16 stitutional provision mean that; that I’m going to be  
17 held liable in damages?” And the way that – where they  
18 would find that out is by reading the Supreme Court’s  
19 decisions in the area. And in this case, they would find  
20 out there is no decision that gives them that guidance.

21       It’s not simply reading the right. The right of the  
22 people to be free from unreasonable searches and  
23 seizures shall not be violated. Well, you know, there’s a  
24 body of law that tells us when a search and seizure is  
25 unreasonable and when it’s been violated and when

1 you can collect damages for its violation. But until the  
2 Supreme Court has said this is what something means  
3 – and in this case, there is a split among the circuits.

4 So if Ms. Patrick had gone to the books, which is the  
5 whole idea, you know, you read a constitutional right as  
6 a public official or otherwise – public official, and it's up  
7 to you to instruct yourself. If you don't do so, you do so at  
8 your peril. Here, there was nothing that any instruction  
9 would have revealed – that's the point; that when it  
10 comes to collecting for a violation of a constitutional  
11 right, the law has to have been clearly established. The  
12 public official is entitled to notice that her conduct might  
13 violate the Constitution, and the Supreme Court has not  
14 given that notice. And the fact that it might give it in this  
15 case, and I have no idea, is immaterial because if it did,  
16 you would make absolutely clear that at the time she  
17 acted, the law was unclear and that's my point.

18 And do not accuse me of not being candid. I am  
19 being candid.

20 MR. GARGASZ: I haven't accused you of  
21 anything, Your Honor, but you seem to be accusing  
22 us of a lot of things.

23 THE COURT: I am simply saying, Mr. Gargas,  
24 and the law as I understand it, the position of the par-  
25 ties cannot be affected one way or the other, because

1 even if the Supreme Court does rule in your favor and  
2 say that, yes, these plaintiffs are entitled – or plaintiffs  
3 in this situation are entitled to compensation, that doesn't  
4 help your clients because that wasn't enunciated, pro-  
5 claimed, pronounced before they acted. And that's the  
6 whole way—that's the way that immunity doctrines work.  
7 Because one of the main attributes of the law, generally,  
8 is we're to be put on notice of what's right and what's  
9 wrong, and we can't be held accountable unless we have  
10 that notice. That's what immunity is all about.

11       You folks are welcome to do as you please, but I'm  
12 telling you, I believe that what you are doing cannot have  
13 any effect in this case. The next shutdown, the next  
14 pandemic, it could have a great deal of effect because the  
15 public officials would then know. It would be clear what  
16 they can't and the line would be drawn, and here, it is not.

17       And that being so, I truly think that you have an  
18 obligation to inform the Court that in the light of exist-  
19 ing law, not the law that you hope it will become,  
20 these officials will not – in light of my now binding and  
21 affirmed decision that they are entitled to qualified  
22 immunity, are not accountable for anything, and the  
23 plaintiffs will take nothing at the end of the day.

24 There's no case or controversy in this case.

25       If you win this case, you know, however that

1 | would be formulated, then the next pandemic, the next  
2 | public health official would be on notice. The lawyers  
3 | who are on the phone would tell their clients, “No, don’t  
4 | do that. You can be held accountable on damages, the  
5 | same way a police officer can be held accountable if he  
6 | beats somebody up in the course of arresting them – a  
7 | non-resisting suspect when arresting them.”

8 |         But that’s not the case here. And I understand what  
9 | you’re saying, sure, that language is in the – that’s the  
10 | Fifth Amendment language. But for that language to  
11 | have the effect for the compensation that it promises, for  
12 | that to be gained, the law is clear that Ms. Patrick and  
13 | all these other defendants had to know, had reason to  
14 | know that they were violating clearly established law.

15 |         And in your own petition, that’s the cornerstone  
16 | of why you want to get in. There’s a circuit split. But  
17 | as I say, that’s the paradigmatic situation in which  
18 | the law is not clearly established.

19 |         If all 11 or 12th Circuits had said, “Yes,” then  
20 | it’s clearly established; the Supreme Court doesn’t  
21 | have to say anything.

22 |         But where you have a split among the circuits,  
23 | it’s not clearly established. It really isn’t. And there-  
24 | fore, at the end of the day – and I just don’t think  
25 | that you should simply assume that somehow, “By

1 the way, here is a citation to Judge Carr’s opinion,”  
2 that that’s – that is putting the Court on notice that  
3 this problem exists for your clients. They can’t  
4 collect. They cannot collect no matter how you do.

5 MR. RENZ: Your Honor, it’s my intention,  
6 assuming that my co-counsel does not disagree, to  
7 inform them that that is your opinion, because while  
8 I do disagree with you, I also recognize the duty of  
9 candor. So I appreciate the heads up, and we will, to  
10 my – it’s my expectation we will let the Supreme  
11 Court know that that is your (indiscernible) –

12 (Court Reporter clarification)

13 MR. RENZ: But we will inform the Supreme  
14 Court that that is your opinion and that you made that  
15 clear in this meeting, and we’ll reiterate it so that they  
16 can do with it whatever they choose to do with it.

17 THE COURT: That’s all I’m suggesting.

18 MR. GARGASZ: Just so you know, the con-  
19 ference is set for the 13th. And I don’t think that they  
20 will meet on Martin Luther King Day. As I under-  
21 stand it, it’s usually the Monday after.

22 THE COURT: I thought – I thought – I must  
23 have misread that. I thought it was the 19th. I’m not  
24 – I have no idea how they schedule or what they do.  
25 But that, of course, is next Monday, I think.



1 MR. GARGASZ: It's this Friday. The 13th is  
2 this Friday.

3 MR. ALKIRE: It's this Friday.

4 THE COURT: Yeah, that's right. Sure, the  
5 13th. Okay.

6 MR. ALKIRE: The 13th.

7 MR. GARGASZ: So we'll have to get the  
8 transcript before then, hopefully, if it can be done.

9 THE COURT: Stacey, can you get a transcript  
10 done by tomorrow?

11 THE COURT REPORTER: Yes, Your Honor.

12 THE COURT: Okay.

13 No. I mean, it's your call. I don't care. Because  
14 as far as I'm concerned, in terms of my own workload,  
15 it doesn't matter for the reasons I've just said. But in  
16 the end, I think, quite candidly, you are asking for  
17 the Court to give you an advisory opinion, and quite  
18 – in my case, I could have ended with qualified im-  
19 munity because there's no clearly established law.

20 So my discussion that I entered upon so that every-  
21 body would fully understand the defects in the original  
22 complaint, I discussed – I think there were three sub-  
23 stantive issues. The takings was one of them. I may  
24 have missed–there may have been another, I can't re-  
25 call, but so far as to the technical aspects of my opinion,

1 that was dicta because I could have disposed of the case  
2 only by saying, “Counsel have not cited” – “Counsel for  
3 the plaintiffs have not cited a case that put any of the  
4 health directors and/ or Dr. Patrick on appropriate and  
5 sufficient notice that what they were doing in implemen-  
6 ting the gubernatorial mandate violated clearly established  
7 law under the Fifth Amendment which would entitle the  
8 plaintiffs to compensation. That’s the core of immunity in  
9 this or any other immunity case and that’s all I’m saying.

10 Okay. Unless there’s something further to be said  
11 by anybody, why wasn’t I told earlier than a few days  
12 before this conference about the petition for certiorari  
13 and, according to you, the need therefore to vacate a  
14 hearing and set a substantial amount of time aside?

15 MR. ALKIRE: Your Honor, it appeared on the  
16 Court’s docket when it occurred, and you were advised in the  
17 report that was ordered to be filed by December 30th, and  
18 so we felt that the Court was on notice once it appeared on  
19 the docket, and, in fact, I think that was even mentioned.

20 THE COURT: I was not on notice. I don’t  
21 check the docket.

22 MR. ALKIRE: I apologize for that, Your Honor.

23 THE COURT: I mean, quite candidly, it creates  
24 a serious scheduling problem for me. I’m going to grant  
25 the motion. I don’t think I have any alterna-tive. But

1 at some point, you knew you were going to be filing a  
2 writ of certiorari. In fact, I don't think you had to wait.  
3 In fact, indeed, once you decided that – or who-ever  
4 decided that you want to file such a petition, I think you  
5 owed it to me and to the defendants' counsel to say, "By  
6 the way, Judge, on or before day X, we will be filing a  
7 petition for writ of certiorari." And you had to have  
8 known that a good long time before you filed it, and I  
9 just—you know, you put me in a quandary, and there is  
10 nothing I can do about it, so I will do nothing except  
11 grant the motion. But I do think I should have been noti-  
12 fied well in advance, not on the date that it was filed, not  
13 a few days later or four – I guess it was four weeks after  
14 it was filed. Quite candidly, Counsel, I think, as a matter  
15 of courtesy to the Court, you should have done it, but  
16 that's all. There's nothing that can be done about it now,  
17 such is life. But in the future, please give heed to me and  
18 other judges. If you're contemplating doing something  
19 that's obviously going to disrupt the schedule, then I think  
20 you should notify us. That's all. Such is life so it goes.

21 So I will vacate that hearing pending further  
22 proceedings. The parties to submit status reports  
23 monthly beginning February 1st. I mean, on the other  
24 hand, what if the Court – if you provide that notice  
25 and the Court—I think maybe what I should do is wait

1 a week and see what happens. Let's do that.

2 Let's assume for the moment that the Court –  
3 that notice is provided that's sufficiently clear to ex-  
4 press my views and to call the Court's attention to  
5 them and for the Court to give due consideration. I  
6 mean, I don't know the mechanism. I have no idea if  
7 they were to deny the petition—which I assume is what  
8 they would do—I don't know the timetable on that. That  
9 hearing is set for, what, five weeks from now?

10 MR. ALKIRE: Yes, Your Honor. We have a  
11 briefing schedule. First briefs are due next week.

12 THE COURT: I know.

13 Well, you know, you really put me – what can I  
14 do? I've got to grant the motion; right? I have no  
15 alternative; right?

16 MR. ALKIRE: I would ask that you do that,  
17 Your Honor.

18 THE COURT: I mean, I will, of course.

19 MR. ALKIRE: Thank you, Your Honor.

20 THE COURT: You know, quite candidly, it  
21 creates a pretty substantial disruption, but, you know,  
22 that happens. Okay. Such is life. You set cases for  
23 trial, and they get settled and find something else to  
24 do. But I'm not sure I can do the things that I would  
25 be doing that week on short notice, I really am not, but

1 such is life. It doesn't matter.

2 Well, I guess let's go back to the other issue. Let  
3 me ask counsel for the defendants who filed the Rule  
4 11 sanction motions, how much time do you need to  
5 file an opposition? A month, which is my – as, Kevin,  
6 you know, that's my customary ...

7 MR. PITUCH: That's fine by me, Judge.

8 THE COURT: And so why don't we say the 10th  
9 of February. And then let's have you – I'll give you  
10 until the 15th of February, and I'll give them until  
11 the 1st of March to file a reply.

12 MR. ALKIRE: Thank you, Your Honor.

13 THE COURT: As to that, I have–this is not an  
14 area of the law that I would profess any substantial  
15 familiarity with at all, but I have some dim impression  
16 – I don't know if defense counsel can say, or maybe  
17 you can–it's my impression that, to some extent, Rule  
18 11 – well, first of all, I suppose I have a question for –  
19 if I grant the motion to dismiss, is that with prejudice?  
20 Does that foreclose entirely the opportunity for the  
21 defense counsel – for defendants to be reimbursed for  
22 their fees, expenses, by whatever standard would be  
23 applied, with prejudice? I would be kind of surprised  
24 if it did, but I don't know. I have no idea.

25 Secondly, it seems to me – I have some dim

1 recollection – again, Counsel, you may be able to tell  
2 me one way or another, that to some extent it may  
3 not matter because it's my understanding that in  
4 applying Section 1927, I can take into account and  
5 consider and, indeed – and adopt the standards in Rule  
6 11 in terms of the, you know, good faith basis in the  
7 fact and law that counsel must have before filing liti-  
8 gation. The lawyer may not, in the terms of – I think  
9 it's in the terms of Rule 11, certify to that effect, but I  
10 think any lawyer does that when he files any pleading.

11 It seems to me – and I'm – I don't know. I'm just. . .

12         But it seems to me that you don't need Rule 11 to  
13 impose a duty on the lawyers to do the legal research to  
14 determine whether the facts, as he or she understands  
15 them, provide – in light of the law that you found in  
16 legal research that found a legal basis for recovery,  
17 certainly in this case, among the other things, that  
18 would relate to the question of qualified immunity.

19         But I do think that the burden remains on the  
20 respondent attorneys to satisfy whatever the standards  
21 under Section 1927 and my inherent power. And I  
22 believe in my inquiry as to whether or not to have  
23 done so, I can look to the standards set in Rule 11 or  
24 the requirements – that's a better term – the require-  
25 ments set in Rule 11. I don't know. But these are things

1 I think, among others, that should be looked into. And  
2 on all of what I said, I may be mistaken, I may not. I  
3 don't know. I've not encountered that before. I think  
4 on a rare occasion, I may have turned to – I've had  
5 very few cases in which sanctions have been an issue.

6 MR. RENZ: Your Honor, with due respect, I  
7 mean, it sounds like you're asking us for directions on  
8 how you can sanction us most, and we haven't had the  
9 opportunity to present our case yet. I (indiscernible) –  
10 (Court Reporter clarification)

11 MR. ALKIRE: Tom, I would suggest you respond  
12 to a question if Your Honor has one for you.

13 THE COURT: No. Mr. Renz, I'm not. Okay?  
14 I'm just saying that that's my understanding. Okay?  
15 But that's what – I'm telling you that so that you can  
16 address that. We're talking about –

17 MR. ALKIRE: On behalf of the respondents,  
18 Your Honor, I appreciate your discussion with us so  
19 that I have an insight into your thinking. I do  
20 appreciate it. Thank you.

21 THE COURT: And I want to try to let Mr. Renz  
22 know that as long as I've been on the bench, I tell  
23 lawyers what's on my mind. I want you to have a  
24 sitting target, not one that pops up in an opinion and  
25 you say, "Well, why did he say that?" Okay?

1 MR. ALKIRE: I appreciate that, Your Honor.

2 Thank you –

3 THE COURT: Yeah. No –

4 MR. GARGASZ: – on behalf of Mr. Gargasz and  
5 Mr. Renz.

6 THE COURT: Okay. Is there anything else we  
7 have to talk about today?

8 MR. ALKIRE: Not on behalf of the respondents.

9 THE COURT: Okay.

10 MR. PITUCH: No, Judge. I will put it all in  
11 my reply brief that I'll file shortly.

12 THE COURT: Your response brief.

13 MR. PITUCH: That's what I mean, yes.

14 THE COURT: And then they'll file a reply  
15 brief.

16 MR. SCIALDONE: Nothing here, Your Honor.

17 THE COURT: Now – okay. Then, beginning on  
18 February 1st, I want the respondent counsel/counsel for  
19 the plaintiffs to submit a status report with regard to  
20 the status of the proceedings before the Supreme Court.

21 MR. ALKIRE: Yes, Your Honor, will do.

22 THE COURT: And once I know what's  
23 happening there, whenever that happens, we will sit  
24 down and put the hearing back together.

25 MR. ALKIRE: Thank you, Your Honor.



1           THE COURT: Okay. And, Counsel, I do think you  
2 understand that's exactly why I laid out the issues, and I  
3 may even lay out more as time goes, I don't know, because I  
4 think it's important that lawyers know the questions  
5 that I think are important and that I think the answer  
6 –and the answer may be easy, and it may be difficult,  
7 but if I don't ask the questions, then I don't get the ans-  
8 wers, and if I don't have the answers, I don't think I can  
9 fully and completely and fairly do my job, I really don't.

10           MR. ALKIRE: On behalf of the respondents, I'm  
11 reading your mail, Your Honor.

12           THE COURT: Okay. I understand that.

13           MR. ALKIRE: Okay. Stacey, what's your phone  
14 number again? Stacey Kiprotich: 419-213. . .

15           THE COURT REPORTER: 5520.

16           THE COURT: And you've got their contact  
17 information? You'll email a copy or fax a copy as soon  
18 as you get the transcript ready; correct?

19           (Discussion held off the record)

20           THE COURT: Thanks a lot. That will conclude  
21 this proceeding.

22           (Proceedings concluded at 2:34 p.m.)

- - -

**C E R T I F I C A T E**

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter prepared from my stenotype notes.

/s/ Stacey L. Kiprotich                      1/10/2023  
STACY L. KIPROTICH, RMR, CRR              DATE