

No. 22-__

In the Supreme Court of the United States

BEST SUPPLEMENT GUIDE LLC
and SEAN COVELL
Petitioners,

v.

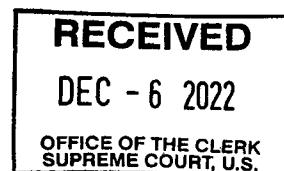
COUNTY OF SAN JOAQUIN,
CITY OF LODI, MAGGIE PARK
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

James M. Henderson, Sr.	Brian Ricardo Chavez-Ochoa
James Henderson Law Offices	Chavez-Ochoa Law Offices, Inc.
3125 Burgaw Hwy Lot 3	4 Jean Street, Suite 4
Jacksonville, NC 28540	Valley Springs, CA 95252
910-381-0317	209-772-3013
jmhenderson58@gmail.com	brianr@chavezochaoalaw.com
	Counsel of Record

Attorneys for Petitioners
Best Supplement Guide LLC and Sean Covell



QUESTIONS PRESENTED

A natural person and a California limited liability company filed a Section 1983 federal civil rights lawsuit alleging that certain State and local public health orders violated rights secured to them by the Constitution of the United States, which lawsuit the district court dismissed invoking a judicial innovation of a so-called Jacobson cause of action. The court of appeals affirmed.

In the view of the Petitioners, the following questions are presented:

- (1) Did this Court's decision in *Jacobson v. Massachusetts* impose a heightened standard of pleading applicable to federal civil rights actions brought pursuant to Title 42 U.S.C. § 1983 when such lawsuits are filed during, or because of, a public health epidemic?
- (2) Whether, to survive dismissal pursuant to F.R.Civ.P. 12(b)(6), federal civil rights claimants must plead that the government action complained of bore no "real or substantial relation to public health" or that "the measures, beyond all question, [constitute] a plain, palpable invasion of rights secured by the fundamental law"?

PARTIES TO THE PROCEEDING

Petitioners, Best Supplement Guide LLC and Sean Covell, were Plaintiffs in the district court and Appellants in the court of appeals. Respondents, County of San Joaquin, City of Lodi, and Maggie Park, in her official capacity as the Public Health Officer of San Joaquin County, were Defendants in the district court and Appellees in the court of appeals.

Gavin Newsom, in his official capacity as the Governor of California; Xavier Becerra, in his official capacity as the Attorney General of California, and Sonia Y. Angell, MD, MPH, in her official capacity as the Director and State Public Health were Defendants in the district court and Appellees in the court of appeals.

Katherine Miller, in her official capacity as a member of, and the Chair of, the San Joaquin County Board of Supervisors; Tom Patti, in his official capacity as a member of, and as Vice Chair of, the San Joaquin County Board of Supervisors; Miguel Villapudua, in his official capacity as a member of the San Joaquin County Board of Supervisors; Chuck Winn, in his official capacity as a member of the San Joaquin County Board of Supervisors; Bob Elliott, in his official capacity as a member of the San Joaquin County Board of Supervisors; Shellie Lima, in her official capacity as the San Joaquin County Director of Emergency Services; Patrick Withrow, in his official capacity as the Sheriff of San Joaquin County; Doug Kuehne, in

his official capacity as a member of the Lodi City Council and Mayor of Lodi; Alan Nakanishi, in his official capacity as a member of the Lodi City Council and Mayor Pro Tempore of Lodi; Mark Chandler in his official capacity as a member of the Lodi City Council; Joanne Mounce, in his official capacity as a member of the Lodi City Council; Sierra Brucia, in his official capacity as the Chief of the City of Lodi Police Department were also Defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of Best Supplement Guide LLC's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
PARTIES TO THE PROCEEDING	iii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES	vii
TABLE OF APPENDICES	ix
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY	1
PROVISIONS INVOLVED	1
CONCISE STATEMENT OF THE CASE	2
 Facts Material to Consideration of the Questions Presented	2
 Basis of Federal Jurisdiction in the District Court	6
REASONS TO GRANT THE WRIT.....	6
 1. In the decision below, the United States Court of Appeals for the Ninth Circuit so far departed from this Court's teaching in its application of Rule 12(b)(6) of the Federal Rules of Civil Procedure as to	

require the supervisory intervention of this Court on certiorari.....	8
2. The Ninth Circuit Has Manufactured a Heightened Standard for the Scrutiny of Takings Claims Asserted Under Section 1983 in Conflict with the Circuit Courts for the Eighth Circuits.	15
CONCLUSION	17

TABLE OF AUTHORITIES**Cases**

Bell Atlantic Corporation v. Twombly 550 U.S. 544 (2007)	8
Crawford-El v. Britton 523 U.S. 574 (1998)	8
Heights Apartments, LLC v. Walz 30 F.4th 720 (8th Cir. 2022)	16
Jacobson v. Massachusetts 197 U.S. 11 (1905)	7, 10, 11, 15
Johnson v. City of Shelby, Mississippi 574 U.S. 10 (2014)	8, 9
Jones v. Bock 549 U.S. 199 (2007)	8, 9
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit 507 U.S. 163 (1993)	9
Penn Cent. Transp. Co. v. City of New York 438 U.S. 104 (1978)	12
Roman Cath. Diocese of Brooklyn v. Cuomo 592 U.S. __, 141 S. Ct. 64 (2020)	7
S. Bay United Pentecostal Church v. Newsom 591 U.S. __; 141 S. Ct. 716; 209 L.Ed.2d 22 (2021)	7

Scheuer v. Rhodes
416 U. S. 232 (1974) 9

Swierkiewicz v. Sorema N.A.
534 U.S. 506 (2002) 8

Tandon v. Newsom
141 S. Ct. 1294 (2021) 7

Tellabs, Inc. v. Makor Issues & Rights, Ltd.
551 U.S. 308 (2007) 8, 9

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 6
28 U.S.C. § 1343 6
42 U.S.C. § 1983 6, 11

Rules

F.R.Civ.P. Rule 12(b)(6) 8, 11, 12, 15

TABLE OF APPENDICES

U.S. NINTH CIRCUIT COURT OF APPEALS, OPINION, FILED JULY 12, 2022	1a
U.S. NINTH CIRCUIT COURT OF APPEALS, ORDER RE PETITION FOR REHEARING EN BANC, FILED AUGUST 17, 2022	8a
IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA, REPORTER'S TRANSCRIPT RE: MOTION TO DISMISS, FILED OCTOBER 27, 2020	11a
IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA, ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION AND MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE, FILED MAY 22, 2020	52a
THIRD AMENDED COMPLAINT, FILED JULY 29, 2020	72a
ADDENDUM OF CONSTITUTIONS, STATUTES, RULES	158a

PETITION FOR A WRIT OF CERTIORARI**OPINIONS BELOW**

The order denying the petition for rehearing *en banc* (Pet.App.8a-10a) is unpublished. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App. 1a-7a) is unpublished.

The decision of the United States District Court for the Eastern District of California granting dismissal was rendered orally from the bench and is unreported (Pet. App. 11a-51a). An earlier decision of the United States District Court for the Eastern District of California denying a temporary restraining order (Pet. App. 52a-71a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its memorandum disposition on July 12, 2022. The panel denied a petition for rehearing *en banc* on August 17, 2022. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant provisions of the United States Constitution together with relevant statutory provisions.

CONCISE STATEMENT OF THE CASE

Facts Material to Consideration of the Questions Presented

Best Supplement Guide LLC ("Best SG"), a California domestic limited liability corporation, transacts business under the trade name Fitness System ("Fitness System"). Sean Covell ("Covell"), a resident of Sacramento, California, organized and registered Fitness System with the State of California in 2008. Covell directs and manages Fitness System as its president.¹

Fitness System operates three membership-based gyms, including a location in Lodi, California, at issue here. Fitness System and Covell have contracted with individuals and other businesses for facilities and services. Among the services Fitness System has contracted to provide, Fitness System personal trainers design exercise programs, coach clients to healthier and more active lifestyles, and teach appropriate exercise technique and safety. Fitness System clients rely on the services of the gym and of personal trainers at the gym to satisfy doctors' orders for training, rehabilitation, and recovery.²

¹ See Third Amended Complaint ("TAC") ¶¶ 17-20 (Pet.App. 77a).

² See TAC ¶¶ 40, 42-48 (Pet.App. 80a-82a).

During the onset of the covid-19 pandemic, California State and Local officials undertook a broad scale shuttering of the casually-so-denominated "nonessential" economy within the State of California. State actors obtained the desired result by issuing, threatening to enforce, and actually enforcing various public health orders requiring businesses to shutter and compelling California residents to remain in their homes. For Fitness System, the closure orders were devastating.³

Gymnasiums, as matters developed, were not identified as part of California's (or this Nation's) "critical infrastructure sectors" referenced in the Executive Order. Because Fitness System and Covell' business was "Non-Essential," they were compelled, under threat of citation, prosecution, fine, imprisonment, and loss of business licensing, to shut down their gym business.⁴

Neither Covell nor Fitness System had any intention, design, or plan to shutter the Lodi gym in response to the pandemic. Fitness System closed because of, and only because of, government coercion -- in the form of State and Local public health orders and written threats of arrest and prosecution directly delivered to Fitness System and addressed to Sean Covell.⁵

³ See TAC ¶¶ 100-138 (Pet.App. 91a-97a).

⁴ See TAC ¶¶ 139-142 (Pet.App. 97a-98a).

⁵ See TAC ¶¶ 143-155 (Pet.App. 98a-100a).

As a consequence of those Orders, Fitness System and Covell were compelled to close their facilities to their members. By summer 2020, Covell estimated business losses resulting from the government's ordered closure of Fitness System's facilities to have reached approximately Eight Hundred Fifty Thousand Dollars (\$850,000.00).⁶

On April 30, 2020, the City dispatched three City of Lodi Police Department officers to Fitness System and Covell' Lodi location. The police officers brought with them and delivered to Fitness System and Covell' employees a letter from county counsel. The police officers told the employees they were there to "educate" them. The police officers further told those employees that, if Fitness System and Covell opened the Lodi gym, the consequences could include fines and arrest.⁷

The County's Counsel prepared a letter that was then delivered by the City's police officers. In the letter, counsel warned that reopening the gym would be "a violation of the County Public Health Officer's order of April 14, 2020." County Counsel further warned, "Any person who refuses or willfully neglects to comply with this emergency order is guilty of a misdemeanor, punishable by fine and/or imprisonment." Finally, in his letter, County

⁶ See TAC ¶¶ 79 (Pet.App. 87a).

⁷ See TAC ¶¶ 146-149 (Pet.App. 99a).

Counsel warned that “there are civil and administrative penalties that can be imposed upon you as a result of continued operation” and that “The County of San Joaquin is prepared to pursue all available civil and criminal sanctions should you open your facility to the public.” County Counsel’s letter indicates that a copy of the letter was also provided to the City Attorney for the City of Lodi.⁸

County Counsel’s letter constituted a final decision of the Defendants on the application of the Orders complained of herein to the rights, liberties, and interests of Fitness System and Covell. These Orders have caused catastrophic damage to Fitness System and Covell is not denied by the State and Local officials. The strong-arm, forced closure of Fitness System and Covell’ facilities has disastrously impacted their financial obligations and deprived them of all economically feasible uses of their property.⁹

Before the State and Local Defendants issued the destructive orders attacking private businesses and stripping individuals of the right to travel, Fitness System and Covell had nearly 6000 active accounts covering all three of their gym locations. Unsurprisingly and directly because of the coerced closure, Fitness System and Covell suffered substantial loss.¹⁰

⁸ See TAC ¶¶ 150-155 (Pet.App. 99a-100a).

⁹ See TAC ¶¶ 156 (Pet.App. 100a).

¹⁰ See TAC ¶¶ 156-160 (Pet.App. 100a-101a).

Basis of Federal Jurisdiction in the District Court

The State and Local Government officials, Petitioners allege, deprived them of federal constitutional rights to freedom of speech, peaceable assembly, expressive association, substantive due process, to procedural due process, to equal protection, and to security of their property against a taking without just compensation.¹¹

Such claims are redressable in a civil action for damages, for injunctive relief, and for declaratory judgment.¹² Jurisdiction in the district court was conferred by Title 28 U.S.C. §§ 1331 and 1343.

REASONS TO GRANT THE WRIT

The instant petition seeks redress for a Taking of private property without contemporaneous payment of just compensation. The harm is fixed; the case is not moot.

State and local government responses to the Covid-19 pandemic have provoked several urgent requests to this Court for equitable relief from government overreach, including requests to be relieved of entirely unbalanced limitations on the right of individuals to gather for worship **and** coercive federal executive vaccination mandates on

¹¹ See TAC ¶¶ 258-389 (Pet.App. 131a-156a).

¹² See Title 42 U.S.C. § 1983.

private employers. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *S. Bay United Pentecostal Church v. Newsom*, ___ U.S. ___, 141 S. Ct. 716, 717-18, 209 L.Ed.2d 22 (2021) (Statement of Gorsuch, J.); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67. Remarkably, in treating the bulk of those applications, this Court never mentions its seminal decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

It remains to be proven that "[e]ven in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution." See *S. Bay United Pentecostal Church*, 141 S. Ct. at 718 (Statement of Gorsuch, J.)). In the instant case, compelling culpable governments and officials to include, in calculating the costs of public health orders the costs of compensation for regulatory takings is the only constitutionally proper course of action.

Petitioners seek this Court's review because they have suffered injury at the hands of individuals who may be made to answer for their actions in a federal civil rights lawsuit. Even with the evanescing of the offending public health orders, the injury has already been inflicted, and as the Taking occurred without contemporaneous compensation being made, this lawsuit provides the only avenue to correct the constitutional wrongs laid out in the Third Amended Complaint.

1. In the decision below, the United States Court of Appeals for the Ninth Circuit so far departed from this Court's teaching in its application of Rule 12(b)(6) of the Federal Rules of Civil Procedure as to require the supervisory intervention of this Court on certiorari.

This Court's decisions on dismissal practice stand as ample warning against litigant or judicial impatience alike, which, as this Court has warned, is not a ground on which to grant dismissal pursuant to F.R.Civ.P. Rule 12(b)(6).¹³ This Court has repeatedly warned the lower federal courts and litigants alike that Rule 8 of the Federal Rules of Civil Procedure does not authorize the application of heightened pleading requirements to complaints attacked on the ground of failing to state a claim upon which relief can be granted.¹⁴

¹³ See *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10 (2014); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007); *Jones v. Bock*, 549 U.S. 199 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998).

¹⁴ See, e.g., *Johnson*, 574 U.S. at 11 (“Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief” ... “they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted”) (citations and internal quotation marks omitted); *Tellabs, Inc.*, 551 U.S. at 319 (“In an ordinary civil action, the Federal Rules of Civil Procedure require only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’”) (citation omitted).

As this Court instructed in *Johnson*, the Federal Rules "are designed to discourage battles over mere form of statement[.]"¹⁵ Even before heightened standards for pleadings in civil rights cases were rejected,¹⁶ this Court had explained that, "[w]hen a federal court reviews the sufficiency of a complaint ... [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").¹⁷

This Court has rejected overzealous docket management via the application of ~~unapproved~~ judicial or litigant innovation of standards. The persistent problem of overly exuberant pursuit of resolutions by dismissal compels this Court to spend time in repair of error that could be averted by adherence in the lower courts to the standards identified and applied in this Court.¹⁸

¹⁵ See 574 U.S. at 11.

¹⁶ See *Johnson*, 574 U.S. at 11; *Tellabs, Inc.*, 551 U.S. at 319; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

¹⁷ See *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974).

¹⁸ See *Jones v. Bock*, 549 U.S. 199 (2007) ("Thus, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163 (1993), we unanimously reversed the court of appeals for imposing a heightened pleading standard in §1983 suits against municipalities. We explained that "[p]erhaps if [the] Rules ... were rewritten today, claims against municipalities under §1983 might be subjected to the added specificity requirement But that ... result ... must be obtained by ... amending the Federal Rules, ... not by judicial interpretation" (citation omitted); *Swierkiewicz v. Sorema N.A.*, 534 U. S. 506, 515 (2002) (amendment of the Federal

This Court has rejected such judicially elevated pleading standards as both wrong **and** inconsistent with the notice pleading under Rule 8 of the Federal Rules of Civil Procedure. Here, Petitioners' regulatory Takings claim has not, **contrary to the essence of the panel's decision below**, been tested on its merits. Rather, the Ninth Circuit has peremptorily licensed the district courts under its supervision to create a fantastical **Jacobson** action and to find wanting those federal civil rights complaints that plainly satisfy pleading requirements of Rule 8 but fail judicial measurement according to the pseudo-**Jacobson** cause of action. **See** Memorandum Order at 3 (Pet.App. 4a) ("We affirm the district court's order dismissing all claims against the city and county defendants")

Rules, rather than ad hoc rationales, is the sole proper means for imposing heightened pleading standards); *id.*, 534 U.S. at 511 ("This Court has never indicated that the requirements for establishing a *prima facie* case under **McDonnell Douglas** also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss"); *Hill v. McDonough*, 547 U.S. 573 (2006) (no heightened pleading standard applicable to Section 1983); *Hill*, 547 U.S. at 582 ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts"); *Leatherman*, 507 U.S. at 168 ("the heightened pleading standard is just what it purports to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief") (internal quotation marks and citation omitted); *Leatherman*, 507 U.S. at 168 ("We think that it is impossible to square the heightened pleading standard ... with the liberal system of notice pleading set up by the Federal Rules") (internal quotation marks omitted).

Fitness System asserted a regulatory Takings claim. It framed that claim as one arising under the Constitution of the United States and suitable for the relief authorized by Congress in the Civil Rights Act, Title 42 U.S.C. § 1983.¹⁹ The Ninth Circuit affirmed the district court's **dismissal** of the claim on the Local Government officials' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That dismissal, in turn, embodied the district court's conclusion that this Court had provided "the substantive elements needed to state a constitutional claim during a public health emergency" in its decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).²⁰

¹⁹ The court of appeals reached its decision on Fitness System's Takings claim **because** Petitioners' damages claims against the city and county have not been mooted by revocation of the offensive government orders. See Memorandum Order at 7 (Pet. App. at 3a) ("Because Plaintiffs seek damages against the city and county defendants, however, those claims are not moot"). That this case continues to present at least an actual controversy on the question of Petitioners' Takings claim is not subject to reasonable dispute.

²⁰ The district court's fantastical construction of a *Jacobson* cause of action continues with this **suspect** pronouncement: "The elements under *Jacobson* are, one, whether the Government action has a real or substantial relation to the crisis, and, two, whether the Government action is not beyond all question a plain, palpable invasion of rights secured by the fundamental law." See Transcript (Pet.App. at 31a). The Ninth Circuit never explained, in its affirmation of the district court's travesty, how this Court's disposition of a criminal appeal accomplished the expurgation of Section 1983's express terms

While offering lip service to *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Ninth Circuit's decision reads as a ~~merits~~ decision treating the record proof assembled on ~~summary~~ judgment or for trial.²¹ The panel decision omits analysis of whether the Third Amended Complaint satisfied the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure and was, therefore, an inappropriate candidate for dismissal pursuant to Rule 12(b)(6).

In treating the second and third parts of this Court's *Penn Cent. Transp. Co.* test, the panel's opinion omitted analysis of the dismissal of Fitness System's Takings claim. The panel simply asserted, "[t]he second and third factors cut strongly against finding the public health orders were a regulatory taking."²² Asserting that this fact supported its conclusion, the panel noted that Fitness System "was shut down for about five months with an additional eleven months of restriction."²³

for the district court's innovation. ~~See generally~~ Memorandum Order (Pet.App. at 1a).

²¹ ~~See generally~~ Memorandum Order (Pet.App. 1a-7a).

²² ~~See~~ Memorandum Order at 4 (Pet.App. 4a-5a).

²³ ~~See~~ Memorandum Order at 4 (Pet.App. 4a-5a).

That a government-coerced shut down of all **governmentally designated, non-essential businesses** lasted five months provides ample evidence of the destructive and invasive character of the government action by which the regulatory taking was accomplished. Rather than the mere adjustment of the benefits and burdens of public life to promote the common good, the closure orders were targeted attacks stripping businesses and their owners, their employees, their agents, and their contract partners, from any access to the common good or to the benefits of the common good. Indeed, in the **government-centric** philosophy of the decisions below, these actions were direct threats of criminal prosecution enforced by the reminding presence of law enforcement officers and written warnings of coming arrests.

Fitness System pled that the character of the government action was direct, destructive, and invasive of private property and private property interests.²⁴ Moreover, the TAC adequately pleaded that the shut-down orders directly, abruptly, and completely disrupted distinct, investment backed, economic expectations.²⁵ When the peremptory business closures ordered by the State and Local Government officials took effect, Local Government

²⁴ See TAC ¶¶ 277-287 (Pet.App. at 135a-137a)

²⁵ See TAC ¶¶ 277-287 (Pet.App. at 135a-137a)

officials directly delivered threats to enforce Fitness System's closure by threats of criminal prosecution for misdemeanor offenses under State law. To emphasize the intentionally provocative and terroristic approach to governmental enforcement of this attack on private enterprise, the Local Government officials required that the arrest threat be delivered by uniformed police officers.²⁶

One might, in an effusive rapture for the imposition of capital punishment, proclaim that executing a convicted murderer will "adjust[] the benefits and burdens of economic life to promote the common good."²⁷ But when the force of government puts in motion the slow-motion execution of private enterprise, as happened here, there is no basis on which to gussy up the circumstances as a mere "balancing of benefits and burdens."

The Ninth Circuit's cavalier disregard for the loss and the harm resulting from government-targeted destruction of distinct investment backed expectations does, in fact, shock the conscience.²⁸

²⁶ See TAC ¶¶ 146-149 (Pet.App. at 99a)

²⁷ Compare Memorandum Order at 4 (Pet.App. 4a) (finding the closure orders were more akin to a simple adjustment of "the benefits and burdens of economic life to promote the common good.")

²⁸ What shocks the conscience, of course, will depend on how a conscience has been trained. If a conscience has been formed under the ideals of the Declaration of Independence, and

The panel's disregard for injuries inflicted on Petitioners is balanced. It is balanced by the panel's complete omission of any sign that it had undertaken review on appeal of the Rule 12(b)(6) dismissal order rather than reviewing a merits determination of Petitioners' Takings claim.

2. The Ninth Circuit Has Manufactured a Heightened Standard for the Scrutiny of Takings Claims Asserted Under Section 1983 in Conflict with the Circuit Courts for the Eighth Circuits.

The panel decision affirmed the district court's judgment. The district court concluded, and the panel did not reverse that holding, that the TAC failed to state a claim for the regulatory Taking of Petitioners' property, and particularly that Petitioners had failed to state a *Jacobson v. Commonwealth of Massachusetts* cause of action.²⁹ The dismissal pursuant to Rule 12(b)(6) the Petitioners' Third Amended Complaint has the legal effect of denying to the Petitioners the right to obtain redress, not on their failure to plead a Takings claim properly under Section 1983. Rather, the dismissal hangs on the conclusion that it isn't

informed by the guardrails of the Constitution, then it cannot but be shocked by the government actions that caused so much damage and harm, including to the Petitioners.

²⁹ See Transcript (Pet.App. 31a).

possible to state a regulatory takings claim during a public health emergency without meeting legal standards that this Court hasn't recognized and that the Federal Rules do not provide.

The United States Court of Appeals for the Eighth Circuit reversed in part a decision of the U.S. District Court for Minnesota, holding that the Plaintiffs-Appellants there were entitled to proceed to discovery on two claims asserted in opposition to Governor Walz's eviction moratorium, *Heights Apartments, LLC v. Walz*.³⁰ The allegations of the amended complaint asserted both a *per se* physical taking and a regulatory taking.³¹ The Eighth Circuit explained, in its reversal, that Governor Walz's executive orders "chops through the bundle" of property rights "taking a slice of every thread . . ."³²

Except for the nature of the businesses, the Takings injury inflicted by State and Local officials in California on Fitness System is indistinguishable from the harm asserted by Heights Apartments, LLC in its complaint.³³ In the absence of supervision

³⁰ See *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 724 (8th Cir. 2022) (setting out salient facts of Executive Orders effecting a moratorium on evictions in the State).

³¹ See *Heights Apartments, LLC*, 30 F.4th at 733.

³² 30 F.4th at 735.

³³ 30 F.4th at 735.

by this Court, two circumstances obtain under the law. In the Eighth Circuit, compensation may be available based on proving a regulatory takings claim. In the Ninth Circuit, the claim will be dismissed for failing to satisfy the elements of a fictitious standard invented out of whole cloth.

The Court should grant the Petition and set the matter for briefing and argument.

CONCLUSION

The Ninth Circuit's allowance of the creation and use of an extraordinary standard for pleading a violation of a federal civil right directly disregards this Court precedents, and the Ninth Circuit's decision positions it in conflict with the decisions of the United States Court of Appeals for the Eighth Circuit.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James M. Henderson, Sr.	Brian Ricardo Chavez-
James Henderson Law Offices	Ochoa
3125 Burgaw Hwy Lot 3	Chavez-Ochoa Law
Jacksonville, NC 28540	Offices, Inc.
910-381-0317	4 Jean Street, Suite 4
jmhenderson58@gmail.com	Valley Springs, CA 95252
	209-772-3013
	Fax: 209- 772-3090
	brianr@chavezochaolaw.com

Counsel of Record

Attorneys for Appellants
Best Supplement Guide LLC and Sean Covell

ORIGINAL

No. 22-_____

In the Supreme Court of the United States

BEST SUPPLEMENT GUIDE LLC
and SEAN COVELL
Petitioners,

v.

COUNTY OF SAN JOAQUIN,
CITY OF LODI, MAGGIE PARK
Respondents.

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

CERTIFICATE OF COMPLIANCE

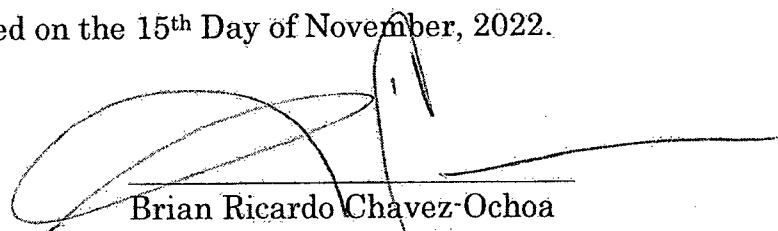
James M. Henderson, Sr.	Brian Ricardo Chavez-Ochoa
James Henderson Law Offices	Chavez-Ochoa Law Offices, Inc.
3125 Burgaw Hwy Lot 3	4 Jean Street, Suite 4
Jacksonville, NC 28540	Valley Springs, CA 95252
910-381-0317	209-772-3013
jmhenderson58@gmail.com	brianr@chavezocholaw.com
	<i>Counsel of Record</i>

Attorneys for Petitioners
Best Supplement Guide LLC and Sean Covell

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 3,630 words, excluding parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15th Day of November, 2022.



Brian Ricardo Chavez-Ochoa
Chavez-Ochoa Law Offices, Inc.
4 Jean Street, Suite 4
Valley Springs, CA 95252
209-772-3013
brianr@chavezochaoalaw.com
Counsel of Record

No. 22-____

In the Supreme Court of the United States

BEST SUPPLEMENT GUIDE LLC
and SEAN COVELL
Petitioners,

v.

COUNTY OF SAN JOAQUIN,
CITY OF LODI, MAGGIE PARK
Respondents.

Certificate of Service

Being duly sworn, I depose and say under penalty of perjury:

1. That I am over the age of 18 years and am not a party to this action. I am an employee of Ace Attorney Service, Inc., mailing address at 811 Wilshire Blvd., Ste 900, Los Angeles, CA 90017.

2. On November 16, 2022, I served the parties in the above captioned matter

with the PETITION FOR WRIT OF CERTIORARI, by mailing three (3) true and correct copies of the same by USPS Priority mail, postage prepaid delivery to the following addresses:

KILLEEN, JOHN W.
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
916-210-6045
916-324-8835 (fax)
John.Killeen@doj.ca.gov

FOX,DEBORAH J.
ROSEQUIST,MARGARET W.
BURKE, TED STEVEN JR.
NAZARETH,MATTHEW B.
YUJIN CHUN
Meyers Nave
707 Wilshire Blvd.
24th Floor
Los Angeles, CA 90017
213-626-2906
213-626-0215 (fax)
dfox@meyersnave.com

Dated November 16, 2022

Fernando Mercado
Fernando Mercado