NO. _____

In The
Supreme Court of the United States

Stand for Something Group Live, LLC, d/b/a The Rail Club Live, *et al.*

Petitioners,

v.

Greg Abbott, as Governor of Texas, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should statements by relevant authorities predicting future threats be considered in the "reasonable expectation" analysis triggering the capable-of-repetition-yet-evading-review mootness exception?

2. Did the Texas Alcoholic Beverage Commission violate equal protection and perform a regulatory taking not "promoting the common good" under the *Penn Central* factors requiring just compensation when they revoked liquor licenses of bars operating legally and according to TABC regulations in violation of the Texas Administrative Procedures Act and without first providing an opportunity for stakeholder input?

3. Should the "reasonable expectation" analysis and *Penn Central* factor analysis be left to the trier of fact?

PARTIES TO THE PROCEEDINGS

A. Petitioners and their Counsel

1. Stand For Something Group Live, LLC, d.b.a. The Rail Club Live, is a domestic limited liability company ("LLC"); Fort Worth, Texas.
2. Cardinal Companies Int'l, LLC, d.b.a. Barge295; Seabrook, Texas.
3. Dave & Bobby LLC, d.b.a. Soggy Bottom Saloon; Beaumont, Texas.
4. Cooter Brown's Private Club, Inc., d.b.a. Cooter Browns; Burleson, Texas.
5. Patricia Adams, an individual, d.b.a. Lazy H Bar; Liberty, Texas.
6. Robin Evans, an individual, d.b.a. The Bar on Veterans; Harker Heights, Texas.
7. O'Mojo Enterprises, LLC, d.b.a. Six Springs Tavern; Richardson, Texas.
8. LWDC Enterprises, LLC, d.b.a. Pearl's Cherokee Lounge; Arlington, Texas.
9. Horny Toads, LLC, d.b.a. Horny Toads Bar and Grill; Galveston, Texas.
10. A. Powers Enterprises, LLC, d.b.a. Scout Bar; Houston, Texas.
11. The Station Bar, Inc. d.b.a. The Whiskey Girl; Abilene, Texas.
12. Tomerica, LLC, d.b.a. Caves Lounge; Arlington, Texas.
13. Ozzie Rabbit, LLC, d.b.a. The Ozzie Rabbit Lodge; Fort Worth, Texas.
14. Stacey B. Jones, LLC, d.b.a. Basin Nights; Odessa, Texas.
15. Uisce Beatha Corp, d.b.a. Plaza Pub; Arlington, Texas.
16. Back Stage Entertainment, LLC, d/b/a Chuter's; Pasadena, Texas.
17. TROB Inc., d/b/a Mr. B's Sports Bar; Marble Falls, Texas.
18. Tiks Tavern LLC, d/b/a Tiks Tavern; Houston, Texas.
19. James Sheffield, d/b/a This Bar; Crosby, Texas.
20. Katydid Inc., d.b.a. Old Santa Fe Lounge; Amarillo, Texas.

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B. Respondents and their Counsel:

1. Gregory Wayne Abbott (in his official capacity)
2. Texas Alcoholic Beverage Commission ("TABC")
3. Exec. Director, Thomas Graham (replacing Bentley Nettles by TRAP 7.2)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant discloses the following. There is no parent or publicly held company owning 10% or more of any Applicants' stock.

STATEMENT OF RELATED PROCEEDINGS

There are no directly related proceedings from the same trial court case as the case in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The Petition to Review for the Texas Supreme Court by Petitioners is reproduced in the appendix to this petition at App. D. The denial of the writ by the Texas Supreme Court is reproduced in the appendix to this petition at App. E. The panel opinion of the Thirteenth District Court of Appeals is published at 2022 WL 11485464 and reproduced at App. B. The judgment of the Thirteenth District Court of Appeals is reproduced at App. C. The order of the district court is unpublished and is reproduced at App. A.

ADMINISTRATIVE ACTIONS

The relevant Emergency Orders of Suspension against Petitioners are produced at App. G.

JURISDICTION

This Court has jurisdiction over this petition according to 28 U.S. Code § 1257 because the Supreme Court of Texas denied the petition to review in Case No. 22-1036 on June 23, 2023, from the Thirteenth Court of Appeals. This case questions the validity of an alleged statute of the State of Texas on the ground of its being repugnant to the Constitution and laws of the United States, and involves the privileges claimed under the Constitution and laws of the United States.

The alleged statute comprises an executive order issued by the governor of Texas during an alleged emergency which closed bars in Texas based on irrational rules enforced by the Texas Alcoholic Beverage Commission without seeking stakeholder input and failing to follow the Texas Administrative Procedures Act long after the TABC was operating normally in all other respects.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article I, § 3 of the Texas Constitution guarantees equal protection, and reads:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

STATEMENT OF THE CASE

Trial Court:	The Hon. Tim Sulak, District Judge, Cause No. D-1-GN-20-004403 200th Judicial District, Travis County, Texas.
Trial Disposition:	On December 18th, 2020, the trial court entered its Order Denying Plaintiff's Application for Temporary Injunction and its Order Granting Defendants' Plea to the Jurisdiction. App. A.
Appellate Court	Thirteenth District Court of Appeals Chief Justice Contreras and Justices Hinojosa and Silva heard the appeal; Justice Hinojosa authored the opinion.
Appellate Disposition:	On October 20, 2022, the Court of Appeals dismissed for want of jurisdiction the Bars' appeal from the dismissal of their claims for declaratory and injunctive relief, and affirmed the trial court's dismissal of the Bars' takings claims; *Stand for Something Grp. Live, LLC v. Abbott,* No. 13-21-00017-CV, 2022 Tex.App. LEXIS 7719 (Tex. App.—Corpus Christi Oct. 20, 2022). No post-opinion motions are pending. App. B, C.
Supreme Court of Texas Disposition	Petitioners filed a Petition for Review on January 18, 2023. On June 23, 2023, the Supreme Court of Texas denied the petition for review. App. D.

Petitioners show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. The portions of the record relied on under this subparagraph are voluminous and are included in the appendix.

This case results from a series of regulatory actions which effectively closed all bars in Texas at least temporarily, and then suspended licenses of bars accused of failing to comply with COVID emergency requirements. The suspensions were misplaced: in an effort to lower the spread of COVID, TABC used Tex. Alco. Bev. Code Ann. § 11.614 to suspend alcoholic beverage licenses and permits. In this case Bar owners exceed COVID-19 mitigation prevention practices, exceeding restaurants similarly situated to them, but the TABC still closed down businesses and suspended alcohol licenses for an unsustainable period of time. App. D and H.

Even after the TABC decided to allow some bars to reopen, its irrational regulations were adopted without stakeholder input and favored bars inside restaurants and hotels over stand-alone bars which were unaffiliated with another business.

Alleging that these suspensions and closures worked a taking under the constitutions of both the United States and Texas, this group of bar owners then filed a regulatory taking suit against the TABC in state district court, directly invoking both the Texas and United States Constitutions. App. D and H. Additional bar owners were added as Plaintiffs in subsequent amendments.

After appearing, TABC filed a plea to the jurisdiction arguing (in relevant part) that the bar owners could not bring their regulatory taking claim because the pandemic was over, mooting the issue, and adding that the actions taken were for the common good and therefore could not constitute a taking. App. H. According to Respondents, TABC actions could not be considered as capable of repetition yet evading review because the likelihood of another pandemic was minimal. Further, the TABC claimed that its record of actions could not be reviewed because "common good" rationales give TABC unbridled authority to suspend licenses and close businesses that are allegedly a threat public health even when they lack a statutory basis. TABC argued that, since it suspended licenses and closed business during a public health emergency, its actions escape judicial scrutiny.

The district court granted TABC's plea to the jurisdiction and denied the bar owners a temporary injunction. App. A. The district court issued no opinion explaining its decision.

The bar owners appealed the decision to the 3rd Court of Appeals in Austin, arguing that the district court erred in its decision to grant the plea and that their claims were not moot and the courts had subject matter jurisdiction to adjudicate their claims on the merits. Respondents argued

that the pandemic was over, all claims were moot as a result, and there was no subject matter jurisdiction. TABC also argued that because the pandemic was over, there was no reasonable expectation that contested actions could recur.

The appeal was transferred to the 13th Court of Appeals for adjudication. The appellate court there affirmed TABC's plea to the jurisdiction on October 20, 2022. App. C. Specifically, the appellate court noted that the pandemic was over and therefore there was no reason to expect that TABC would act outside its regulations in the future. App. B. Further, the appellate court argued that because the TABC's actions were taken in the name of public health, during a public health emergency, the actions were for the common good and could not be classified as a regulatory taking. *Id.*

The appellate court did not directly address the actions of the TABC. *Id.* The appellate court did not address statements from high-ranking health officials and authorities warning of future pandemics. *Id.* The appellate court did not address the reasonable expectations of future threat of TABC overreach during an emergency. *Id.* The appellate court did not discuss or otherwise address the bar owners in compliance with COVID-mitigation practices that were still closed down by TABC enforcement actions. *Id.* The appellate court does not explain how TABC's actions of closing businesses that were in compliance with emergency health regulations was in the "common good". *Id.* The appellate court preemptively decided the "reasonable expectation" and "common good" analyses that should have been left to the trier of facts. *Id.*

After a motion to extend the time to file, Petitioners filed a petition for review in the Supreme Court of Texas on January 18, 2023. App. D. The Supreme Court of Texas denied the petition on June 23, 2023. This petition timely followed.

REASONS FOR GRANTING THE PETITION

1. The legal issues at stake are significant and have national implications. States all over the country are attempting to decide the proper scope of regulatory takings arising from the COVID pandemic. This Court should weigh and decide the bounds of "reasonable expectations" in light of statements made by public health authorities warning of future pandemics. This Court should weigh and decide the bounds of the "common good" in regard to shutting down businesses that are exceeding state agency COVID mitigation practices, exceeding restaurants similarly situated to them, in an effort to keep their doors open and their employees on the payroll. This Court should instruct administrative bodies that they cannot use a pandemic or other emergency as a 'get out of constitutional chains, free' card.

2. If this Court does not hear this petition, state agencies all over the country will know they have nearly unlimited authority to interfere with commercial operations as long as there is some declared state of emergency. Furthermore, courts all over the country will begin to impose their subjective and varied interpretations of "reasonability" in future pandemics and emergencies. This Court should hear the petition and settle the conflicts of the bounds of "reasonable expectations" analysis and the "common good" analysis in *Penn Central* in light of possible future pandemics and similar declared emergencies.

3. The nature of this petition involves regulatory takings, the failure of the TABC in its obligation to seek stakeholder input, and closure of businesses that exceeded COVID-19 mitigation practices of other businesses similarly situated. In this case, the TABC did not seek input from stakeholders while creating irrational rules about mitigating COVID spread, even long after the TABC resumed normal operations in all other respects. Petitioners far exceeded the COVID-19 mitigation practices compared to other restaurants and businesses TABC allowed to operate. Nevertheless, they were still shut down

by the TABC. Petitioners argue that "common good" justifications are not applicable in a case where the victims were exceeding COVID-19 mitigation practices compared to other businesses the TABC allowed to operate. Allowing some restaurants to operate that had subpar COVID mitigation protocols to operate but not allow the Bar Owners that had excellent COVID mitigation protocols cannot be "for the common good" and in the name of public health and safety.

4. Further, Petitioners argue that since there are still predictions of future pandemics by high-ranking authorities, this issue is not moot because there are reasonable expectations that Petitioners could be subject to the same or similar emergency regulations and enforcement actions. Additionally, even if there are no reasonable expectations of future pandemics, there is a reasonable expectation of continued TABC overreach if left unchecked. The TABC shut down entities that were exceeding COVID-mitigation practice compared to nearby restaurants. No bar owner can reasonably expect to be able to operate his bar knowing TABC can run amok outside the bounds of its own emergency requirements.

FACTS

5. The appellate court correctly stated many facts of this case, but its focus on mootness left unconsidered many facts which militate for a different conclusion. A fuller explanation of these facts clarifies the issues presented.

6. The Texas Alcoholic Beverage Commission ("TABC") enforcement of executive orders required stand-alone bars to close. The TABC did not take any stakeholder input regarding these rules, ignoring its statutory duty, long after it could have collected input that might have saved long-standing businesses. App. H, pg. 60-110.

A. Texas Alcoholic Beverage Commission Procedure

7. Texas alcohol sales are governed by the Alcoholic Beverage Code ("Code") and implemented by the Texas Alcoholic Beverage Commission ("TABC") after the public is given notice and opportunity to comment. App. H, pg. 10-12. Relevant sections of the Code[1] include section 5.07(c), which requires the commission to provide the public with a reasonable opportunity to appear and speak on any issue under TABC's jurisdiction, and section 5.31, which gives the TABC authority to "prescribe and publish rules necessary to carry out the provisions of this code." App. H, pg. 10-12.

8. The TABC decided, based on Governor Abbott's executive orders, that an organization may not have any commercial or non-profit activity if it has previously earned more than 51% of its revenue from alcohol sales. An exception was made for businesses that had a kitchen and served food, although the only distinction between businesses with different types of liquor license is the requirement to display signage regarding whether guns are allowed in the restaurant ("51% Rule"). App. H, pg. 7-20, 60-110; App. B, p.4, fn. 2; Texas Gov't Code § 411.204.

9. The 51% Rule is not a distinction between restaurants and bars, but rather the distinction between lawful and unlawful possession of firearms on a given premises. *Id.* Nevertheless, the 51% Rule was used as the demarcation between bars that were required to close and bars that could remain open.

10. No part of the bar-restaurant distinction rested on the 51% Rule. A restaurant with a bar was not prevented from operating its bar *area* under the TABC's COVID rules. A restaurant with

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[1] The Commission's Administrative Rules are part of the Texas Administrative Code at: http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=3&ti=16&pt=3; the TABC maintains a webpage with links to an annotated copy of the Code and TABC Administrative Rules at https://www.tabc.state.tx.us/laws/code_and_rules.asp.

a dance floor was not prevented from operation. Every Chili's, Humperdinks, and other restaurants featuring bars were allowed to continue operating under GA-28 while bars that were not part of restaurants were not. *Id.*

B. Executive Order GA-28 and "Reopening of Texas"

11. The appellate court's rendition of the facts and opinion contained no consideration of the impact of the TABC's implementation of the plan to "reopen" Texas. App. F, pg. 1-6. The plan stated that "Reopened Services" would be allowed to operate even if they were not "Essential Services". App. H, pg. 13.

12. Those Reopened Services rules allowed dine-in restaurants to operate, so long as less than 51% of their gross receipts were from the sale of alcoholic beverages. *Id.* In other words, any business generating a majority of its revenue from alcohol sales in the past could not reopen, irrespective of any other considerations. *Id.*

13. The irrational rules continued with GA-26 and -28, which closed any business on the wrong side of the 51% Rule, regardless of the true nature of the business or the services it provided to the public. Texas. App. F, pg. 12-17. Texas bar owners, operators, and employees were given mere hours to comply. However, GA-28 did not close "bar" type areas. It closed businesses based on a belief that the 51% Rule defines the bright line between bars and restaurants even though it does not. App. H, pg. 14.

14. Importantly, favored businesses remain unaffected by GA-28; bars affiliated with other facilities, such as hotels, bowling alleys, and bars in restaurants that are not licensed as bars with the TABC. The only discernable difference here is that one group has a license to sell food and can remain open while continuing to sell just as much alcohol as it did pre-COVID, whereas all others were prevented from engaging in any commercial or charitable activity at all. Bar owners

who had received an alcohol permit were prohibited from doing that which others, including their competitors, could do *without* a permit. App. H, pg. 14-15.

15. The TABC continued with its yo-yo open and closing instructions, each one becoming more irrational. On June 27, 2020, the TABC issued an Industry Notice which created two classes: one group could *ignore state law* and sell alcohol on a to-go basis; the second group could not. The second set of disfavored businesses were similarly situated but prohibited from adapting to the changing circumstances, as restaurants-with-bars were. App. H, pg. 7-20, 60-110.

16. Under GA-30, the TABC developed a rule to allow stand-alone bars and breweries to get around TABC's rules by creating additional rules allowing use of a food truck to operate on a bar's parking lot and thereby allow a bar to self-identify as a restaurant. App. D, pg. 10, ¶12.

17. However, this workaround failed to protect stand-alone bars in crowded urban areas which were unable to park a food truck in the street. Such businesses were still unable to open and serve their patrons.

18. Additionally, the food-truck approach was irrational. Under no circumstances could the TABC explain how a bar becomes safer by requiring the sale of food at a food truck, or encouraging $5 deals for a pretzel and beer combination, with 51% of the cost assigned to the pretzel. The resulting façade of food sales cannot be claimed to be safer than just allowing a bar to operate without the increased foot traffic between a bar area and its parking lot.

19. During this entire time TABC's rules were in effect, the TABC refused to accept stakeholder input and adopted irrational rules without providing opportunity to comment. App. H, pg. 7-20, 60-110. Critically, the appellate court did not address TABC's refusal to consider stakeholder input at all.

C. Example of the Rail Club

20. The Rail Club Live ("the Rail") operated as a bar, but also as a multi-purpose event venue. App. D, pgs. 10-11, 47-50, 92-95.In addition to concerts, the facility regularly hosted events such as a guitar school, church gatherings, and charity fundraisers. During the COVID-19 TABC emergency rulemaking era, the Rail opened its doors to bands who were unable to earn revenue through their customary performances, to practice and stream performances online in order to to earn virtual donations. *Id.*

21. All means of staying in business were prohibited because the Rail had previously obtained the state's permission to earn income through the sale of alcohol. Because of that permit, the Rail had to close. Meanwhile other bars, which are associated with white-listed restaurants artificially distinguished by the 51% Rule, acted without restriction from the TABC.

22. As argued before the trial and appellate courts, the Rail took extra precautions beyond those required or taken by favored bars and restaurants. App. D, pgs. 10-11. The TABC deemed the Rail's operations a "threat to public welfare" and demanded its closure under Tex. Alco. Bev. Code § 11.614(a). *Id.* The court of appeals observed that the Rail was closed for violating TABC rules and then circularly used that closure to justify the closure as a matter of law. App. B, p.4, fn. 2.

23. For the Rail and for many similarly situated small businesses, despite their choice not to sell alcohol during the mandate period, the fact that they had previously earned 51% or more of their income from alcohol resulted in the suspension of TABC-issued licenses. *Id.* Indeed, in the midst of the worst pandemic in living memory, TABC's rules prevented 51% bars from adapting to local conditions and providing service to their communities by providing the public with food and drink. The Memo does not examine the irrationality of the 51% rule, which prevented not only liquor sales, but non-alcoholic band practice, church gatherings, or other innocuous activity

unrelated to alcohol. App. B. In sum, the 51% rule was not only arbitrary and irrational, but even counterproductive since it materially inhibited local communities' small businesses from adapting in order to weather the pandemic storm.

24. The court of appeals did not discuss any of the irrational rules or analyze the failure of the TABC to take stakeholder input as required. While that input may have been impossible in those first two weeks of lockdown to flatten the curve, nothing in the record indicates an inability for the TABC to accept stakeholder input during the entirety of the two years of COVID regulations.

ARGUMENT

25. The appellate court's analysis regarding reasonable expectation for mootness for the declaratory judgment and injunctive relief is erroneous. Furthermore, its economic value analysis and justifications for "common good" in the taking claim analysis are erroneous. This Court should accept this petition and schedule full briefing, and then overturn the appellate court's rulings, since the appellate court's analysis regarding reasonable expectation was erroneous, and its first and third prong *Penn Central*[2] analysis lacks an appreciation of the facts of Respondents' actions, and is even contradictory at times.

37. Petitioners do not challenge all emergency public health restrictions employed to fight novel pandemics. Petitioners merely seek judicially imposed accountability to settle the conflicting approaches taken around the nation concerning "reasonable expectations" and how far "common good" rationales protect agencies from liability for the destruction of small business. The split in authority – essentially one between courts that considered the actions of the governing authorities and courts that ignore them in favor of broad grants of near absolute immunity – warrants this

[2] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Court's intervention. Among other things, the division of authority matters because it invites the sort of gamesmanship illustrated by the facts at bar. Had the lower courts considered the record of the TABC, the courts would have granted the takings claim because TABC arbitrary discriminated against Bar owners that exceeded COVID-19 mitigation practices without any rational basis. Had the lower courts considered statements by public health authorities they would have recognized that there are reasonable expectations of future pandemics, and now, because TABC is left unchecked, a reasonable expectation of TABC overreach in future emergency situations.

38. Petitioners stress that Texas has yet to show signs of relinquishing its emergency orders from various authorities and there are many warnings of future similar pandemic threats. Further, "common good" analysis shows that these types of pandemic responses are still very possible and allegedly justifiable from the appellate court's point view. If Texas agencies are judicially permitted to act outside their own rules without any consequences they will do so again, resulting in inevitable lost revenue, job destruction, and the permanent closure of entire businesses.

39. "Common good" justifications cannot be a blank check for agencies to do whatever they want without judicial review *indefinitely.* At law, TABC is obligated to seek and accept stakeholder input. Yet long after the TABC was operating normally in every other respect, it took no input from stakeholders who might have disabused it of its irrational notion that a firearm regulation was the best method of ascertaining which food and beverage providers should be allowed to operate in a pandemic. Had TABC been required to face stakeholder input and public scrutiny, its restrictions might have been lifted in favor of more a more rational approach and countless small businesses might have survived. Again, the unreviewed top-down restrictions were simply irrational – COVID spread is not mitigated by use of food trucks outside a bar, TABC's protests notwithstanding.

40. Nor does the requested review oblige this Court to second guess the judgments of the political branches or ask the Court to craft a one-size-fits-all approach to emergency response regulations. Petitioners seek a narrow opinion that imparts to regulatory agencies a mandate to ground their responses to novel emergency challenges in the foundational principles of our constitutional order. Specifically, regulatory agencies should make some effort to allow and consider stakeholder input and should endeavor to abide by their own rules even in emergencies.

41. While the particular circumstances that gave rise to this grievous error of regulatory enforcement have, for the time being, abated, the slumbering beast of emergency power, along with the possibility of future pandemics and other similar emergencies, remains undefined and under-scrutinized by U.S. courts. If the emergency powers and enforcement thereof are to have any limit whatsoever, this case is one that can provide a practical limiting principle without jeopardizing the broader scope of the Texas Disaster Act and similar legislation in other states.

42. The appellate court's rational in its Memorandum is erroneous. There are reasonable expectations of future pandemics. The *Penn Central* test supports the view that Petitioners suffered a regulatory taking by being denied the ability to operate their businesses legally, which has and will inevitably lead to lost profits and business closure. "Common good" justifications cannot be a blank check for authorities to act outside the scope of the law.

A. The Appellate Court's denial of declaratory and injunctive relief is erroneous because there is a reasonable expectation that state agencies are free to expand its enforcement powers beyond their own regulations during times of emergency, and there is a reasonable expectation of future pandemics.

43. Petitioners have no reason to believe that Respondents will not do everything the same way during the next declared emergency; rather, there is good reason to expect that Respondents would do exactly what they did in 2020. Respondents have made no public statements regarding their

past actions during the COVID-19 pandemic. The Texas Legislature has met and taken no action that would suggest that the state apparatus has learned anything at all regarding top-down overreach.

44. Respondents acted outside of the scope of the promulgated COVID regulations. A reasonable person would consider public knowledge relevant to their situation. This could include considering relevant historical events and statements by governing authorities.

45. Respondents acted outside the scope of their own COVID regulations when they shut down Petitioners who were operating *legally*. Worse, the TABC resumed its normal operations in all other respects during the ongoing COVID-19 pandemic but refused to seek stakeholder input as required by the Texas Administrative Procedures Act. The term "general applicability" under the APA references "statements that affect the interest of the public at large such that they cannot be given the effect of law without public input." *El Paso Hosp. Dist. v. Texas Health and Human Services Comm'n*, 247 S.W.3d 709, 714 (Tex. 2008); Tex. Gov't Code Ann. §§ 2001.001 & 2001.029.

46. This case is distinguished from *City of Dallas v. Woodfield*, 305 S.W.3d 412, 420 (Tex. App.--Dallas 2010) because that case included nothing in the record to support the "capable of repetition" inquiry and this case supports the contention that the contested actions could happen again. Unlike *Woodfield*, this case involves government orders to shut down businesses for months and a current worldwide pandemic which may dominate government action again.

47. The appellate court cited many circuit cases in Memorandum footnote 6, none of which are binding on Texans, but show the national significance of this issue and the split of judicial opinions. Further, none of the cases cited share facts with this case, which includes a government agency acting irrationally closing business that exceed COVID-19 mitigation practices of similar

businesses allowed to be open by the TABC and refusing to follow its own administrative process. App. H, pg. 7-20, 60-110.

48. The Thirteenth Court of Appeals of Texas shows the circuit split for mootness regarding reasonable expectations of future pandemics citing the cases on footnote 6 and *Cassell v. Snyders*, 990 F.3d 539, 546–47 (7th Cir. 2021) (applying voluntary cessation exception to mootness regarding stay-at-home orders); see *also Ector Cnty. All. of Bus'es v. Abbott*, No. 11-20-00206-CV, 2021 WL 4097106, at *7 (Tex. App.—Eastland Sept. 9, 2021, no pet.) (concluding that "the Governor and the State did not meet their heavy burden to make it absolutely clear that restrictions on people patronizing, and being served in, bars will not be reimposed through a future executive order"). Yet then conclusively decides for itself that somehow "it has become clear that there is 'no reasonable expectation' that COVID-19 restrictions like the ones to which the Bars object will be reimposed." App. B, pg. 11.

49. The appellate court cites *Eden, LLC v. Justice*, 36 F.4th 166, 171 (4th Cir. 2022) to say the advent of alternatives to lockdowns make the chance of lockdowns more remote. A proper evaluation of these facts would consider the unreasonable application of the COVID lockdown measures over months of not being allowed to operate even when exceeding COVID mitigation measures. App. H, pg. 7-20, 60-110. Public authorities in the case would not allow Petitioners to operate legally, forcing them to remain closed. *Id.*

50. If the appellate court's opinion stands unreviewed, Texas agencies are taught that they have free reign to bully citizens even well outside the scope of its own rules as long as they publicly offer statutory alternatives for the courts to cite, but in practice ignore.

51. The appellate court cites earlier pandemic cases, but none of them rebut the contention that Petitioners' reasonable expectations support that these harassing actions by the TABC are easily

repeatable. Further, as in *Ector Cnty. All. of Bus'es v. Abbott,* No. 11-20-00206-CV, 2021 WL 4097106, at *7 (Tex. App.—Eastland Sept. 9, 2021, no pet.), TABC did not meet its heavy burden to make it clear that the unreasonable and illegally enforced restrictions imposed on Petitioners will not be repeated. The appellate court's opinion focuses on excusing non-action and never discusses the TABC's failure to perform its job better over time or the fact that Petitioners exceeded public health guidance.

52. The appellate court cited *State v. City of Austin*, No. 03-20-00619-CV, 2021 WL 1313349, at *8 (Tex. App.—Austin Apr. 8, 2021, no pet.) and *Riley Drive Entm't, Inc. v. Reynolds*, 970 N.W.2d 289, 300–02 (Iowa 2022) to suggest Petitioners' challenge of TABC's and the Governor's actions are moot. Unlike the officials in *City of Austin* who were ordered to stop enforcing the law, TABC enforcement was not enjoined when shutting down Texas bars operating legally within those COVID protocols. App. H, pg. 60-110. As in *Matthews v. Kountze Indep't School District*, 484 S.W.3d 416, 418 (Tex. 2016), the TABC has constructive unfettered discretion to regulate Petitioners as they wish outside of the promulgated law.

53. Stated plainly, the TABC has never recognized that it may have overreached, or acted irrationally, even looking back. Petitioners exceeded COVID-19 mitigation requirements and still were closed down. No public official or policy has indicated a reluctance to act as though an emergency prevents the TABC from bothering with that pesky administration procedure that requires them to draw between the legal lines. *See R.R. Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 79 (Tex. 2003); Tex. Gov't Code Ann. §§ 2001.001 & 2001.029. There exists no reason to believe the TABC will act differently when the Sigma Variant of COVID-19 arrives.

i. Texas Authorities, including the Supreme Court, continue to claim emergency conditions, militating against a conclusion that this case is moot.

54. State authorities are still issuing emergency orders and still claim to have authority to impose similar emergency orders as described in this case, including the Fifty-Sixth Emergency Order[3] regarding eviction issued by this Court on October 14, 2022, though the appellate court concluded that these matters are moot, and this Court has yet to end such emergency orders.

55. There have been no statements by any state authority that these shutdown actions taken against Petitioners will not happen again. App. H, pg. 60-110. The White House still warns of spikes and recommends vaccine boosters.[4] Dr. Fauci warned us of winter spikes stating, "You don't make the timeline, the virus makes the timeline."[5] The CDC still issues guidance recommending isolation techniques and has never said there will be an end to CDC lockdown recommendations.[6]

56. Domestic and international experts recognize that the pandemic and its effects are not over.[7] The Court can take judicial notice that lockdowns were and are still used around the world.[8]

57. Further, there are still public health authorities warning of future imminent pandemics.[9]

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[3] https://www.txcourts.gov/court-coronavirus-information/emergency-orders/

[4] https://thegrio.com/2022/10/30/white-house-covid-19-vaccine-booster-shot-winter-holiday-spike/.

[5] https://www.cnn.com/2022/05/09/politics/white-house-100-million-covid-infections-projection-what-matters/index.html.

[6] https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html; https://www.foxnews.com/politics/white-house-future-lockdowns-school-closures-cdc.

[7] https://www.who.int/news/item/27-10-2022-tag-ve-statement-on-omicron-sublineages-bq.1-and-xbb; https://pulse.ncpolicywatch.org/2022/11/01/the-pandemic-is-not-over-health-experts-warn-of-winter-covid-surge-amid-fewer-safety-precautions/; https://thehill.com/policy/healthcare/3651195-fauci-says-we-are-not-where-we-need-to-be-after-biden-declares-pandemic-is-over/; https://www.breitbart.com/europe/2022/06/17/lockdown-forever-eu-votes-to-extend-covid-cert-until-2023/.

[8] https://en.wikipedia.org/wiki/COVID-19_lockdowns_by_country#Countries_and_territories_with_lockdowns; https://en.wikipedia.org/wiki/COVID-19_lockdowns#Table_of_pandemic_lockdowns.

[9] https://en.mercopress.com/2023/05/24/who-forecasts-new-pandemic-deadlier-than-covid-19-is-coming-up; https://www.mirror.co.uk/news/health/fears-new-pandemic-humans-vulnerable-30866780; https://tdn.com/life-entertainment/nation-world/wellness/fda-signs-off-on-updated-covid-19-vaccines/article_5bef09e2-612c-5213-99f9-d14257d63d2d.html; https://www.cdc.gov/media/releases/2023/p0912-COVID-19-Vaccine.html; https://www.weforum.org/agenda/2023/07/diseasex-pandemic-preparedness-cepi/.

58. A reasonable person's expectations would consider the totality of these circumstances. Even if a reviewing court chooses not to recognize the problem of pandemic overreach, the judicial system of Texas should require administrative agencies to follow their administrative processes.

ii. Reasonable expectations should include analysis of related history and the character of inconsistent untrustworthy actors.

59. The appellate court's analysis regarding reasonable expectations is erroneous because a reasonable person can consider public statements on this issue and recognize that lockdowns may be reimposed at the drop of a hat.

60. The appellate court's opinion instructs Petitioners to accept that the actions of the state were temporary, though the impact on Petitioners was life-changing and financially destructive beyond the imagination of the "essential" bureaucrats who closed businesses so cavalierly while continuing to receive regular paychecks themselves.

61. The appellate court did not discuss why the TABC could ignore the Texas Administrative Procedures Act and the Code, nor did it analyze why the clear instruction to take input on regulatory changes can be swept aside for years and never resumed. *See R.R. Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 79 (Tex. 2003); Tex. Gov't Code Ann. §§ 2001.001 & 2001.029. With the appellate court's ruling, the frequency of unchecked agency action is only more likely.

62. COVID did not ruin Petitioners' lives and businesses; the TABC irrationally imposed a top-down set of rules that laid waste some businesses but allowed others to continue unmolested and thereby ruined Petitioners' lives.

63. The Court can take judicial notice that this is not the first time that the government has

imposed lockdown type measures in an emergency.[10] It will not be the last, particularly if the judiciary blinks when such matters arrive at their door.

64. At the very least, reasonable minds can differ regarding reasonable expectations in this case and the case should be remanded to establish "reasonable expectations" in this case.

65. The appellate court asks Petitioners to give the benefit of the doubt to public officials acting inconsistently, unreasonably, and illegally, and expects Petitioners to quietly pay the price of doing so. These statements and actions are obviously shown through public officials' own admissions.[11] "Two weeks to slow the spread" may not give time for the TABC to accept stakeholder input, but two years is plenty of time to do so, particularly when the agency is operating normally in almost every way.

66. "Reasonable expectation" should be left to the trier of fact, the ruling is erroneous as reasonable minds can differ on the reasonable expectations considering historical facts and showings of inconsistent and untrustworthy behavior by authorities and information sources related to Petitioners situation. The dismissal by the appellate court should be reversed.

B. The Appellate Court's denial of Petitioners' claim is erroneous because "common good" justifications are not a blank check to allow agencies to act unreasonably, TABC's actions were not in the common good.

67. Respondents shut down Petitioners' legally operating businesses. No reasonable person would suggest an authority acting unreasonably outside of the scope of its own regulations promulgated for the common good are consistent with acting in the common good. If that was the

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[10] *See Korematsu v. United States*, 323 U.S. 214 (1944).

[11] https://www.foxnews.com/politics/faucis-mixed-messages-inconsistencies-about-covid-19-masks-vaccines-and-reopenings-come-under-scrutiny; https://www.youtube.com/watch?v=ShiwHR5OvtM&t=248s; https://www.youtube.com/watch?v=kyhP7PVRdlo; https://www.youtube.com/watch?v=kz7OGxb9X6E (admissible as a statement against interest by a person who is effectively an agent of the state.) https://www.foxnews.com/politics/dr-anthony-fauci-step-down-december.

case, at the very least TABC's enforcement actions would have been properly included in its promulgation. Instead, TABC acted outside the scope of its own regulations. Agencies cannot have a blank check to deprive legally operating actors of their businesses in an emergency.

i. Penn Central first factor supports Petitioners' takings claim - Economic Value.

68. Petitioners suffered a regulatory taking from TABC's actions against their legally operated businesses. TABC's actions led to lost profits, and for some Petitioners, the loss of their entire business. Such an action can only be considered a regulatory taking. *AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, 262 S.W.3d 574, 581 (Tex. App.--Austin 2008).

69. This case is different than *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense* Bd., 527 U.S. 666, 675 (1999) because Petitioners were denied access to legally operate their businesses, inevitably resulting in lost profits, and some Petitioners lost their businesses entirely as a result. Petitioners were not allowed to operate their properties at all, not even to conduct activities that did not involve alcohol. App. H, pg. 60-110.

70. Respondents substantially interfered with Petitioners' property, impairing their ability offer any services through their businesses through TABC regulations created without stakeholder input. *Id. See AVM-HOU,* 262 S.W.3d at 581; *Whataburger,* 60 S.W.3d at 261. The inevitable effect of this interference and denial of access lead to lost profits and closed businesses.

ii. Penn Central's third factor favor's Petitioners' takings claim - Common Good

68. "When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Severance v. Patterson*, 370 S.W.3d 705, 749 (Tex. 2012).

69. On August 7, 2020, Respondent TABC's Executive Director Nettles sent a letter to the alcoholic beverage industry explaining that "the governor's executive order is the current law of

the state, and TABC will enforce it, as will other state and local government entities. When a business tells TABC it does not intend to follow these orders, you leave the agency with no option but to revoke your license and shut you down." App. D, pg. 20.

70. Respondents' taking of Petitioners' property cannot reasonably be justified by "common good" rationales when Respondents allow businesses with worse COVID-19 mitigation practices to be open and close Petitioners' businesses that exceeded COVID-19 mitigation practices, and thwart any examination of the irrational rules that result.

71. The TABC's reasoning allowed a bar to operate if more than 51% of its income was from food, but did not allow it to operate if only 50% of its income was from food. "Common good" rationales cannot be used to justify shutting down a bar for a 1% food profit difference, rather than things like social distancing, masks, or other alternatives that make a difference like delivery methods. The TABC's rules encouraged gamesmanship such as the selling of $5 pretzels with a free beer.

72. The appellate court failed to recognize or distinguish Louisiana's similar executive order, differing by requiring all bar areas to reconfigure as restaurant areas, which was at least internally consistent. App. E, I (discussed during the oral hearing and documented in post-hearing briefing). The Chili's restaurant bar areas in Texas were allowed to operate, but at least in Louisiana, all bar areas had to be reconfigured as restaurants, whether they were 51% bar areas, restaurants that served liquor, or event venues that had a liquor license and occasionally used it. App. H, pg. 195.

73. Notably, Respondents closed Petitioners' businesses even when operating legally, inevitably resulting in lost profits, and business closure. App. H, pg. 7-20, 60-110. Petitioners were not illegally operating a bar. *Id.* Some Petitioners stopped selling alcohol entirely and did not engage in any alcohol-related services or engaged in compliant operations while looking to add

food service capabilities. *Id.* Petitioners completely complied with the law and with Respondents' illegal requests. *Id.* Yet, Petitioners' businesses were still totally closed by the TABC as a "threat to public welfare" without explanation. *Id.* The appellate court's analysis that TABC was justified in the name of the common good to shut down businesses that were legally operating according to TABC's standards is erroneous. *Id.* TABC ordered the cessation of all activities, no matter how unrelated they were to alcohol or how legal those activities might have been compared to its own rules. *Id.*

74. Eventually, there must be an end to "common good" rationales, even if the intentions were for the "common good." According to the appellate court's analysis, if emergency regulations are issued for the common good and the regulated are complying with the regulations, government actors can arbitrarily enforce new damaging regulations with judicial approval without stakeholder input. This rationale is erroneous and sets a dangerous precedent. Petitioners ask the Court to examine the TABC's "common good" justification for closing Petitioners' businesses.

75. This is an important case of first impression regarding an agency's power to ignore its own regulations. This case is of national significance which affects potential expectations of entrepreneurs regarding regulations issued during an emergency regardless of agency rules.

76. As noted, the TABC rules were not properly promulgated with public input – *not* initially, *not* two months later, and *not* two years later. If not reviewed, this case will be cited by small-minded bureaucrats running Texas agencies to justify outrageous regulatory overreach during disasters, however inane, for as long as they like.

C. Whether "reasonable expectation" for "capable of repetition yet evading review" mootness analysis and *Penn Central* factors should be left to the trier of fact.

77. An issue such as reasonableness is inherently an issue for a jury. *Lawrence v. TD Industries*, 730 S.W.2d 843, 845 (Tex. App.--Dallas 1987), writ refused. The *Penn Central* test requires engaging in essentially ad hoc, factual inquiries. *See Penn Cent.*, 438 U.S. at 124; *see also City of Sherman v. Wayne*, 266 S.W.3d 34, 46 (Tex. App.--Dallas 2008) (factual finding for no economically viable use for takings claim supported by jury).

78. Whether the Petitioners had reasonable expectations supporting their claims should be left to a trier of fact. The TABC denied legal business operations, leading to inevitable lost profits and bankruptcy, a regulatory taking, and TABC's actions outside its own regulations and applied arbitrarily were out of line with the "common good" analysis that should be left to a factfinder.

79. Respondents note for the Court that the circuits are split on this issue and the issue implicates national significance. The Thirteenth Court of Appeals also recognized a disagreement between the circuits for mootness citing the cases on footnote 6 and *Cassell v. Snyders*, 990 F.3d 539, 546–47 (7th Cir. 2021) and *Ector Cnty. All. of Bus'es v. Abbott*, No. 11-20-00206-CV, 2021 WL 4097106, at *7 (Tex. App.—Eastland Sept. 9, 2021, no pet.). Further, there are other cases showing disagreements amongst courts across the nation. *See Haney v. Pritzker*, 563 F. Supp. 3d 840, 852 (N.D. Ill. 2021)(Despite those circumstances, the court concluded that the case should not be dismissed; the court explained that "[g]iven the uncertainty about the future course of the pandemic, we are not convinced that these developments have definitively rendered [the case] moot."); *Amato v. Elicker*, 534 F. Supp. 3d. 196, 205 (D. Conn. 2021) (finding that the governor did not meet his burden when "he cannot say with certainty that it will never be necessary to re-impose restrictions in the future."); *BK Salons, LLC v. Newsom*, No. 2:21-CV-00370, 2021 WL

3418724, at *3 (E.D. Cal. Aug. 5, 2021) (finding that the governor did not meet his burden because COVID-19 pandemic is "ever-evolving"); *Moxie Owl, Inc. v. Cuomo*, No. 121CV194MADDJS, 2021 WL 1402297, at *5 (N.D.N.Y. Mar. 18, 2021) (finding case was not moot despite announcement that the COVID restriction at issue would be dialed back).; *Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 1894277, at *4 (S.D.N.Y. May 11, 2021)("[T]he only certainty about the future course of this pandemic is uncertainty."); *Kristen B. v. Dept. of Children and Fam. Services*, 203 N.E.3d 352, 361 (Ill. App. 1st Dist. 2022)("Given the ongoing uncertainty about the course of the pandemic, we cannot say there is no basis to conclude that DCFS will never again suspend in-person supervised visits. Plaintiffs' challenge is not moot.")

D. This case is a good vehicle.

80. This case is a good vehicle to resolve the questions presented. The questions presented are narrow, the Court need not address whether there is a reasonable expectation of future pandemics or TABC overreach. It need not decide whether closures during emergencies amount to a taking. The Court only needs to decide if "common good" and "reasonable expectation" analysis should be left to the trier of fact, and that TABC's overreach past its own emergency rules amounts to a regulatory taking.

81. There is no barrier to this Court's granting the petition, determining whether the specific analyses should be left to a trier of fact, and that TABC's actions outside its own rules amounts to a taking under the Fifth Amendment, and remand for further proceedings. Further, different results from courts across the nation show the national significance of this case to be heard by the Court.

CONCLUSION

For the reasons stated above, this Court should hear the petition. The TABC arbitrarily shut down Petitioner's businesses that exceeded COVID-19 mitigation requirements compared to businesses allowed to be open by TABC without due process amounting to a regulatory taking. Further, there is a reasonable expectation of future pandemics and without checks and balances, future TABC overreach. The Thirteenth Court of Appeal's analysis of "common good" in this case is erroneous, as Petitioner's were exceeding COVID-19 mitigation practices compared to businesses allowed to be open by the TABC and were still arbitrarily closed. The "reasonable expectations" and "common good" analysis should be left to a trier of fact. The petition should therefore be granted.

The petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE - The undersigned hereby certifies that, pursuant to Supreme Court Rule 33.1 the number of words in this document are 7696, based upon MS Word and the words are in Times New Roman 12-point (footnotes in 10-point).

/s/Warren V. Norred
Warren V. Norred

I hereby certify, in accordance with Supreme Court Rule 29.5(b) that Bar Owners' Petition for a Writ of Certiorari in case number _____, styled *The Rail Club Live vs. TABC*, was served by pre-paid U.S. Mail by first-class mail in accordance with Supreme Court Rule 29.3 mailed on this, the 26th day of September, 2023, on counsel for Respondent, at the address below:

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