No. 26-

IN THE

Supreme Court of the United States

CUP FOODS, INC., *et al.*,

Petitioners,

v.

CITY OF MINNEAPOLIS AND
MAYOR JACOB FREY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondents' actions of murdering George Floyd, placing and maintaining concrete barricades at the intersection of 38th Street and Chicago for over one year, and permanently withdrawing police protection from the intersection constituted a per se taking of Petitioners' properties.

2. Whether Respondents' actions of murdering George Floyd, placing and maintaining concrete barricades at the intersection of 38th Street and Chicago for over one year, and permanently withdrawing police protection from the intersection constituted a regulatory taking of Petitioners' properties.

3. Whether Respondents' actions of murdering George Floyd, placing and maintaining concrete barricades at the intersection of 38th Street and Chicago for over one year, and permanently withdrawing police protection from the intersection constituted right of access taking of Petitioners' properties.

PARTIES TO THE PROCEEDING

Petitioners are Cup Foods Inc.; Menthol Tobacco, LLC; Southside Electronics, Inc.; NMA Investments, LLC; and 3759 Chicago Ave, LLC.

Respondents are the City of Minneapolis and Mayor Jacob Frey.

CORPORATE DISCLOSURE

Petitioners are all private corporations or limited liability companies that are not owned by any parent corporation or any parent limited liability company. No publicly held company owns 10 percent or more of any of Petitioners' stocks or membership interests. None of the Petitioners have a stock ticker symbol.

LIST OF ALL PROCEEDINGS

Cup Foods, Inc., et al., v. City of Minneapolis and Mayor Jacob Frey, No. A25-1219, the Minnesota Supreme Court. Judgment entered on May 20, 2026.

Cup Foods, Inc., et al., v. City of Minneapolis and Mayor Jacob Frey, No. A25-1219, the Minnesota Court of Appeals. Judgment entered on February 23, 2026.

Cup Foods, Inc., et al., v. City of Minneapolis and Mayor Jacob Frey, No. 27-CV-24-16716, Minnesota Hennepin County District Court. Judgment entered on June 17, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners—Cup Foods Inc.; Menthol Tobacco, LLC; Southside Electronics, Inc.; NMA Investments, LLC; and 3759 Chicago Ave, LLC—respectfully petition for a writ of certiorari to review the opinions of the Minnesota Court of Appeals and of the Minnesota Supreme Court.

OPINIONS BELOW

The Minnesota Supreme Court's decision of denying Petitioners' petition is unpublished but is available at 2026 WL 1460085 and reprinted in the Appendix at 1a. The Minnesota Court of Appeals's decision affirming the district court's decision is unpublished but is available at 2026 WL 492342 and reprinted in the Appendix at 11a–34a. The Minnesota District Court's decision is unpublished, not available in Westlaw, but is reprinted in the Appendix at 35a–73a and can be found at Index #27.[1]

JURISDICTION

The Minnesota Supreme Court denied Petitioners' Petition on May 20, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

[1] The Index number refers to the numbering system in the Minnesota District Court record.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution. The Fifth Amendment of the U.S. Constitution states:

> 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.

INTRODUCTION

Petitioners are business owners within the intersection of 38th Street and Chicago Avenue in Minneapolis, Minnesota. On May 25, 2020, a City of Minneapolis ("City") police officer murdered George Floyd ("Mr. Floyd"). On June 2, 2020, in response to Mr. Floyd's murder, Respondents withdrew police from the intersection and surrounded Petitioners' properties with concrete barricades by placing the barricades at all four entry points at the intersection. The barricades and withdrawal of police prevented vehicles and pedestrians from accessing Petitioners' businesses. Respondents refused to remove the barricades for over one year, withdrew police protection, and authorized third parties to overtake the intersection. Petitioners' actions caused Petitioners to suffer extraordinary economic damages and endure traumatic violent crime. The number of gunshots fired at the intersection rose from 33 rounds in 2019, to more than 700 gunshots fired in 2020, according to the City's own tracking devices. The number of gunshot victims likewise rose from 3 victims in 2019 to 18 gunshot victims in 2020.

Petitioners filed a writ of mandamus against Respondents for inverse condemnation. Petitioners requested the district court compel Respondents to begin condemnation proceeding for unlawfully taking Petitioners' properties. Minnesota law requires petitioners to bring an inverse condemnation action in an action for mandamus. *Am. Fam. Ins. v. City of Minneapolis*, 836 F.3d 918, 923–24 (8th Cir. 2016); *Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul*, 216 N.W.2d 651, 657 (Minn. 1974). Petitioners alleged that Respondents' actions constituted a per se, regulatory, and right of access taking of Petitioners' properties that Respondents never paid just compensation for in violation of the Fifth Amendment of the United States Constitution and Article I, Section 13 of the Minnesota Constitution.

Respondents filed a Motion to Dismiss. The district court granted Respondents' Motion to Dismiss after concluding Respondents' actions did not constitute a per se, regulatory, or right of access taking under the Fifth Amendment of the U.S. Constitution or under Article I, Section 13 of the Minnesota Constitution. Petitioners appealed. The Minnesota Court of Appeals affirmed the district court's decision. The Minnesota Supreme Court denied Petitioners' Petition for Review of the Minnesota Court of Appeals's decision.

STATEMENT OF THE CASE

I. Facts

On May 25, 2020, the City murdered Mr. Floyd just outside of Cup Foods. Index #1 ¶ 10. Third parties immediately created a memorial next to Cup Foods. Index #1 ¶ 13. The City murdering Mr. Floyd sparked riots and protests in Minneapolis. Index ¶ 14. On June 2, 2020, Respondents placed concrete barricades at the intersection of 38th Street and Chicago Avenue in response to the riots and protests. Index #1 ¶ 14. The barricades surrounded Petitioners' properties. Index #1 ¶ 14. Respondents placed the barricades less than one block east and west of Petitioners' properties on 38th Street and less than one block north and south of Petitioners' properties on Chicago Avenue. Index #1 ¶ 14. The barricades prevented or substantially impaired Petitioners and the public from using public roads and other public rights-of-way to access Petitioners' properties. Index #1 ¶¶ 23–25. Respondents did not remove the barricades until over a year later on June 3, 2021. Index #1 ¶ 17.

Respondents knew their actions imposed great economic and safety hardships on Petitioners' businesses. Index ¶ 59. On November 9, 2020, the City published a public letter that stated, "[t]he continued full closure of the street is harming local business, and some may not be able to survive much longer under the current conditions." Index #1 ¶ 61. In April 2021, the City gave a $50,000 forgivable loan to "businesses that have been substantially impacted" in the intersection. Index #1 ¶ 63. The City gave the loans because, according to the City, "[a]ll the businesses in that intersection are still struggling." Index #1 ¶ 65. Respondents' actions resulted in devastating economic consequences that caused the market value of Petitioners' properties to decline by $660,000. Index #23 at 5. Additionally, Petitioners' rental income decreased by 36 percent in 2020, 40 percent in 2021, 56 percent in 2022, 22 percent in 2023, and 45 percent 2024. Index #22 at 1. Cups Foods, Inc.'s sales dropped by 8 percent in 2020, 11 percent in 2021, 32 percent in 2022, and consequently forced to go out of business in 2023. Index #22 at 1. Menthol Tobacco, LLC's sales dropped by 28 percent in 2020, 49 percent in 2021, 54 percent in 2022, and consequently forced to go out of business in 2023. Index #22 at 1. Southside Electronics, Inc.'s sales dropped by 41 percent in 2020, 50 percent in 2021, 43 percent in 2022, and consequently forced to go out of business in 2023. Index #22 at 1.

Respondents also withdrew police protection from the intersection and refused to answer emergency calls. Index #1 ¶¶ 35, 40. Respondents allowed civilian occupiers to "guard" the intersection. Index #1 ¶ 27. The intersection became so violent that the public called it the "No Go Zone," which prevented Petitioners and the public from accessing Petitioners' properties. Index #1 ¶ 26. The intersection also had barricades with "ROAD CLOSED" and "RESIDENTS ONLY" signs. Index #1 ¶ 28. The third-party occupiers occasionally admitted Petitioners and the public to enter intersection but warned them the area could not be used for "business as usual." Index #1 ¶ 33. The Respondents' actions caused crime to drastically increase in the intersection. Index #1 ¶ 41. Violent crime rose by 122% in Ward 8 where the intersection is located. Index #1 ¶ 43. Nine people were murdered in the intersection. Index #1 ¶¶ 47–49, 51–52, 54–55. There were nineteen shootings in the area in 2020 compared to only three shootings in 2019. Index #1 ¶ 56. The then Minneapolis Police Chief publicly called the violent crime within the intersection "unacceptable" and stated the best solution to stop the crime was for Respondents to remove the barricades. Index #1 ¶¶ 69–70.

Petitioners filed a writ of mandamus against Respondents for inverse condemnation. Petitioners requested the district court compel Respondents to begin condemnation proceeding for unlawfully taking Petitioners' properties. Minnesota law requires petitioners to bring an inverse condemnation action in an action for mandamus. *Am. Fam. Ins. v. City of Minneapolis*, 836 F.3d 918, 923–24 (8th Cir. 2016); *Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul*, 216 N.W.2d 651, 657 (Minn. 1974).

II. Petitioners Raised Their Federal Questions in the Court of First Instance and Appellate Courts

Petitioners alleged in their Writ of Mandamus filed with the Minnesota District Court that Respondents' actions violated the Fifth Amendment of the United States Constitution, which applies to the State of the Minnesota through the Fourteenth Amendment of the U.S. Constitution. Index #1 ¶¶ 78–80. Petitioners alleged that Respondents' actions constituted a per se, regulatory, and right of accessing of Petitioners' properties that Respondents never paid just compensation for in violation of Fifth Amendment of the United States Constitution and Article I, Section 13 of the Minnesota Constitution. Index #1 ¶¶ 78–80.

The Fifth Amendment of the U.S. Constitution states:

> 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.

Article 1, Section 13 of the Minnesota Constitution states: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

The Minnesota District Court acknowledged Petitioners' Fifth Amendment claim in the court's order dismissing all of Petitioners' takings claims. The Minnesota District Court wrote in its order that "Petitioners assert that Respondents violated the Takings Clause of the United States and Minnesota Constitutions by depriving them of property rights through (1) a per se physical taking, (2) a regulatory taking, and (3) interference with their right of access." Pet.App.36a. The Minnesota District Court granted Respondents' Motion to Dismiss and dismissed Petitioners' per se, regulatory, and right of accessing takings claims.

Petitioners appealed the Minnesota District Court's decision to the Minnesota Court of Appeals to challenge the district court's order dismissing Petitioners takings claims under the Fifth Amendment of the U.S. Constitution and under the Minnesota Constitution. The Minnesota Court of Appeals affirmed the district court's decision to dismiss Petitioners' taking claims under the Fifth Amendment of the U.S. Constitution and the Minnesota Constitution.

Petitioners appealed the Minnesota Court of Appeals's decision to the Minnesota Supreme Court. In their Petition for Review to the Minnesota Supreme

Court, Petitioners argued that Respondents' actions violated the Fifth Amendment of the U.S. Constitution. Pet.App.77a-87a. The Minnesota Supreme Court denied the Petition for Review.

III. Minnesota District Court Rulings

Respondents filed a Motion to Dismiss against all of Petitioners' taking claims. The district court granted Respondents' Motion to Dismiss after concluding Respondents' actions did not constitute a per se, regulatory, or right of access taking.

The district court held that Respondents' actions did not constitute a per se taking under either the Minnesota Constitution or the Fifth Amendment of the U.S. Constitution. The district court concluded Petitioners failed to allege that Respondents physically entered Petitioners' properties, and Petitioners failed to identify a regulation, ordinance, or directive that Respondents used to grant third parties the legal right to enter Petitioners' properties. Pet.App.42a. The district court also concluded a per se taking could not occur because Petitioners retained actual possession and economic use of their properties. Pet.App.43a.

The district court held that Respondents' actions did not constitute a regulatory taking under either the Minnesota Constitution or U.S. Constitution. The district court concluded the *Penn*

Central test[2] did not weigh in favor of finding a regulatory taking. The district court concluded the first *Penn Central* factor—the economic impact of the regulation on the owner—did not weigh in favor of a taking because the district court believed that Petitioners alleged $660,000 loss in the value of their properties were due to general market conditions and third parties rather than Respondents' actions. Pet.App.54a–55a. The district court concluded the second *Penn Central* factor—the extent to which the regulation interferes with distinct investment-backed expectations—did not weigh in favor of a taking because Petitioners' investment backed expectations remained legally viable, and the properties continued to be used until voluntarily closed by Petitioners. Pet.App.56a–57a. The district court concluded the third *Penn Central* factor—the character of the governmental action—did not weigh in favor of a taking because Respondents acted behind their police powers, such actions were temporary, and the concrete barricades did not single out Petitioners' properties. Pet.App.58a.

The district court held that Respondents' actions did not constitute a right of access taking, specifically under the right of access test outlined in *Kick's Liquor Store, Inc. v. City of Minneapolis,* No. C4-00-2063R, 2002 WL 1364018 (Minn. Ct. App. June 25, 2002). To establish a right of access taking under Minnesota law, the plaintiff must demonstrate: (1) a

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

special injury distinct from that suffered by the general public; (2) actual damage, typically a diminution of the market value; and (3) the lack of reasonably convenient and suitable access in at least one direction. Pet.App.63a. The court concluded that while the law requires "reasonably convenient and suitable access," Respondents' actions were mere inconveniences, were temporary in nature since the barricades stayed in place for one year, and did not constitute a "special injury" because "the losses suffered were akin to those suffered by the general public." Pet.App.62a–67a.

IV. Minnesota Appellate Court Rulings

The Minnesota Court of Appeals affirmed the district court's decision that Respondents' actions did not constitute a per se, regulatory, or right of access taking under the U.S. Constitution or Minnesota Constitution. The Minnesota Court of Appeals concluded Respondents' actions did not constitute a per se taking because there is no evidence showing that Respondents physically occupied Petitioners' properties, that Petitioners lost the right to possess their properties, or that they lost the right to exclude others from their properties. Pet.App.8a-9a. Additionally, the Minnesota Court of Appeals noted that there is no evidence indicating that Respondents instituted policies or regulations allowing third parties to occupy Petitioners' properties, such as affirmatively planning, creating, or executing the protest-related encampment near East 38th Street and Chicago Avenue. Pet.App.10a-11a.

The Minnesota Court of Appeals concluded Respondents' actions did not constitute a regulatory taking under the *Penn Central* test. The Minnesota Court of Appeals concluded the first *Penn Central* factor—the economic impact of the government regulation on the claimant—did not weigh in favor of a regulatory taking because Petitioners retained possession of their properties and operated their businesses while the barricades were in place and outside factors other than Respondents' conduct caused Petitioners' property values to decrease. Pet.App.16a. The Minnesota Court of Appeals concluded the second *Penn Central* factor—the extent to which the regulation has interfered with distinct investment-backed expectations—did not weigh in favor of a regulatory taking because Petitioners' businesses remained opened while the barricades were in place, the public could still access the businesses, and Petitioners' businesses were not restrained by changes due to property zoning laws. Pet.App.17a. The Minnesota Court of Appeals concluded the third *Penn Central* Factor—the character of the government action—did not weigh in favor of a regulatory taking because the concrete barricades and diminished police presence did not single out Petitioners' properties for adverse treatment. Pet.App.19a.

The Minnesota Court of Appeals held Respondents' actions did not constitute a right of access taking under the test used in *Kick's*. The Minnesota Court of Appeals concluded Petitioners did not suffer a special injury since “all the businesses in and around 38th Street and Chicago Avenue” suffered the injuries as a community; sidewalk access, alley access, and alternative routes remained available to reach their Petitioners’ businesses; and Respondents installed the temporary barriers for only one year during a public emergency. Pet.App.24a. The Minnesota Court of Appeals concluded Petitioners did suffer a measurable diminution of their businesses market value. Pet.App.25a. However, the Minnesota Court of Appeals concluded there was not a loss of “reasonably convenient and suitable access in at least one direction” to Petitioners’ businesses because the public could still access the businesses by foot even though the public had to park at least one block away or be dropped off in a nearby ally. Pet.App.25a-26a. Access to the Petitioners’ businesses was inconvenient but not impossible. Pet.App.26a.

Petitions subsequently filed a Petition for Review to the Minnesota Supreme Court. Pet.App.77a-87a. The Minnesota Supreme Court denied Petitioners’ Petition for Review on May 20, 2026. Pet.App.1a.

REASONS FOR GRANTING THE WRIT

This case raises important legal questions that captured the country’s attention: was it lawful for the government to barricade an entire city intersection for over one year and withdraw police protection from the same intersection? Additionally, the Court can resolve unanswered legal questions in the takings context that will have an impact nationwide. First, does the government need to enact a law authorizing a third party to enter onto an owner's property to constitute a per se taking, or is a government's policy, practice, or endorsement of allowing third parties to overtake private property enough to constitute a per se taking? Second, can the government's actions constitute a per se or regulatory taking even if the government is rightfully exercising its police powers? Finally, the takings questions involved here will continue to recur unless resolved by the Court.

ARGUMENT

I. A Government Policy or Practice May Result in a Per Se Taking

A per se taking occurs in two scenarios: (1) when the government physically acquires private property for a public use, or (2) "[w]hen the government . . . imposes regulations that restrict an owner's ability to use his own property." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–48 (2021). The latter scenario is at issue here. This Court clarified the meaning of the latter scenario with the following pertinent language:

> The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—*by whatever means*—or

> has instead restricted a property owner's ability to use his own property.

Id. at 149 (emphasis added). In *Cedar Point*, a California regulation required agricultural employers to allow union organizers to physically enter employers' land for up to three hours per day, 120 days per year. *Id.* The United States Supreme Court held the "access regulation" constituted a per se taking because the regulation granted union organizers the right to physically enter the employers' land, and even though the regulation did not restrain the employers' use of their own property, "the regulation appropriate[d] for the enjoyment of third parties the owners' right to exclude." *Id.*

Similar to this case, the Western District of Washington decided a case involving the "CHAZ" or "CHOP" autonomous zones in Seattle, Washington. *See Hunters Cap. LLC v. City of Seattle*, 499 F. Supp. 3d 888 (W.D. Wash. 2020) (hereinafter "*Hunters Capital I*"); *Hunters Cap., LLC v. City of Seattle*, 650 F. Supp. 3d 1187 (W.D. Wash. 2023) (hereinafter "*Hunters Capital II*"). The plaintiffs in *Hunters Capital* brought a taking claim against the City of Seattle for allowing and supporting civilian occupiers to create their own "no-cop zone" in Seattle in response to Mr. Floyd's murder. *See Hunters Capital I*, 499 F. Supp. 3d at 899; *Hunters Capital II*, 650 F. Supp. 3d at 1197. The plaintiffs' taking claim alleged that the City of Seattle "adopted a policy supporting the CHOP occupation, acting with deliberate indifference toward those suffering harms from it."

Hunters Capital I, 499 F. Supp. 3d at 895. The plaintiffs' taking claim alleged, in part, the following: the City of Seattle adopted a "no response" policy within CHOP; refused to send police officers into CHOP unless the 911 caller reported "significant life-safety issues"; and the City of Seattle provided concrete barricades to the CHOP participants to block plaintiffs' properties from access to public streets and rights-of-way. *Id.* at 899–90.

In *Hunters Capital I*, the court denied the City of Seattle's motion to dismiss plaintiffs' taking claims because the plaintiffs plausibly asserted the "City's *endorsement of, and the provision of material to*, CHOP set in motion a series of acts by certain CHOP participants, who the City knew or reasonably should have known would deprive Plaintiffs of protected property interests." *Id.* at 904 (emphasis added). The court concluded that plaintiffs sufficiently pleaded their per se taking claim by alleging that from June 8, 2020, to July 1, 2020, the City of Seattle allowed and encouraged CHOP participants to block access from plaintiffs' properties to streets and other public rights-of-way, which resulted in the deprivation of all or nearly all economic use of plaintiffs' properties. *Id.* at 903–04. Notably, the Western District of Washington made this decision in 2020 before this Court issued its *Cedar Point* opinion in 2021. Later, the court in *Hunters Capital II* changed its position, at least in part, based on this Court's opinion in *Cedar Point*. In *Hunters Capital II*, the court granted the City of Seattle's summary judgment motion to dismiss plaintiffs' per se takings claim because plaintiffs failed to show the City of Seattle expressly authorized the third-party physical invasions, and because the City of Seattle did not enact a regulation or ordinance granting the protestors the right to enter plaintiffs' properties. 650 F. Supp. 3d at 1203–04 (citing *Cedar Point*, 141 S. Ct. at 2079–80).

Here, Respondents did not enact a law that authorized a third party to invade Petitioners' properties, so the Minnesota courts concluded that Respondents' actions did not constitute a per se taking. *Cedar Point*, however, does not require the government to enact a law for a per se taking to occur. Rather, Respondents adopted a policy or practice of maintaining the barricades and withdrawing police protection as the "means" to authorize third parties to invade Petitioners' properties. On November 9, 2020, the City of Minneapolis published a letter stating that "[t]he continued full closure of the street is harming local business, and some may not be able to survive much longer under the current conditions." Index #1 ¶ 61. Respondents, however, still remarkably waited almost seven more months to remove the barricades on June 3, 2021. Respondents authorizing third parties to take over the intersection substantially interfered with Petitioners' property rights. Respondents admitted they supported and promoted the legal right of third parties to take over the intersection. Respondents maintained the barricades to keep the intersection closed to promote the third-party interests of providing a space for mourning and reflection and preserving public art. Index #14 at 11; Index #15 at 2, 5. Respondents also admitted there would not be a "return to normalcy" in the intersection. Index #14 at 11; Index #15 at 2. These admissions from Respondents show that they maintained the concrete barricades and withdrew police protection to authorize third parties to take over the intersection. Respondents were more concerned with the political interest of allowing third parties to take over the intersection than Petitioners' constitutionally protected property rights.

Respondents also knew they needed to improve access for emergency responders to enter the intersection. Index #14 at 11. Yet, Respondents refused to respond to 911 calls. Index #1 ¶ 40. Respondents even went as far as allowing volunteer medics to enter the intersection to bring crime victims to the police. Index #1 ¶ 40. Respondents abandoned Petitioners within the intersection because Respondents were either too afraid to enter the violent intersection, or worse, wanted to avoid upsetting the lawless and violent third parties who took over the intersection. The unprecedented levels of violent crime within the intersection were directly caused by Respondents' active decision to withdraw police protection, which in turn substantially interfered with Petitioners' property rights. Violent crime increased by 122 percent in Ward 8 where the intersection is located. Index #1 ¶ 43. At least nine individuals were tragically murdered in the intersection from July 2020 through August 2022. Index #1 ¶¶ 47–49, 51–52, 54–55. Additionally, 19 other non-fatal shootings occurred within intersection in 2020 compared with only three shootings in 2019. Index #1 ¶ 56. The then

Minneapolis Police Chief publicly stated reopening the intersection was the best solution to stop crime within the intersection. Index #1 ¶ 69.

Respondents' policy or practice of placing and maintaining concrete barricades at the intersection for over one year, actively withdrawing police protection from the intersection, and the City murdering Mr. Floyd, constituted a per se taking.

II. Respondents' Actions Constitute a Regulatory Taking

The *Penn Central* test balances three factors to determine if a regulatory taking occurred: (1) the economic impact of the regulation on the owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124. The economic impact factor weighs in favor of a taking. The Minnesota Court of Appeals ignored Petitioners' appraisal report that concluded that Respondents' actions caused Petitioners' property values to decline by $660,000. The court incorrectly focused on the fact that Petitioners' businesses continued to operate while the barricades remained in place. Petitioners continuing to operate their businesses is irrelevant under *Penn Central*. The court's analysis conflates the categorical takings test with the *Penn Central* test. Courts apply the *Penn Central* test when a "a regulation impedes the use of property without depriving the owner of all economically beneficial use." *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017).

The investment-backed expectations factor weighs in favor of a taking because Petitioners invested their life's work and economic resources into their businesses. Respondents' actions forced Petitioners to close their businesses. The character of the government action also weighs in favor of a taking. The Minnesota Court of Appeals erroneously concluded this factor does not weigh in favor of a taking because Petitioners suffered the same harm suffered by the public, and the Respondents reasonably exercised their general police powers. Petitioners disagree. First, only the businesses within the intersection—and no other businesses in Minneapolis—suffered the specific harm inflicted by Respondents. Second, it is irrelevant that Respondents acted behind their general police powers. The relevant question is whether the use of police powers resulted in a compensable taking. *See Johnson v. City of Plymouth*, 263 N.W.2d 603, 607 (Minn. 1978) (stating, "the operative question is not whether the city of Plymouth exercised its police powers in a reasonable fashion by upgrading Kilmer Lane but rather whether the city's admittedly legitimate police power action unduly restricted vehicular access to the subject property and thereby deprived Petitioners of their right of reasonable access").

III. Respondents' Actions Constitute a Right of Access Taking

To prove a right of access taking by the closure of a public street, the property owner must prove the owner (1) suffered a special injury; (2) suffered actual damage that measurably decreased the property's market value; and (3) is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction. Kick's, 2002 WL 1364018, at *2–3. The Minnesota Court of Appeals erroneously concluded that Petitioners did not suffer a special injury and still had reasonably convenient and suitable access to their properties. The court misinterpreted *Cnty. of Anoka v. Esmailzadeh*, 498 N.W.2d 58 (Minn. Ct. App. 1993) to reason that Petitioners had reasonably convenient and suitable access because access to Petitioners' properties was not "nearly impossible." The court in *Esmailzahed* stated:

> If access to property in an urban area requires "going around the block," a substantial inconvenience might still be reasonable access. If, however, access has been made so inconvenient as to be nearly impossible, there would not be reasonable access. We hold the trial court erred in failing to focus upon whether [the property owner] has reasonable access from Highway 65.

498 N.W.2d 58, 61–62. Therefore, Government action making access "nearly impossible" is sufficient to constitute a regulatory taking, but it is not required. Instead, "going around the block" to access a property might constitute a right of access taking. This is a genuine question of material fact to be decided by a jury and cannot be decided under summary judgment. *See Kick's*, 2002 WL 1364018, at

*2. Petitioners pleaded they could not access their properties, which the lower courts should have accepted as true under Rule 12.02(e). Furthermore, Respondents deciding to withdraw police protection from intersection prevented pedestrians from accessing the properties because the intersection transformed into a violent No Go Zone.

Petitioners suffered a special injury. Only businesses within the intersection—and no other businesses in Minneapolis—suffered the specific harm inflicted by Respondents. In fact, only businesses within the intersection were eligible to receive a $50,000 forgivable loan from Respondents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE STATE OF MINNESOTA SUPREME COURT, FILED MAY 20, 2026

STATE OF MINNESOTA

IN SUPREME COURT

A25-1219

CUP FOODS, INC., *et al.*,

Petitioners,

vs.

CITY OF MINNEAPOLIS, *et al.*,

Respondents.

Filed May 20, 2026

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Cup Foods, Inc., et al., for further review is denied.

Dated: May 20, 2026

BY THE COURT:

/s/ Natalie E. Hudson
Natalie E. Hudson
Chief Justice

APPENDIX B — OPINION OF THE STATE OF MINNESOTA COURT OF APPEALS, FILED FEBRUARY 23, 2026

STATE OF MINNESOTA
IN COURT OF APPEALS

A25-1219

CUP FOODS, INC., *et al.*,

Appellants,

v.

CITY OF MINNEAPOLIS, *et al.*,

Respondents.

Filed February 23, 2026

NONPRECEDENTIAL OPINION

Hennepin County District Court
File No. 27-CV-24-16716

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

CONNOLLY, Judge

On appeal from the dismissal of their petition for a writ of mandamus related to respondents' actions, appellant-business owners argue that the district court erred in concluding that respondents' actions did not constitute an unconstitutional (A) per se physical taking, (B) regulatory taking, or (C) right-of-access taking. Because respondents' actions did not constitute an unconstitutional taking, we affirm.

FACTS

The facts of this case are not disputed. On May 25, 2020, George Floyd was killed by Minneapolis Police Officer Derek Chauvin outside of the property where appellant CUP Foods, Inc. operates. Cup Foods is owned by four brothers, who also own appellants Southside Electronics, Inc.; NMA Investments, LLC; 3759 Chicago Ave., LLC; and Menthol Tobacco, LLC, which are located in or near the same property. Floyd's death sparked riots and protests in respondent City of Minneapolis (the city) and, in response to Floyd's death, a memorial was created for Floyd outside of CUP Foods at the intersection of East 38th Street and Chicago Avenue in the city.

The civil unrest also prompted the city to place concrete barricades at the north, south, east, and west entry points of East 38th Street and Chicago Avenue on June 2, 2020. The barriers were accompanied by signs stating, "Road Closed," and "Residents Only," and the signs redirected traffic around the area. Within the barricaded area, "civilian occupiers" "guard[ed]" the area and "create[d] an autonomous zone that became known to local residents as the 'No Go Zone.'" The city also limited, but did not completely eliminate, police response to this area. Consequently, this area experienced a "drastic increase in violent crime."

The concrete barriers blocking the entry points to the intersection of East 38th Street and Chicago Avenue remained in place until June 3, 2021, despite repeated requests by appellants to remove the barriers. In fact, the city acknowledged the detrimental economic impacts of the barriers on local businesses, including appellants' businesses. In an effort to counter the adverse economic effects of the barriers, the city approved a one-time $50,000 forgivable loan program for businesses and property owners in the affected area. The city also created the THRIVE Strategic Development Plan to address the social and economic problems created by the concrete barriers.

Despite the existence of the concrete barriers, appellants' businesses remained open. But in 2021, CUP Foods reported gross sales of $598,181, a 11.49% decrease from 2019; Menthol Tobacco reported gross sales of $237,316, a 49.96% decrease from 2019; and Southside Electronics reported gross sales of $899,642, a 50.56% decline from 2019. And by 2023, Southside Electronics closed.

In November 2024, appellants filed a petition for a writ of mandamus, seeking a writ compelling the city and respondent Mayor Jacob Frey (collectively, respondents) to (1) begin condemnation proceedings for unlawfully taking their properties through inverse condemnation; and (2) provide police protection to their properties and the surrounding area. Respondents then moved to dismiss or, in the alternative, for summary judgment. The district court granted respondents' motion to dismiss under

Minnesota Rule of Civil Procedure 12.02(e). In a detailed and well-written opinion, the district court determined that respondents' actions did not constitute a per se physical taking, regulatory taking, or right-of-access taking. The district court also determined that appellants' claim for a writ of mandamus compelling respondents to provide police protection to their properties failed for several reasons not relevant here.[1] This appeal follows.

DECISION

Appellants challenge the district court's order granting respondents' motion to dismiss their petition for writ of mandamus to compel condemnation proceedings. When we review a dismissal under rule 12.02(e), and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Minn. R. Civ. P. 12.02; *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004). The parties agreed at oral argument that the district court referred to, and relied upon, information outside of the pleadings in granting respondents' motion to dismiss. As such, the parties agree, as do we, that we should treat the district court's order as one granting summary judgment.

This court reviews a grant of summary judgment de novo and affirms "if no genuine issues of material fact exist and if the court accurately applied the law."

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1. Appellants do not challenge the dismissal of this claim in this appeal.

Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 371-72 (Minn. 2022). In doing so, we "view the evidence in the light most favorable to the nonmoving party." *Id.* at 372 (quotation omitted). "Whether a governmental entity's action constitutes a taking is a question of law that we review de novo." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

Turning now to the takings issue, the state and federal constitutions do not allow the state to take, destroy, or damage private property for public use without just compensation.[2] U.S. Const. amend. V; Minn. Const. art. I, § 13; *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 200 (Minn. 2020). "The purpose of the Takings Clause is to ensure that the government does not require some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Wensmann Realty*, 734 N.W.2d at 632 (quotations omitted). Three recognized forms of takings are (1) a per se physical taking; (2) a regulatory taking; and (3) a right-of-access taking. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-48 (2021) (describing per se physical takings); *Wensmann Realty*, 734 N.W.2d at 632 (describing regulatory takings); *Grossman Invs. v. State by Humphrey*, 571 N.W.2d 47, 50 (Minn. App. 1997) (recognizing right-of-access takings), *rev. denied* (Minn. Jan. 28, 1998).

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2. Because the Takings Clause of the United States Constitution is similar to the Takings Clause of the Minnesota Constitution, we may look to caselaw analyzing a takings claim under the United States Constitution in evaluating a takings claim arising under the Minnesota Constitution. *Wensmann Realty*, 734 N.W.2d at 632-33.

If a property owner shows "that the state interfered with ownership, possession, or enjoyment of a property right," the property owner may obtain a writ of mandamus for "inverse condemnation" requiring the state to initiate condemnation proceedings to determine just compensation. *Oliver v. State ex rel. Comm'r of Transp.*, 760 N.W.2d 912, 915 (Minn. App. 2009), *rev. granted* (Minn. Apr. 29, 2009), *and appeal dismissed* (Minn. Nov. 16, 2009); *Grossman*, 571 N.W.2d at 50. "Mandamus is an extraordinary remedy that is available only to compel a duty clearly required by law." *Ly v. Harpstead*, 16 N.W.3d 788, 800 (Minn. App. 2025) (quotation omitted), *rev. denied* (Minn. Apr. 15, 2025). In order to prevail on a mandamus action, the petitioner must establish that the government failed to perform an official duty imposed by law. Minn. Stat. § 586.03 (2024). For mandamus seeking inverse condemnation, a district court "must decide whether a taking of property has occurred in the constitutional sense." *Id.*

Appellants argue that the district court erred in determining that respondents' actions did not constitute an unlawful (A) per se physical taking, (B) regulatory taking, and (C) right-of-access taking. We address these arguments in turn.

A. Per se physical taking

A per se taking, also known as a physical taking, occurs when private property is "physically acquire[d]" or "invade[d]" by the government. *Cedar Point*, 594 U.S. at 147, 149. "The clearest sort of [a physical] taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Supreme Court has also held that "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred." *Cedar Point*, 594 U.S. at 149. Courts use a "simple, *per se* rule" to assess these physical-taking claims: "[t]he government must pay for what it takes." *Id.* at 148.

Appellants argue that the district court erred in determining that respondents' "actions did not constitute a per se taking" because respondents' "policy or practice of placing and maintaining concrete barricades at the intersection for over one year, actively withdrawing police protection from the intersection, and the [c]ity murdering . . . Floyd, constituted" such a taking. To support their position, appellants rely on *Cedar Point*, in which a California regulation required agricultural employers to allow union organizers to physically enter the employers' land for up to three hours per day, 120 days per year to solicit support for unionization. 594 U.S. at 143. The Supreme Court determined that the California regulation was a per se physical taking because it appropriated the owners' right to exclude third parties. *Id.* at 152.

Appellants' reliance on *Cedar Point* is misplaced. Unlike in *Cedar Point*, in which the regulation allowed a third party to physically enter the employers' land, there is no evidence showing that respondents allowed a third party to physically enter appellants' property. Nor is there any evidence showing that respondents physically entered appellants' properties or authorized third parties to do so. In other words, the record reflects that appellants retained full physical possession and use of their properties throughout the relevant time period. Moreover, there is nothing in the record demonstrating that respondents' actions appropriated appellants' rights to exclude third parties from their properties. As such, *Cedar Point* does not support appellants' position.

Appellants also rely heavily on *Hunters Capital LLC v. City of Seattle*, 499 F. Supp. 3d 888 (W.D. Wash. 2020) (*Hunters I*). In that case, the court considered a motion to dismiss a series of claims filed by a class of individuals, including an unlawful-taking claim under the Fifth Amendment. *Hunters I*, 499 F. Supp. 3d at 899, 903-04. Underlying the claim were facts demonstrating that, in the summer of 2020, during civil-rights protests following the death of Floyd, a 16-block section of Seattle became known as the Capitol Hill Occupying Protest ("CHOP"), an area with no official law-enforcement presence and barriers separating it from the rest of the city. *Id.* at 893. In denying the City of Seattle's motion to dismiss the plaintiffs' takings claims, the court determined that the plaintiffs "plausibly assert that the [City of Seattle's] endorsement of, and the provision of material support to, CHOP set in motion a series of acts by certain CHOP participants, who the City [of Seattle] knew or reasonably should have known would deprive [the p]laintiffs of protected property interests." *Id.* at 904. The court concluded that "[t]hese allegations support the claim that the [City of Seattle's] conduct was causally related to the private misconduct and it was sufficiently direct and substantial to require compensation under the Fifth Amendment." *Id.* (quotations omitted).

However, in *Hunters Capital LLC v. City of Seattle*, 650 F. Supp. 3d 1187, 1203-04 (W.D. Wash. 2023) (*Hunters II*), which was decided after *Cedar Point*, the plaintiffs' per se takings claim did not survive the City of Seattle's motion for summary judgment. In that case, the court recognized that the plaintiffs did "not allege that the City [of Seattle] itself physically invaded their properties. Rather, [the p]laintiffs contend[ed] that the City [of Seattle] authorized third-party physical invasions." *Hunters II*, 650 F. Supp. 3d at 1203. But the court determined that the plaintiffs "presented no evidence that the City [of Seattle] expressly authorized any of the third-party physical invasions at issue," and the City of Seattle "did not adopt a regulation or ordinance granting protesters a 'formal entitlement' to enter [the p]laintiffs' properties." *Id.* at 1203-04. Therefore, the court granted the City of Seattle's motion for summary judgment as it related to the plaintiffs' per se theory of liability. *Id.* at 1204.

As the district court here acknowledged, the rulings in *Hunters I* and *Hunters II* "underscore the critical doctrinal point in this case: a per se physical taking requires actual physical appropriation or compelled third-party occupation of property by the government—not merely toleration, negligence, or indirect support." (Emphasis omitted.) Even viewing the evidence in the light most favorable to appellants, there is no evidence supporting appellants' theory that respondents physically appropriated or compelled third-party occupation of their property by placing the concrete barriers and reducing police presence in the area. More specifically, there is no evidence showing that respondents physically occupied appellants' properties, that appellants lost the right to possess their properties, or that they lost the right to exclude others from their properties. Moreover, there is no evidence indicating that respondents instituted policies or regulations allowing third parties to occupy appellants' properties, such as affirmatively planning, creating, or executing the protest-related encampment near East 38th Street and Chicago Avenue. Rather, the record can only support that respondents' involvement consisted of ongoing public-safety decisions and strategic restraint amid evolving community tensions. As the district court determined, appellants' "theory rests on inaction and passive acquiescence—precisely the kind of allegations the court found legally insufficient in *Hunters II*." *See Hunters II*, 650 F. Supp. 3d at 1203-04 (rejecting the plaintiffs' per se theory of liability where no evidence was presented that the City of Seattle "expressly authorized any of the third-party physical invasions at issue," and "did not adopt a regulation or ordinance granting protestors a 'formal entitlement' to enter [the p]laintiffs' properties"). Therefore, the district court did not err in determining that appellants failed to demonstrate a per se physical taking.

B. Regulatory taking

Appellants also contend that the district court erred when it held that respondents' actions did not constitute a regulatory taking. "A regulatory taking occurs when the government goes too far in its regulation, so as to unfairly diminish the value of the individual's property, thus causing the individual to bear the burden rightly borne by the public." *Fletcher Props., Inc. v. City of Minneapolis*, 24 N.W.3d 287, 300 (Minn. 2025) (quotation omitted). But as the Supreme Court has acknowledged, "[t]he rub of course, has been—and remains—how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). And our supreme court has stated that "[t]he determination of whether a regulatory taking has occurred is highly fact-specific, depending on the particular circumstances underlying each case." *Fletcher Props.*, 24 N.W.3d at 303 (quotation omitted). Nonetheless, when, as here, the facts are not disputed, the takings issue is a question of law. *See Wensmann Realty*, 734 N.W.2d at 631.

Minnesota courts have used two tests to determine whether a regulatory taking has occurred: the *Penn Central* balancing test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and the *Alevizos* test set forth in *Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul*, 216 N.W.2d 651 (Minn. 1974) (*Alevizos I*). *See Fletcher*, 24 N.W.3d at 304 (applying *Penn Central* test); *see also Haeussler v. Braun*, 314 N.W.2d 4, 9-10 (Minn. 1981) (applying *Alevizos* test to takings claim). Appellants challenge the district court's decision that they failed to satisfy either one of these two tests.

1. *Alevizos* test

In *Alevizos I*, the supreme court recognized that, "[t]raditionally," property rights include "the rights to possess, use, and dispose of property." 216 N.W.2d at

661. But the supreme court also recognized that "[t]his does not mean that every noise or interference with a property owner's use and enjoyment thereof constitutes a taking" because every landowner must endure a "level of inconvenience, discomfort, and loss of peace and quiet which can be reasonably anticipated by any average member of a vibrant and progressive society." *Id.* at 662. Nonetheless, when interference with property causes "a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the [actions at issue], a property right has been, if not 'taken or destroyed,' at the very least 'damaged,' for which our constitution requires that compensation be paid." *Id.* The supreme court then established a test to determine if there was a compensable regulatory taking. *Id.* at 662. Under the *Alevizos* test, "[o]nly when these two factors are proved: (1) substantial invasion of a property right; (2) resulting in definite and measurable diminution in market value, can it be said that a taking has occurred." *Haeussler*, 314 N.W.2d at 9 (acknowledging the test established in *Alevizos*).

Appellants argued that the "district court erred when it held [that they] failed to satisfy the *Alevizos* market value test."[3] We disagree. Importantly, after prescribing the *Alevizos* test, the supreme court in *Alevizos I* stated that "[t]o justify an award of damages it must be proved that [the alleged] invasions of property rights are not of an occasional nature, but are repeated and aggravated,

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3. The district court never considered, nor do the parties argue, that the *Alevizos* test is inapplicable to this case.

and that there is a reasonable probability that they will be continued in the future." 216 N.W.2d at 662.

Here, appellants acknowledge in their complaint that the concrete barriers were removed after approximately one year. Although the presence of the barriers may have constituted a "repeated and aggravated" interference for about a year, there is no probability that any interference "will be continued in the future" because the barriers have been removed. *See id.* As such, the record lacks evidence supporting appellants' theory of a regulatory taking under the *Alevizos* test.

Not to be deterred, appellants argue that the removal of the barricades "after one year does not make the barricades an 'occasional' interference" because the barricades "stood [for] 24 hours a day for 366 days," and "blocked 911 traffic access to [a]ppellants' properties and severely limited pedestrian traffic." And appellants contend that the existence of the barricades in this time period caused the intersection to become "so violent" that it "prevented [a]ppellants and the public from accessing [a]ppellants' properties."

Appellants' argument is unavailing. The *Alevizos* test requires a "direct and substantial invasion" of a property right in order to be granted relief. *Id.* But viewing the evidence in the light most favorable to appellants, there is no evidence in the record consistent with their theory of the case that would satisfy this requirement. Rather, as the district court recognized, appellants' "theory rests on indirect harm—i.e, that the [c]ity's withdrawal of police presence, tolerance of barricades, and inaction in the face of protests led to a loss in value." The alleged indirect harm is insufficient to satisfy the first part of the *Alevizos* test. And because appellants fail to satisfy the first part of the *Alevizos* test, appellants' takings claim under that test fails.

2. *Penn Central* test

Appellants also challenge the district court's determination that they failed to satisfy the *Penn Central* test. The Minnesota Supreme Court has "used the *Penn Central* framework in . . . cases to analyze takings claims arising under the [United States] and Minnesota Constitutions." *Wensmann Realty*, 734 N.W.2d at 633; *see Fletcher Props.*, 24 N.W.3d at 303 (stating that, "[w]hen considering regulatory takings claims under the Minnesota Constitution, we have generally adopted the flexible test developed in *Penn Central*"). Under this test, courts must consider (i) the economic impact of the government regulation on the claimant; (ii) the extent to which the regulation has interfered with distinct investment-backed expectations; and (iii) the character of the government action. *Penn Central*, 438 U.S. at 124. "The *Penn Central* approach is flexible, with the factors often being balanced." *Wensmann Realty*, 734 N.W.2d at 633. But the primary focus of the injury is on "the severity of the burden that government imposes upon private property rights." *Lingle*, 544 U.S. at 539.

i. Economic impact

The inquiry under the first *Penn Central* factor "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Fletcher Props.*, 24 N.W.3d at 304 (quotation omitted). Courts generally determine this by "compar[ing] the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).[4]

Appellants argue that the first *Penn Central* factor weighs in their favor because respondents "instituted a policy or practice of placing and maintaining the concrete barricades surrounding [a]ppellants' properties for over one year and actively withdrawing police protection, which caused [them] to suffer economic harm." And appellants contend that this economic harm included a drastic decline in sales revenue as well a $660,000 decline in the value of their properties. We are not persuaded.

Appellants do not allege that respondents entered their land, condemned it, or imposed any legal restriction on its use or development. Instead, appellants acknowledge

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4. The supreme court in *Fletcher Properties*, noted that "we have not articulated a standard that applies in all cases" related to the first *Penn Central* factor, but "assume[d] without deciding" the *Keystone* standard applied in that case because neither party disputed the application of the *Keystone* standard. 24 N.W.3d at 304 n.10. For the same reasons, we assume that the *Keystone* standard applies here.

in their complaint that they retained possession of their properties and continued to operate their businesses while the barricades were in place. Although the city acknowledged in a letter that the existence of the barriers was "harming local businesses," the existence of the barriers was just one factor that caused the decline in appellants' property values and the sales related to their businesses. In light of the fact that appellants' retained possession of their properties and operated their businesses while the barricades were in place, as well as other factors that caused the harm to appellants' businesses, the economic impact related to respondents' actions and the degree to which it interfered with their property interests falls short of a taking. *See Fletcher Props.*, 24 N.W.3d at 304 (stating that the first *Penn Central* factor "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests" (quotation omitted)). As such, this factor does not weigh in appellants' favor.

ii. Interference with distinct investment-backed expectations

The second *Penn Central* factor requires us to examine "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. "In examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Wensmann*

Realty, 734 N.W.2d at 637. These expectations remain legally intact so long as the property can continue to be used in concert with governing regulations. *Minn. Sands*, 917 N.W.2d at 784.

Appellants argue that this factor weighs in their favor because they "invested their own money . . . into their businesses with the reasonable expectation of continuing to use their properties and receive a business profit" only to have respondents' "actions destroy[ ]" their businesses. But appellants' businesses were not restrained by changes to the property's zoning or otherwise altered by any legal framework governing its use. Although the barriers and lack of police presence may have resulted in less business, appellants acknowledge that the public still had access to their businesses. And appellants acknowledge that they remained open while the barriers were in place. In fact, the barriers were removed after approximately one year. Consequently, this factor does not weigh in appellants' favor.

iii. Character of the government action

The third *Penn Central* factor focuses on the character of the government action. *Penn Central*, 438 U.S. at 124. Our supreme court has recognized that the "appropriate focus" of this factor "is on the nature rather than the merit of the governmental action, with an important consideration being whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *Fletcher Props.*, 24 N.W.3d at 306-07 (quotations and emphasis omitted). “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124 (quotation omitted).

Appellants argue that this factor weighs in their favor because “the ‘nature’ of [r]espondents’ actions—murdering . . . Floyd, surrounding [a]ppellants’ businesses with concrete barricades for over one year, and withdrawing police protection—caused” appellants severe economic damage. We disagree. The concrete barriers and diminished police presence did not single out appellants’ properties for adverse treatment. And the diversion of traffic resulting from the barriers applied to the public intersection in general and affected a broad area of adjacent streets. Further, appellants offered no evidence indicating that respondents’ actions imposed a unique or disproportionate burden on appellants’ businesses as compared to similarly situated businesses in the area. As such, respondents’ actions are characterized as a general application rather than a burden that fell disproportionately on appellants. *See Fletcher Props.*, 24 N.W.3d at 306-07.

Moreover, the supreme court has recognized that the government may, under its broad police powers, “impose any reasonable restrictions and may make any reasonable regulations, in respect to the use which the owner may make of his property, which tend to promote the general well-being or to secure to others that use and enjoyment of their own property to which they are lawfully entitled." *Johnson v. City of Plymouth*, 263 N.W.2d 603, 606-07 (Minn. 1978) (quotation omitted). It is only when the government attempts to forbid property owners from making use of their property—which use is not harmful to the public and does not interfere with the rightful use and enjoyment of their own property by others—that the government action invades property rights secured to the owner by both the state and federal constitutions. *Id.* at 607.

Here, the record reflects that respondents placed the concrete barriers in response to widespread civil unrest after Floyd's death, which occurred at the intersection where appellants' businesses are located. In doing so, respondents acted to preserve public safety, facilitate emergency access, and manage community tensions. These actions fall within respondents' general police powers and constitute a reasonable response to promote the general well-being of the public. *See id.* at 606-07. And respondents' actions did not constitute a taking because respondents' exercised their police powers in a reasonable fashion so as to not unduly restrict appellants' ability to use their properties. As such, the third *Penn Central* factor weighs heavily against appellants. And because all three *Penn Central* factors weigh against appellants, the district court did not err in determining that respondents' actions did not constitute a regulatory taking.

C. Right-of-access taking

Lastly, appellants challenge the district court's decision that they failed to establish a right-of-access taking. Such a taking is recognized in Minnesota because state law establishes that property owners have the right of "reasonably convenient and suitable access to a public street or highway that abuts their property." *Grossman*, 571 N.W.2d at 50 (quotation omitted). This access right is "a property right in the nature of an easement." *State by Mondale v. Gannons, Inc.*, 145 N.W.2d 321, 329 (Minn. 1966). Thus, when an abutting property owner's access to a roadway is altered, a taking may occur even if no property is physically appropriated. *Grossman*, 571 N.W.2d at 50.

Our supreme court has recognized that a city government is permitted to exercise its police powers to improve public streets in the interest of public safety and welfare. *Johnson*, 263 N.W.2d at 606. But such an exercise becomes a taking if it has the effect of denying abutting property owners the right of reasonable access to their property. *See id.*; *see also State ex rel. Lachtman v. Houghton*, 158 N.W. 1017, 1021 (Minn. 1916) ("[W]hen the legislative power attempts to forbid the owner from making a use of his property which is not harmful to the public and does not interfere with the rightful use and enjoyment of their own property by others, it invades property rights secured to the owner by both the state and federal Constitutions."). "What constitutes reasonable access . . . depend[s] to some extent on the nature of the property under consideration." *Johnson*, 263 N.W.2d at 607. Not every change in access supports a claim for damages, and even a "substantial inconvenience" may not support a reasonable-access claim. *Id.*

Appellants rely extensively on the *Kick's Liquor Store, Inc.* line of cases to support their position that respondents effected a compensable taking of their right of access by erecting concrete barriers and converting public streets into pedestrian-only zones near their businesses. The *Kick's* cases stemmed from the City of Minneapolis's creation of a permanent cul-de-sac that effectively eliminated a business's only direct vehicular access to a main thoroughfare—Broadway Avenue—by closing off a side street, McNair Avenue, which served as a liquor store's exclusive driveway access. *Kick's Liquor Store, Inc. v. City of Minneapolis*, 587 N.W.2d 57, 58 (Minn. App. 1998) (*Kick's I*). Although vehicles could still technically enter McNair from Broadway, the creation of the cul-de-sac meant that traffic could no longer traverse McNair through Farrant Place and Queen Avenue North, which were the only routes allowing free movement from the south. *Id.*

Based on the city's actions, the liquor store sued the city, seeking a writ of mandamus to compel inverse condemnation. *Id.* The liquor store argued that the city's closing of McNair Avenue, which was the only street through which their parking lot was accessible, deprived the store of its property. *Id.* On appeal from summary judgment in favor of the city, this court reversed and remanded for a trial on whether a compensable taking had occurred. *Id.* at 60. In so ruling, this court stated that, to prove that a compensable taking has occurred by the closing of a public street, the abutting property owner has the burden of proving that it (1) suffered special injury; (2) suffered actual damage; and (3) is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction. *Id.* Following a trial on remand, the district court determined that the City of Minneapolis's actions constituted a taking or damaging of the liquor store's property for which just compensation must be paid, and this court affirmed. *Kick's Liquor Store, Inc. v. City of Minneapolis*, No. C4-00-2063, 2001 WL 506937, at *1 (Minn. App. May 15, 2001) (*Kick's II*).[5]

Appellants argue that, like the decisions in the *Kick's* line of cases, they satisfied the criteria establishing a right-of-access taking. This argument is unavailing.

1. Special injury

To establish a taking, the property owner must first show special injury due to the government's action. *Kick's I*, 587 N.W.2d at 60. Special injury is "one different in kind

5. The supreme court granted review of *Kick's II*, but stayed proceedings pending its review of this court's decision in *Dale Properties., LLC v. State*, 619 N.W.2d 567 (Minn. App. 2000), and after issuing its decision in *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002), vacated this court's opinion in *Kick's II*, and remanded for proceedings consistent with its decision in *Dale Properties*. On remand, this court affirmed its decision in *Kick's II*, concluding that *Dale Properties* did not affect the decision. *Kick's Liquor Store, Inc. v. City of Minneapolis*, No. C4-00-2063R, 2002 WL 1364018, at *4-5 (Minn. App. June 25, 2002) (*Kick's III*), *rev. denied* (Minn. Sept. 17, 2003).

from that suffered by the general public as the result of the city's action." *Id.*; *see also Hendrickson v. State*, 127 N.W.2d 165, 170 (Minn. 1964).

Appellants argue that, like *Kick's II*, they suffered "a special injury different than any injury suffered by the general public" because respondents "placed four concrete barriers" at an intersection that "blocked all vehicle traffic from accessing [a]ppellants' properties from all four directions"; "authorized third-party occupiers to install additional barriers in the intersection with signs stating, 'ROAD CLOSED' and 'RESIDENTS ONLY'"; and "actively withdr[ew] police from the intersection" resulting in unprecedented levels of violent crime in the area. But *Kick's II* is distinguishable. In that case, the liquor store suffered a very specific and individual injury in that the traffic change created a de facto cul-de-sac that forced uninvited traffic to enter and turn around in the liquor store's parking lot. *Kick's II*, 2002 WL 1364018, at *2.

Here, as respondents point out, appellants' "alleged injuries as pled were suffered by the [community] as a whole in response to the uprising, and more locally, by all the businesses in and around 38th [Street] and Chicago [Avenue] and in other protest zones in the [area]." In other words, unlike in *Kick's II*, appellants suffered the same inconveniences and challenges as the general public and other businesses. Moreover, the record reflects that sidewalk access, alley access, and alternative routes remained available to reach their businesses. As the district court determined, unlike in *Kick's II*, appellants "did not lose their sole ingress or egress. An impenetrable cul-de-sac did not encircle them." Finally, the barriers were installed during a public emergency and were temporary, lasting only about a year. In contrast, the configuration in *Kick's II* was indefinite and implemented outside the context of civil unrest or emergency response. Thus, unlike in *Kick's II*, the record here does not demonstrate a special injury.

2. Diminution in market value

The second criterion in *Kick's I* requires that the property owner show that actual damage has occurred in the form of a measurable diminution of the market value of the property. *Kick's I*, 587 N.W.2d at 60. Appellants argue that they satisfy this criterion because the record shows that, due to the implementation of the barriers and the lack of police presence in the area, their business and property values declined substantially. We agree that the record shows a measurable diminution in the market value of appellants' properties, as well as loss in business revenue. As such, viewing the evidence in the light most favorable to appellants, we conclude that appellants have satisfied the second criterion in *Kick's I*.

3. Reasonably convenient and suitable access

The third criterion set forth in *Kick's I* requires that the property owner show that, as a result of the government action, it is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction. *Kick's I*, 587 N.W.2d at 60. In other words, a right-of-access taking is compensable only when this criterion is satisfied. *See Hendrickson*, 127 N.W.2d at 172-73.

Appellants argue that the "barricades left [them] without reasonably convenient and suitable access to the main thoroughfare in at least one direction." But as this court has recognized, even "[i]f access to property in an urban area requires 'going around the block,' a substantial inconvenience might still be reasonable access." *County of Anoka v. Esmailzadeh*, 498 N.W.2d 58, 61 (Minn. App. 1993), *rev. denied* (Minn. May 28, 1993). It is only when "access has been made so inconvenient as to be nearly impossible, [that] there would not be reasonable access." *Id.* at 61-62.

Here, viewing the evidence in the light most favorable to appellants, access to their properties was not so inconvenient as to be nearly impossible. *See id.* Appellants acknowledge that their businesses were accessible by foot. In fact, they acknowledge that the alley adjacent to their building was unblocked. Although individuals wanting to access appellants' businesses may have had to park a block away and walk to the business, or be dropped off in the alley near the business, such an inconvenience is not impossible or nearly impossible access. Indeed, our supreme court has recognized that not every change in access supports a claim for damages, and even a "substantial inconvenience" may not support a reasonable-access claim. *Johnson*, 263 N.W.2d at 607; *see also Esmailzadeh*, 498 N.W.2d at 61 ("If access to property in an urban area requires 'going around the block,' a substantial inconvenience might still be reasonable access."). Such is the case here. Appellants had access to their properties, albeit perhaps somewhat inconvenient access at times. As such, appellants have not demonstrated that access to their properties was so unreasonably inconvenient that it rose to the level of an unconstitutional taking.

Because the record fails to show that appellants suffered a special injury, or that respondents' actions resulted in a loss of reasonable and convenient access to their properties, appellants failed to establish a right-of-way taking. Although the record shows a measurable diminution in market value of appellants' properties since Floyd's death, the analysis set forth in *Kick's I* requires that all criteria be satisfied. *See Kick's I*, 587 N.W.2d at 60 (stating that, to prove that a compensable taking has occurred by the closing of a public street, the abutting property owner has the burden of proving (1) it suffered special injury; (2) it suffered actual damage; *and* (3) it is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction); *see also Nash v. Comm'r of Pub. Safety*, 4 N.W.3d 812, 818 n.7 (Minn. 2024) (stating that courts "generally treat . . . 'and' as conjunctive"). Therefore, the district court did not err in determining that appellants failed to demonstrate a right-of-access taking.

In sum, the district court determined that appellants have failed to demonstrate that respondents' actions constituted an unconstitutional per se physical, regulatory, or right-of-access taking. The district court's decision is well reasoned and supported by the record. Accordingly, viewing the evidence in the light most favorable to appellants, we conclude that the district court did not err in determining that appellants failed to establish an unconstitutional taking.

Affirmed.

APPENDIX C — ORDER OF THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF MINNESOTA, FILED JUNE 17, 2025

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Civil/Other

CUP FOODS, INC., MENTHOL TOBACCO, LLC, SOUTHSIDE ELECTRONICS, INC., NMA INVESTMENTS, LLC, AND 3759 CHICAGO AVE, LLC,

Petitioners,

v.

CITY OF MINNEAPOLIS, MAYOR JACOB FREY,

Respondents.

Filed June 17, 2025

Court File No. 27-CV-24-16716
The Honorable Edward Thomas Wahl

ORDER REGARDING MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

INTRODUCTION

This matter came before the Honorable Edward T. Wahl of the Hennepin County District Court on March 19, 2025, for a hearing on Respondents' motion to dismiss, or in the alternative, for summary judgment.

Based on the Petition, the motion filings, the arguments of counsel, and the record as a whole, the Court now issues the following **ORDER**:

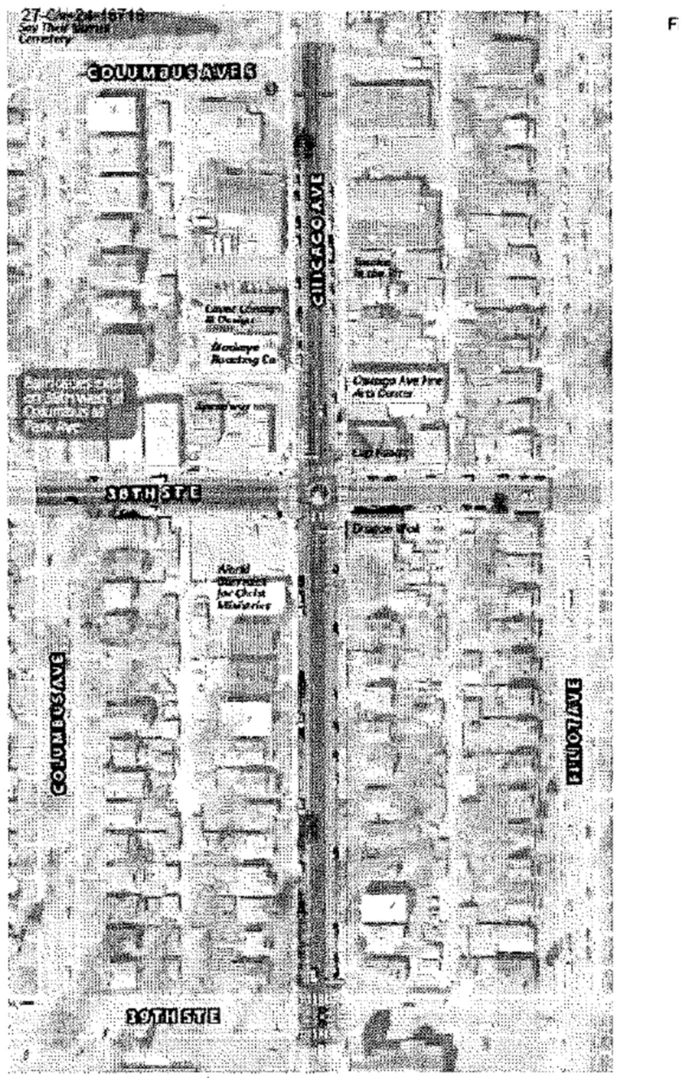
BACKGROUND

On May 25, 2020, George Floyd was murdered on the sidewalk outside Cup Foods, located at the intersection of 38th Street and Chicago Avenue in Minneapolis. Pet. ¶13. In the following days, this intersection became the focal point of widespread protests and civil unrest. On June 2, 2020, the City of Minneapolis installed physical barriers around the intersection to control traffic and public activity. Pet. ¶ 14; Decl. Sautter, Ex. 1, at 13. These barriers consisted of concrete Jersey barricades and signs stating, "Road Closed: Residents Only." Decl. Sautter, Ex. 1, at 8.

Appendix C

Sautter Declaration, Exhibit 1 — Traffic Barricades

Phased Reopening:
Existing Conditions



Traffic barricade

Sautter Declaration, Exhibit 1

The City placed these roadblocks on all four approaches to the intersection: less than one block east and west of Cup Foods on 38th Street and one block north and south on Chicago Avenue. Pet. ¶ 14; Decl. Sautter, Ex. 1, at 13. These barriers redirected vehicle traffic around the area, effectively re-routing it to adjacent blocks such as 37th and 39th Streets and Columbus and Elliot. Avenues. Pet. ¶¶ 14, 24, 26; Decl. Sautter, Ex. 1, at 13. The barriers did not restrict pedestrian and alley access to the businesses. Reply Br. at 1-2; Pet. ¶ 23. Emergency vehicles, including firetrucks, continued to have access to the intersection while the barriers were in place. Decl. Sautter, Ex. 1, at 9.

The barriers remained at the intersection for one year and one day, until June 3, 2021. Pet. ¶¶ 14, 17. During that time, a public memorial to George Floyd was maintained in the intersection. Pet. ¶ 13; Decl. Sautter, Ex. 1, at 11. The area became widely known as "George Floyd Square," and it served as a site of community gathering and protest activity. Pet. ¶ 13; Decl. Sautter, Ex. 1, at 11.

Petitioners Cup Foods, Menthol Tobacco, Southside Electronics, and associated property owners allege that the barriers disrupted access to their properties and caused significant economic losses. Pet. ¶¶ 1-5, 23, 57-73. They also assert that the City reduced police presence in the area during this period. Pet. ¶ 40. A news article cited in the Petition quotes a police spokesperson stating that officers were responding to incidents in the area using a hierarchy of priorities, and that deployment of officers depended in part on the number of available personnel. Pet. ¶ 40 n.6.

Petitioners attribute various damages to the combination of roadblocks and allegedly diminished police services, including lost business revenue, declining property values, loss of tenants, reputational harm, and emotional distress. Pet. ¶¶ 57-73. They estimate total damages at $30,000,000. Pet. ¶ 73.

The City acknowledged that the conditions surrounding 38th and Chicago had economic and non-economic impacts on area residents and businesses. Pet. ¶¶ 59-64. In response, the City initiated the THRIVE Strategic Development Plan to address needs in the area. Pet. ¶ 71. The City also engaged in a public planning process to explore how and when to reopen the intersection. Decl. Sautter, Ex. 1, at 11; Ex. 2, at 4-13. Considerations included public access, preservation of artwork and memorials, community sentiment, emergency response needs, and seasonal weather impacts. (Decl. Sautter, Ex. 2, at 8-13.

While the barriers were in place, Petitioners' businesses continued to operate. Financial documents submitted by Petitioners in related filings show that in 2021, Cup Foods reported gross sales of $598,181, Menthol Tobacco reported $237,316, and Southside Electronics reported $899,642. *See* Healey Dec. Ex. 1B, Income Statements. Southside Electronics later ceased operations in 2023, which Petitioners attribute to criminal activity in the area. Menesi Aff. ¶ 7(e).

STANDARD OF REVIEW

This matter comes before the Court on Respondents' motion to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure, or, in the alternative, for summary judgment under Rule 56. A motion to dismiss under Rule 12.02(e) tests the legal sufficiency of the petition and asks whether, on the face of the pleadings, the petition fails to state a claim upon which relief can be granted. *Martens v. Minnesota Min. & Mfg. Co.,* 616 N.W.2d 732, 739 (Minn. 2000) (citing Minn. R. Civ. P. 12.02(e).

In reviewing a Rule 12.02(e) motion, the Court must accept as true all facts alleged in the petition and construe all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 553 (Minn. 2003). But legal conclusions in the petition are not entitled to the presumption of truth, and the petitioner must allege facts that, if proven, would support a legally recognized claim. *Herbert v. City of Fifty Lakes,* 744 N.W.2d 226, 229 (Minn. 2008); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

When deciding a Rule 12.02(e) motion, the Court may consider the petition, documents referenced therein, and matters of public record subject to judicial notice, without converting the motion into one for summary judgment. *In re Hennepin Cnty. 1986 Recycling Bond Litig.,* 540 N.W.2d 494, 497 (Minn. 1995); *Ly v. Harpstead,* No. A22-1826, 2025 WL 29299, at *9 n.7 (Minn. Ct. App. Jan. 6, 2025); Minn. R. Evid. 201.

If the Court considers evidence outside the pleadings that does not fall within these categories, the motion must be treated as one for summary judgment under Rule 56. Minn. R. Civ. P. 12.02; *In re Hennepin Cnty.,* 540 N.W.2d at 497. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01.

Petitioners seek relief under the mandamus statutes, Minn. Stat. §§ 586.01. In such cases, the petition must allege a public duty that is ministerial, absolute, and enforceable by law.[1] *Minnesota Voters All. v. Cnty. of Ramsey,* 971 N.W.2d 269, 278 (Minn. 2022; *Northern States Power Co. v. Minnesota Metro. Council,* 684 N.W.2d 485, 491 (Minn. 2004).

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1. Mandamus is the proper vehicle to assert a claim for inverse condemnation. *Stenger v. State,* 449 N.W.2d 483, 484 (Minn.App.1989), *review denied* (Minn. Feb. 28, 1990). A writ of mandamus is an extraordinary remedy and should only issue upon a showing that a party has suffered harm that is "direct, substantial, and peculiar in that it differs markedly from the damage suffered by the public at large." *Alevizos,* 298 Minn. at 485, 216 N.W.2d at 661; *see also Coyle v. City of Delano,* 526 N.W.2d 205, 207 (Minn.App.1995) ("Mandamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles.").

DISCUSSION

I. Petitioners Have Not Alleged Facts Establishing a *Per se,* Regulatory, or Right-of-Access Taking, and Thus Fail to State a Claim for Inverse Condemnation.

Petitioners assert that Respondents violated the Takings Clause of the United States[2] and Minnesota Constitutions by depriving them of property rights through (1) a *per se* physical taking[3], (2) a regulatory taking[4], and (3) interference with their right of access. Pet. ¶¶ 79-80. Each theory requires Petitioners to show that Respondents' actions directly and substantially interfered with their property rights and caused a measurable loss

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2. The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V; *State by Humphrey v. Strom,* 493 N.W.2d 554, 558 (Minn.1992).

3. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place. *Cedar Point Nursery v. Hassid,* 594 U.S. 139, 141, and 149 (2021).

4. A regulatory taking occurs when government regulates private property to such a degree that government effectively condemns the property, but does not divest the affected property owner of title to the property. *See DeCook v. Rochester Intern. Airport Joint Zoning Bd.,* 796 N.W.2d 299, 305 (Minn. 2011) (noting government regulation of private property may result in a taking even if the government has not directly appropriated or physically invaded the property).

in property value. *Alevizos v. Metro. Airports Comm'n,* 216 N.W.2d 651, 662 (Minn. 1974).

A. No *Per se* Taking Occurred.

A *per se* taking[5] occurs where the government physically invades or appropriates private property, or where it authorizes a third party to do so by granting a formal entitlement. *Cedar Point Nursery v. Hassid,* 594 U.S. 139, 147-49 (2021). This includes direct physical occupation, permanent appropriation, or legal mandates that eliminate an owner's right to exclude. *Id.; see also Spaeth v. City of Plymouth,* 344 N.W.2d 815, 821 (Minn. 1984) (stating that government action that results in a permanent physical appropriation or occupation of property always constitutes a taking). Moreover, the government is not liable for third-party intrusions it does not expressly authorize. *Alves v. United States,* 133 F.3d 1454, 1458 (Fed. Cir. 1998); *see also Hunters Capital, LLC v. City of Seattle,* 650 F. Supp. 3d 1187, 1203-04 (W.D. Wash. 2023) (holding that even government tolerance of protests and public occupation did not amount to a *per se* taking absent a legal entitlement for third parties to enter private property). But if government were required to compensate everyone affected by the "inconveniences that are reasonably incident to the prosecution of necessary public enterprises," roads and other public improvements

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5. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 (1982) (explaining that a permanent physical occupation constitutes a taking to the extent of the occupation, even if it achieves an important public benefit or has only minimal economic impact on the owner).

would never be built. *Thomsen v. State by Head,* 284 Minn. 468, 473, 170 N.W.2d 575, 579 (1969).[6]

Petitioners argue that the City committed a *per se* physical taking by erecting barricades near their properties and withdrawing police presence, allegedly enabling third parties to occupy and dominate the area surrounding George Floyd Square. Petitioners analogize this to *Cedar Point Nursery v. Hassid,* 594 U.S. 139 (2021), in which a California regulation required property owners to allow union organizers onto their land, thereby effecting a *per se* taking.

But Petitioners' reliance on *Cedar Point* is misplaced. In *Cedar Point,* a California regulation[7] required agricultural employers to allow union organizers onto their property for up to three hours per day, 120 days per year to solicit support for unionization. *Cedar Point Nursery v. Hassid,* 594 U. S . 139, 139 (2021). The U.S. Supreme Court determined that the California regulation was a *per se* physical taking because it appropriated the owners' right to exclude third parties (here, the union organizers). *Cedar Point Nursery v. Hassid,* 594 U.S. 139, 140 (2021)

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6. *See also City of Crookston v. Erickson,* 244 Minn. 321, 69 N.W.2d 909 (1955) (stating for a property owner to force a condemnation and thereby recover for such consequential damage to his property, the damage must be direct, substantial, and peculiar to him, in that it differs markedly from the damage suffered by the public at large).

7. Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (2020).

Here, Petitioners do not allege that any City regulation or ordinance authorized third parties to enter their private property. The barriers were placed in the public right-of-way—an area squarely under municipal control—and there is no claim that Respondents physically entered Petitioners' properties or authorized others to do so. The Supreme Court's concern in *Cedar Point* was government-compelled access to private property. In contrast, Petitioners allege a failure to prevent access by private parties—a markedly different claim that falls outside the scope of *per se* takings jurisprudence. *See Hunters Capital, LLC v. City of Seattle,* 650 F. Supp. 3d 1187, 1203-04 (W.D. Wash. 2023).

Moreover, Petitioners retained full physical possession and use of their properties throughout the relevant period. No City action compelled them to relinquish their right to exclude. While the allegations describe troubling third-party conduct, such behavior does not convert municipal inaction into a government taking. *See Alves v. United* States, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (rejecting takings claim where alleged interference was caused by privately owned livestock, not the government, and emphasizing that government regulation of third parties does not convert private conduct into state action for takings purposes).

Additionally, in support of their *per se* takings theory, Petitioners rely on *Hunters Capital LLC v. City of Seattle,* 499 F. Supp. 3d 888 (W.D. Wash. 2020) ("*Hunters Capital* I"), where the owners and operators of commercial and residential properties in Seattle's

Capitol Hill neighborhood brought constitutional and tort claims against the City following the events surrounding the Capitol Hill Organized Protest (CHOP). Over several weeks in June 2020, protestors occupied a multi-block area after police vacated the East Precinct, and the City provided limited municipal services, such as lighting, barricades, and portable toilets, in the area.

The plaintiffs alleged that the City's actions violated their Fifth Amendment rights, asserting a regulatory theory and a theory of *per se* physical taking. As pled, plaintiffs alleged that the City facilitated the physical occupation of their property by protestors by providing infrastructure and intentionally allowing access to be blocked. *Hunters I,* 499 F. Supp. 3d at 888. The City moved to dismiss that claim under Rule 12(b)(6).

The court denied the City's motion to dismiss the majority of the *per se* takings claim. *Hunters I,* 499 F. Supp. 3d at 900. The court found that plaintiffs sufficiently alleged that the City endorsed, enabled, and encouraged CHOP participants to take over the area and to block access to their properties, and that "[t]he City's endorsement and recognition of CHOP went so far that SPD [Seattle Police Department] adopted a policy and practice of not entering the area except in the case of life-threatening crimes," thereby creating a "no response" zone within the area. *Id.* The City's conduct, as alleged by the complaint, may have been the "moving force" behind the alleged constitutional violation. *Hunters I,* 499 F. Supp. 3d at 900.

The court held that, taking these allegations as true, the plaintiffs had stated a plausible claim for a *per se* physical taking. Importantly, the court emphasized that the City's "endorsement of, and provision of material support to, the autonomous zone set in motion series of acts by protest participants, who knew or reasonably should have known would deprive owners of protected property interests." *Id.* at 904.

But that factual scenario is materially distinct from the record presented here. The record does not support that the City affirmatively planned, created, or executed the protest-related encampment near 38th and Chicago. To the contrary, the record shows that the City's involvement consisted of ongoing public safety decisions and strategic restraint amid evolving community tensions. There is no evidence that the City physically occupied Petitioners' property or required others to do so. Nor is there any indication that it installed public infrastructure to promote or facilitate third-party control. Unlike *Hunters I,* where the City's direct involvement plausibly triggered a *per se* analysis, the Petitioners here rest their claim on the City's alleged failure to act. That is insufficient to establish a *per se* taking under Fifth Amendment jurisprudence.

While the court in *Hunters Capital I* denied a motion to dismiss the plaintiffs' *per se* takings claim, holding that plaintiffs had plausibly alleged City participation in facilitating third-party occupation, that position did not survive further factual development of the record. In *Hunters Capital, LLC v. City of Seattle,* 650 F. Supp. 3d 1187, 1202 (W.D. Wash. 2023) *("Hunters II"),* the court granted summary judgment in favor of the City on the *per se* takings claim. The court found that, even viewing the evidence in the light most favorable to the plaintiffs, there was no genuine dispute of material fact that the City had committed a physical occupation of the plaintiffs' property. *Hunters II,* 650 F. Supp. 3d at 1204.

Specifically, the court rejected the argument that the City's provision of concrete barriers, lighting, and sanitation services in the CHOP zone amounted to a direct or authorized physical invasion of private land. The court emphasized that the plaintiffs presented no evidence that the City expressly authorized any of the third-party physical invasions at issue in the case. *Hunters II,* 650 F. Supp. 3d at 1203. Moreover, unlike in *Cedar Point,* the City did not adopt a regulation or ordinance granting protesters a "formal entitlement" to enter plaintiffs' properties. *Id.* Thus, the City's motion for summary judgment was granted as it relates to plaintiff's *per se* theory of liability. *Id.* at 1204.

The *Hunters* rulings underscore the critical doctrinal point in this case: a *per se* physical taking requires actual physical appropriation or compelled third-party occupation of property by the government—not merely toleration, negligence, or indirect support. Petitioners' reliance on *Hunters Capital I* omits this critical clarification. In *Hunters II,* the court rejected the theory Petitioners advance here. As in that case, Petitioners have not identified any government action that physically occupied or mandated the occupation of their property. Their theory rests on inaction and passive acquiescence—

precisely the kind of allegations the court found legally insufficient in *Hunters II*.

Accordingly, the allegations fail to satisfy the legal standard for a *per se* taking. Petitioners do not allege that Respondents themselves entered or physically occupied any of their properties. Nor do they identify any regulation, ordinance, or directive by which the City authorized or granted third parties the legal right to enter Petitioners' premises. Reply Br. at 3-4. The facts alleged show that the City placed barriers in the public right-of-way at the intersection of 38th Street and Chicago Avenue, but those barriers did not extend onto Petitioners' lots or structures. Pet. ¶¶ 14, 23, 28; Decl. Sautter, Ex. 1, at 13; Reply Br. at 1-2. Petitioners do not allege any City action granting legal authority to third parties to occupy or enter their land, nor do they allege that City agents physically entered their properties.

Petitioners also rely on the cumulative effect of the barriers and a purported withdrawal of police protection to argue that the City constructively transferred control of the area to third parties. But that theory mistakes passive government inaction with affirmative appropriation. As the court held in *Hunters Capital II*, even where the city provided sanitation, lighting, and supplies to protestors who occupied public spaces, there was no *per se* taking because the city never conveyed a legal right to enter private land. *Hunters II*, 650 F. Supp. 3d at 1203-04. The same principle applies here. Petitioners allege that "criminals" and "civilian occupiers" were present in the surrounding streets, but they do not allege that the City empowered those people with legal authority to enter Petitioners' stores or parcels. Pet. ¶ 79; Reply Br. at 4.

Furthermore, the Petition fails to allege that Petitioners lost the right to possess or exclude others from their properties. The record reflects that Petitioners continued to operate their businesses and that they remained in control of their premises throughout the duration of the alleged taking. *See* Healey Dec. Ex. 1B, Income Statements. For instance, in 2021—while the barriers remained in place—Cup Foods reported over $598,000 in sales, and Southside Electronics reported over $899,000 in revenue. *Id.* These facts confirm that Petitioners retained actual possession and economic use of their properties, which is inconsistent with the theory of a physical appropriation.

Petitioners' interpretation of *Cedar Point* to encompass passive withdrawal of services or indirect enabling of protest activity misstates the holding of that case. *Cedar Point,* 594 U.S. at 143. Here, the City granted no such foimal entitlement to any third party to enter Petitioners' private land. Accordingly, the Court concludes that Petitioners have not alleged facts that, if proven, would establish a *per se* taking. The allegations reflect, at most, government inaction in the face of third-party conduct, which is not compensable under the Takings Clause.

B. No Regulatory Taking Occurred.

A regulatory taking[8] occurs when government regulates private property in such a manner that government effectively condemns the property, but does not divest the affected property owner of title to the property. *See DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011) (noting government regulation of private property may result in a taking even if the government has not directly appropriated or physically invaded the property). In determining whether a regulatory taking has occurred, Minnesota courts apply the *Alevizos* market evaluation test or the *Penn Central* balancing test. Determining whether a regulatory taking has occurred is a question of law. *Meriwether Minn. Land & Timber, LLC v. State,* 818 N.W.2d 557, 570. (Minn. Ct. App. 2012).

1. Petitioners' Fail to Satisfy the *Alevizos* Market Value Test.

Petitioners invoke *Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul,* 298 Minn. 471, 487-88 (1974) to support their claim that the City's conduct effected a

8. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (stating that a taking occurs when a law requires a property owner to sacrifice all economically beneficial uses). *See also Wensmann Realty, Inc. v. City of Eagan,* 734 N.W.2d 623, 635 (Minn. 2007) (explaining that determining the economic impact of the regulation is to decide whether it leaves any reasonable, economically viable use of the property).

compensable regulatory taking. The *Alevizos* test requires the petitioner to establish two elements: first, that there was a "direct and substantial invasion of property rights" that significantly impaired the practical enjoyment of the property; and second, that the invasion caused a "definite and measurable diminution in the property's market value." *Id.* at 487-88. Petitioners contend that the City's placement of barricades and its withdrawal of police protection deprived them of safe and profitable operation of their business and thereby reduced the property's value by $660,000.

In *Alevizos,* homeowners near Minneapolis-St. Paul International Airport alleged that low-flying aircraft interfered with their use and enjoyment of property, claiming discomfort, noise, and reduced property values. *Id.* at 492. While the court acknowledged that aircraft overflight cases could, under some circumstances, give rise to takings liability, it drew a bright line: plaintiffs must show that the interference is substantial, peculiar to the affected property, and measurable in economic terms. *Id.* at 488.

First, there is no evidence of a "direct and substantial invasion" of Petitioners' property by the City. Unlike in *AAlevizos,* where persistent low-altitude overflights produced invasive noise pollution and impaired residential use, the conditions here arose from temporary police power measures—barriers in the public right-of-way and the discretionary allocation of police resources. *See Foote v. City of Crosby,* 306 N.W.2d 883, 885-86 (Minn. 1981); *Johnson v. City of Plymouth,* 263 N.W.2d 603, 606 (Minn.

1978). Petitioners' property remained open and accessible albeit via less direct means and the City did not enter, occupy, or alter the private premises in any way.

The Minnesota Supreme Court's decision in *Orfield v. Housing and Redevelopment Authority of St. Paul,* 232 N.W.2d 923 (Minn. 1975), confirms that no taking occurs where government activity merely affects surrounding areas, without directly invading the claimant's parcel. *Id.* at 925. There, the plaintiff alleged that nearby urban renewal activities caused neighborhood deterioration, increased crime, and reduced his rental income. *Id.* at 925-27.

The court rejected the takings claim, emphasizing that economic loss resulting from the changed character of a neighborhood, even if tied to government-related activity, "does not constitute a de facto taking of property in a constitutional sense"; rather, "fluctuations in value of property which may occur by reason of activity undertaken in connection with a government project of this type are incidents of ownership," and a decline in value under such circumstances "cannot be considered a taking in the constitutional sense." *Id.* at 927.

The same reasoning applies here. Petitioners identify violence, economic disruption, and reputational harm caused by third parties—protestors and criminals—but they do not establish that the City physically interfered with their property rights or directed any third party to do so. Petitioners maintain control of their properties, continue to operate at least partially leased buildings, and have not been subjected to formal acquisition, condemnation, or regulatory prohibition. Their theory rests on indirect harm—i.e., that the City's withdrawal of police presence, tolerance of barricades, and inaction in the face of protests led to a loss in value.

Petitioners similarly attempt to reframe general urban deterioration as a constitutional violation. They argue that street closures, heightened crime, and disruptions near George Floyd Square caused business loss and reputational harm. But these impacts, like those in *Orfield,* arise from broader community changes—not from any direct interference with the Petitioners' use, occupancy, or legal rights over their property. The affected parcels were not acquired, zoned out of use, or subjected to new development restrictions.

Second, even assuming a loss in market value, Petitioners have not demonstrated that the diminution was caused by government action sufficiently definite enough to constitute a taking. Here, Petitioners rely on an appraisal suggesting a $660,000 difference between their property's projected value "but for" the conditions at George Floyd Square and its actual sale price. Specifically, Petitioners' appraisal estimates that, absent the social unrest, the property would have a hypothetical market value of $1.4 million as of May 17, 2024; instead, it was appraised on that date at $740,000, resulting in a claimed diminution in value of $660,000. *See* Healey Dec. Ex. 2 at 5. This estimate assumes a stable, pre-2020 market trajectory and attributes the entire disparity in value to the conditions that followed the City's conduct and inaction at the intersection of 38th and Chicago.

Even accepting the appraisal at face value, Petitioners do not establish that a compensable government intrusion under *Alevizos* caused this difference in valuation. A decline in market value, standing alone, is not sufficient to establish a taking. *See Alevizos,* 216 N.W.2d at 661-63. As *Alevizos* and its progeny make clear, the loss must result from a "direct and substantial invasion" of property rights and must be "definite and measurable." *Id.*

Here, the appraisal's hypothetical "but for" framework assumes the absence of not just City conduct, but also the murder of George Floyd, the national protests that followed, crime trends, and general economic instability related to the COVID-19 pandemic—all factors that lie well beyond the scope of municipal action. As Respondents correctly note, a decline in value attributed to broad social and economic events—even if temporally related to City decision-making—does not establish causation under takings law. *See Alevizos,* 216 N.W.2d at 661-63; *Orfield,* 232 N.W.2d 923 at 925-27. In that sense, Petitioners' theory mirrors the one rejected in *Orfield.* As previously mentioned, the Minnesota Supreme Court held that "economic loss caused by the altered character of a neighborhood due to normal activities in connection with an urban renewal project, without more, does not constitute a de facto taking"; fluctuations in value under such conditions "are incidents of ownership," and their occurrence "cannot be considered a taking in the constitutional sense." *Orfield,* 232 N.W.2d at 927.

Thus, even if the Court were to accept the $660,000 figure as a valid measurement of loss of value, the

Petitioners failed to link that decline to a direct and substantial government invasion sufficient to trigger compensation under the Minnesota Constitution.

Furthermore, this Court accepts the analysis of the court that granted summary judgment on the physical takings claim in *Hunters Capital II.* There, plaintiffs alleged that Seattle's support of CHOP—including the provision of infrastructure and street closures—substantially reduced their property value. Yet the court concluded that there was no triable issue on the causation element. It held that "plaintiffs failed to demonstrate that the City physically occupied their property or caused a third party to do so," and that without such occupation, no taking could lie. *Hunters Capital II,* 650 F. Supp. 3d 1196, 1204 (W.D. Wash. 2023). The same causation gap exists here. The record shows economic loss arising from broader unrest and public protest—not from a direct government appropriation or compulsion.

Respondents correctly argue that Petitioners' attempt to link their property's value decline to the City's conduct relies on speculative and attenuated reasoning. Reply Br. at 8-9. Petitioners' valuation does not isolate the impact of City decisions from other causes, such as the global pandemic, national unrest, and localized crime spikes, and thus fails to meet the "definite and measurable" standard required under *Alevizos.*

Moreover, while Petitioners now cite the $330,000 diminution in value as supporting their claim, this figure, though specific, is not tied to a government action targeting Petitioners' property. Healey Dec., Ex. 2, Appraisal Report of Valbridge Property Advisors, July 12, 2024. This calculation reflects the difference in market value between $1,070,000.00 as of May 24, 2020, and $740,000.00 as of May 17, 2024, resulting in a decrease of $330,000.00. Healey Dec., Ex. 2 at 5. Even crediting this figure, it does not support a regulatory taking claim. The loss represents approximately 31 percent of the property's prior value and falls far short of the kind of total economic deprivation courts have found constitutionally significant. The appraisal attributes the decline to a combination of factors, including market perception, tenant turnover, and public safety concerns—conditions that *Orfield* deemed constitutionally insufficient to give rise to takings liability, and are neither unique to Petitioners nor solely attributable to City conduct. *See Orfield*, 232 N.W.2d at 927.[9] As such, the evidence does not show the kind

9. "The main findings of the research are as follows: the subject property and other properties within George Floyd Square face a unique set of challenges that have negatively affected their marketability, accessibility, and profitability. These challenges include: limited street parking due to concrete barriers and other structures blocking curbside access for potential customers and visitors; re-routing of the Metro Transit Line 5 bus route, which previously ran directly in front of the subject property and provided a major commuter service, increased foot traffic, and an amenity for residential tenants; cessation of mail delivery, which affected the residential tenants and some of the commercial tenants who relied on regular mail and parcel delivery and pick-up for their business operations; decreased business revenue, which directly impacts viability, as well as reduces the rent the tenant can pay to remain viable; increased insurance expenses; increased vacancy and collection loss for the residential units; increased vacancy and collection loss for commercial tenants." Healey Dec., Ex. 2, at 3-5.

of definite governmental interference required under Minnesota law.

Unlike the targeted and repetitive physical intrusions at issue in *Alevizos—where* low-flying aircraft directly overflew the plaintiff's property on a near-daily basis—Petitioners identify no affirmative, particularized action by the City that uniquely burdened their property as opposed to others in the surrounding area. There were no physical occupations, no condemnation proceedings, no regulatory prohibitions specific to Petitioners' parcels, and no deprivation of legal access.

Further, Petitioners' operational history undercuts any claim of substantial economic deprivation. Cup Foods continued operations through and after the barrier period, with gross sales exceeding $598,000 in 2021 alone. Healey Dec., Ex. 1. Other petitioners reported year-over-year losses ranging from 8 percent to 50 percent in 2020 and 2021, not the kind of total deprivation required to establish a taking. More severe losses occurred only in 2023, long after the barriers were removed in June 2021, and were attributed to third-party criminal conduct or general urban decline, not to City-imposed restrictions. The property remained legally accessible, under full control of the owners, and capable of generating income throughout the relevant period.

In sum, Petitioners' allegations of economic harm—though real—fail to satisfy the governing legal standards. They have not alleged, nor does the record support, a direct and substantial interference with property rights nor shown that the alleged diminution in market value is traceable to a particular governmental action affecting their parcels. As in *Alevizos* and *Orfield,* their asserted losses are shared by the community at large, and arise from indirect, consequential conditions. These circumstances may give rise to policy questions—but not to constitutional claims.

2. Petitioners fail to satisfy the *Penn Central* test.

Even if Petitioners' claim fails under the *Alevizos* test, the Court must also assess whether the City's actions amount to a taking under the multifactor framework articulated by the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). This test governs claims of regulatory takings under both federal and Minnesota constitutional law. It directs courts to consider (1) the economic impact of the government action on the claimant, (2) the extent to which the regulation interferes with distinct investment-backed expectations, and (3) the character of the government action. *Id.* at 124. The inquiry is fact-intensive and requires the court to balance these factors to determine whether the regulation "goes too far." *Id,* at 124; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

i. The economic impact of the city's conduct was limited and, on balance, weighs against a finding of a regulatory taking.

The first factor examines the severity of the financial loss allegedly imposed by the government conduct. Courts do not apply a rigid threshold, but they generally look for significant, sustained diminutions in value—often exceeding 80 percent or rendering the property effectively valueless—to support a taking. *See generally Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 496 (1987); *Andrus v. Allard,* 444 U.S. 51, 66 (1979) (loss of one "strand" of property rights insufficient where others remain intact).

Here, Petitioners allege a $660,000 loss in value, based on an appraisal estimating the property's worth at $1.4 million in a "but for" scenario, compared to an actual appraised value of $740,000 as of May 17, 2024. Appraisal Report at 105-06. However, that figure assumes a hypothetical situation in which the murder of George Floyd, nationwide protests, and broader social unrest did not occur. *Id.* As such, the appraisal's loss calculation confuses general market conditions and third-party conduct with the effect of the City's specific actions.

This approach fails to isolate the economic impact of the government's conduct from other external forces. Petitioners do not allege that the City entered their land, condemned it, or imposed any legal restriction on its use or development. Rather, they challenge the temporary placement of barricades in the public right-of-way and a reduction in police patrols. Notably, Petitioners continued operating for months after the intersection was barricaded and ultimately chose to close their business nearly a year after those barriers were removed. Menesi Aff., Ex. 1A.

As the U.S. Supreme Court has explained, mere reduction in profitability or market value even substantial—

does not itself trigger compensation. In *Penn Central,* the Court found no taking where the owner was denied the right to build a high-rise atop Grand Central Terminal, despite evidence that the decision impaired the property's development potential. 438 U.S. at 129. Similarly, the economic effects of the City's actions here fall far short of establishing a taking. Petitioners remain in possession of the property, and their losses, however unfortunate, are best characterized as the result of broader civil disruption rather than the kind of targeted regulatory interference contemplated by the Takings Clause.

ii. Petitioners have not demonstrated interference with distinct investment-backed expectations, and this factor weighs against a taking under *Penn Central.*

The second factor in the *Penn Central* regulatory takings framework examines "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). A regulation interferes with distinct investment-backed expectations only when a property owner has made actual, tangible investments in reliance on lawful and reasonable expectations concerning the property's intended use. *See Wensmann Realty, Inc. v. City of Eagan,* 734 N.W.2d 623, 637 (Minn. 2007). Mere hopes or generalized plans—no matter how reasonable—are not sufficient and not every disruption to profitability or convenience constitutes a taking. *Id.* Similarly, expectations remain legally intact so long as the property can continue to be used by governing regulations, *Minnesota Sands, LLC v. County of Winona,* 917 N.W.2d 775, 784 (Minn. Ct. App. 2018). Restrictions arising from participation in a public program or prevailing public conditions do not convert such expectations into protected entitlements. *See Meriwether Minn. Land & Timber, LLC v. State,* 818 N.W.2d 557, 571 (Minn. Ct. App. 2012).

The Court finds no substantial interference with Petitioners' distinct investment-backed expectations. For purposes of *Penn Central,* this factor requires more than disappointed business hopes; it demands a demonstrated investment based on reasonable, objective expectations concerning the continued permitted use of the property. *Wensmann Realty, Inc. v. City of Eagan,* 734 N.W.2d 623, 639 (Minn. 2007) (noting that expectations, however reasonable, are not constitutionally protected absent investment based on those expectations).

In this case, Petitioners do not allege that the City changed the property's zoning, revoked any land-use entitlements, or otherwise altered the legal framework governing its use. The property remained zoned for commercial activity, and Petitioners were not prohibited from operating their business. In fact, the record reflects that they continued operating their store for nearly two years after the George Floyd protests began, including throughout the period during which the intersection was barricaded. They ultimately ceased operations in August 2022—over a year after the City removed the barriers and restored full vehicular access to the intersection in June 2021. Menesi Aff., Ex. 1A.

This timeline undercuts any claim that the City's conduct deprived Petitioners of the core expectations on which their investment relied. While the business undoubtedly experienced hardship, it remained functional, accessible, and legally authorized to operate during and after the events at issue.

The constitutional protection afforded by the Takings Clause does not extend to expectations that are contingent upon public safety conditions, market stability, or uninterrupted municipal services. To hold otherwise would convert temporary social or civic disruption into a compensable taking—a result not supported by *Penn Central* or Minnesota takings jurisprudence.

Because Petitioners' expectations remained legally viable and the property continued to be used in its intended commercial capacity until its voluntary closure, this factor weighs strongly against finding a taking.

iii. The character of the city's actions reflects temporary and discretionary public safety measures, which, when weighed with the other factors, does not support takings liability.

The final *Penn Central* factor—the character of the government action—considers whether the regulation is more akin to a public appropriation (which may require compensation) or to a permissible exercise of the government's police power to regulate for public safety, order, or welfare. *Penn Central,* 438 U.S. at 124; *Tahoe-*

Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323-26 (2002); *Foote v. City of Crosby,* 306 N.W.2d 883, 885-86 (Minn. 1981).

Here, the City placed the barriers in response to widespread civil unrest after George Floyd's death, which occurred at the very intersection where Petitioners' businesses are located. Pet. ¶ 13; Decl. Sautter, Ex. 1, at 11. The City acted to preserve public safety, facilitate emergency access, and manage community tensions. *Id.* Petitioners themselves acknowledge that the City later implemented the THRIVE Strategic Development Plan to address community needs and that it considered public input on how best to reopen the intersection. Pet. ¶¶ 59-71; Decl. Sautter, Ex. 2, at 4-13. These actions fall within the City's police powers and do not reflect the kind of targeted or permanent appropriation required for a compensable taking. *Penn Central,* 438 U.S. at 123 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)

Moreover, the roadblocks did not single out Petitioners' properties for adverse treatment. The traffic diversion applied to the public intersection generally and affected a broad area of adjacent streets. Pet. ¶¶ 14, 24-26; Decl. Sautter, Ex. 1, at 13. There is no indication that the City's traffic management measures imposed a unique or disproportionate burden on Petitioners compared to similarly situated businesses in the area. Courts have repeatedly declined to find a taking where public actions—such as altering traffic flow or closing streets affect properties unevenly but serve a legitimate public purpose. *Hendrickson v. State,* 127 N.W.2d 165, 170 (stating "a property owner has no vested interest in the continued flow of the mainstream of through traffic, and the state may divert it to a new location without being liable for consequential economic losses which owners abutting the old highway may sustain.").

Each *Penn Central* factor weighs against finding a compensable regulatory taking. Petitioners retained economically viable use of their properties, continued to operate their businesses, and failed to show that the City's temporary, safety-driven actions interfered with investment-backed expectations or targeted their properties for adverse treatment. The City's conduct, as alleged, reflects a lawful exercise of police power and does not trigger the Takings Clause.

C. There Was No Taking Based on "Right of Access."

Under Minnesota law, abutting property owners possess a "right of access" to public streets that is akin to a property right and may not be taken without just compensation. *Johnson v. City of Plymouth,* 263 N.W.2d 603, 605-06 (Minn. 1978); *Dale Properties, LLC v. State,* 638 N.W.2d 763, 766 (Minn. 2002). But, to establish a compensable taking, an owner must show a denial of "reasonably convenient and suitable access"—not merely inconvenience or a reduction in traffic volume. *Johnson,* 263 N.W.2d at 606-07.

Petitioners rely heavily on *Kick's Liquor Store, Inc. v. City of Minneapolis,* No. C4-00-2063R, 2002 WL 1364018

(Minn. Ct. App. June 25, 2002) *("Kick's I")* to support their claim that the City of Minneapolis effected a compensable taking of their right of access by erecting concrete barriers and converting public streets into pedestrian-only zones near their business. But a detailed examination of *Kick's I* and its legal standards reveals important distinctions that undermine Petitioners' reliance on the case.

In *Kick's I,* the City of Minneapolis created a permanent cul-de-sac that effectively eliminated a business's only direct vehicular access to a main thoroughfare—Broadway Avenue—by closing off a side street, McNair Avenue, which served as the liquor store's exclusive driveway access. Although vehicles could still technically enter McNair from Broadway, the creation of the cul-de-sac meant that traffic could no longer traverse McNair through to Ferrant Place and Queen Avenue North, which were the only routes allowing free movement from the south. The court found that this interference with access could constitute a compensable taking if it caused a measurable diminution in property value and resulted in a special injury distinct from that suffered by the public. *Kick's I,* 587 N.W.2d at 59-60.

Importantly, the *Kick's I* court did not hold that the creation of a cul-de-sac automatically constituted a taking. Rather, it emphasized the need for a two-part factual inquiry. First, whether the property owner suffered a "special injury, one different in kind from that suffered by the general public." Second, whether there was an "actual damage . . . in the form of a measurable diminution of the market value of the owner's property" *Id.* at 60. Moreover, the court explicitly rejected the idea that the temporary nature of a barrier defeats a takings claim as a matter of law—holding instead that temporariness affects only damages, not liability. *Id.* at 58-60 (stating "a finding that the public action is temporary goes to the measure of damages and not to whether a taking or damage has occurred.").

In contrast, the present case involves temporary, emergency-driven, and nonexclusive street closures. While Petitioners argue that the City's placement of concrete barriers on 38th Street and Chicago Avenue obstructed customer and delivery access, the record reflects that sidewalk access, alley access, and alternative routes remained available to reach their business. Unlike in *Kick's I,* Petitioners did not lose their sole ingress or egress. An impenetrable cul-de-sac did not encircle them. Moreover, the barriers were installed during a public emergency and were temporary—lasting just over a year—whereas the *Kick's* configuration was indefinite and implemented outside the context of civil unrest or emergency response.

In short, *Kick's I* does not mandate the outcome Petitioners seek. It reaffirms that impaired access may be compensable under certain conditions, but those conditions—exclusive access loss, permanent interference, and measurable market depreciation—are absent in this case. Rather than showing a special, distinct injury, Petitioners experienced inconveniences and economic losses akin to those suffered by the general public during a time of heightened civic unrest.

Petitioners allege that the City placed concrete barriers near the intersection of 38th and Chicago, limiting vehicular access to their businesses and causing lost revenue. Pet. ¶¶ 14, 23, 57-73. But they do not allege that access to their properties was eliminated entirely. In fact, the Petition concedes that access was merely "impaired," not denied. Pet. ¶ 23. As Respondents note, the barriers were positioned in the public right-of-way near, but not adjacent to, the Petitioners' parcels, and emergency vehicles could navigate through the area. Decl. Sautter, Ex. 1, at 9, 13. The barriers redirected through-traffic by one block in each direction, but Petitioners retained access via alleys, sidewalks, and nearby cross streets. *Id.*

While *Kick's I* established the foundational legal test for takings claims based on interference with street access, the court's later opinion in *Kick's II* applied that test to the developed factual record. *Kick's Liquor Store, Inc. v. City of Minneapolis,* No. C4-00-2063, 2001 WL 506937, at *1 (Minn. Ct. App. May 15, 2001) *("Kick's 11").* In doing so, it clarified how courts evaluate whether remaining access is reasonably convenient and whether an alleged interference rises to the level of a constitutionally compensable taking.

In *Kick's II,* the Minnesota Court of Appeals affirmed a trial court's determination that the City of Minneapolis had effected a compensable taking by converting McNair Avenue into a cul-de-sac and thereby impairing direct vehicular access to Kick's Liquor Store's parking lot from the south. Although the store could still be accessed from the north, the court found the one remaining access route was neither reasonably convenient nor suitable, which rendered the interference compensable. *Kick's II,* 2002 WL 1364018, at 34.

The court reaffirmed the standard set out in *Kick's I* —that to establish a taking based on interference with access, a plaintiff must demonstrate: (1) a special injury distinct from that suffered by the general public; (2) actual damage, typically a diminution of the market value; and (3) the lack of reasonably convenient and suitable access in at least one direction. *Id.* at *2-3,* citing *Kick's I,* 587 N.W.2d at 60; *Hendrickson v. State,* 267 Minn. 436, 445-46, 127 N.W.2d 165, 172-73 (1964).

In *Kick's II,* the store's only parking lot was accessible via McNair, and the City placed a barrier that blocked all southbound traffic and erected a non-standard concrete pylon at the only remaining entrance from the north, which caused several traffic accidents and was poorly marked. This obstruction, in the court's view, rendered access from the north unsafe and confusing, and not reasonably convenient. *Id.* at 4. The city also failed to provide a proper turnaround area, which resulted in motorists using the store's private parking lot for turning around constituting, according to the court, a direct and repeated intrusion onto private property, not a mere indirect or occasional nuisance. *Id.* at 4-5.

Petitioners in the present case invoke *Kick's II* to argue that even partial restrictions to access may give rise to a taking. But *Kick's II* is factually distinguishable on several critical grounds. First, in *Kick's II,* the impairment was long-term and effectively permanent, while here, the City's street closures were implemented under emergency circumstances, were temporary, and were subject to multiple public engagement efforts and reviews throughout their duration. Decl. Sautter, Ex. 1, at 11; Ex. 2, at 8-13.

Second, the Court in *Kick's II* emphasized that the City's placement of a nonstandard pylon and lack of a turnaround created physical hazards and obstructions that exacerbated the access issue. In contrast, Petitioners here retained pedestrian, alley, and side-street access, and no comparable physical impediments such as hazardous signage or frequent traffic collisions are alleged.

Finally, *Kick's II* rested heavily on the principle in *Hendrickson v. State,* 267 Minn. 436, 440, 127 N.W.2d 165, 169 (1964) that remaining access must be reasonably convenient and suitable, and that such a determination is fact-intensive and typically for the finder of fact. *Kick's II* at 4; *Hendrickson v. State,* 267 Minn. 436, 127 N.W.2d 165 (1964) (stating "what is reasonable ingress and egress is fact question in proceeding to recover damages suffered by property owner who is denied access to main thoroughfare except at interchanges yet to be designated but who has unlimited access to service road over which main thoroughfare can be reached by circuitous route."). However, unlike in *Kick's II,* the closures at issue here did not single out Petitioners but applied to a broader commercial district and were motivated by public safety concerns arising from sustained civil unrest and global attention at the intersection of 38th and Chicago.

Thus, while *Kick's II* provides a valuable framework for evaluating takings based on loss of access, its facts and legal conclusions do not compel a finding of a compensable taking here because the case is fundamentally distinguishable. Petitioners cannot satisfy the thresholds for special injury, actual damage, or the loss of suitable access under the standards reaffirmed in *Kick's II*.

This level of access satisfies the legal standard of "reasonably convenient and suitable access." *Johnson,* 263 N.W.2d at 606-07. Minnesota courts have held that changes to traffic flow, such as converting roads to one-way, installing medians, or rerouting streets, do not constitute takings where general access is preserved. *See Dale Properties,* 638 N.W.2d at 766 (restriction that forced travel "around the block" did not result in a compensable taking); *County of Anoka v. Esmailzadeh,* 498 N.W.2d 58, 61-62 (Minn. Ct. App. 1993) ("[I]f access to property in an urban area requires 'going around the block,' a substantial inconvenience might still be reasonable access.").

Petitioners argue that their right of access was effectively taken away because their businesses experienced a severe drop in customer traffic and revenue. Pet. ¶¶ 57-73. But this mistakes economic harm with legal impairment of access. The right of access is not a guarantee of customer volume or economic performance. Rather, it simply protects the physical ability to reach the property. As the Minnesota Supreme Court stated in *Hendrickson v. State,* 127 N.W.2d 165, 170 (Minn. 1964), "[a] property owner has no vested interest in the continued flow of the mainstream of through traffic," and the state may divert it "without being liable for consequential economic losses." *Hendrickson v. State,* 127 N.W.2d 165, 170 (Minn. 1964).

Respondents further argue that Petitioners' own financial records confirm that they continued operating during the alleged period of diminished access. *See* Healey Dec. Ex. 1B, Income Statements. In 2021, after a full year under the barrier conditions, Cup Foods and its affiliated businesses collectively generated over $1.7 million in gross sales. *Id.* These figures contradict any suggestion that Petitioners were deprived of physical access necessary to conduct business.

Finally, the barriers were temporary and were removed on June 3, 2021. Pet. ¶ 17. Petitioners do not allege that the City imposed permanent infrastructure changes or legal restrictions on access to their parcels. The absence of permanence further undermines any claim to a compensable taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 329-30 (2002) (temporary restrictions on use generally do not amount to takings).

Accordingly, although Petitioners may have experienced hardship due to rerouted vehicular traffic and reduced foot traffic, they did not plead facts that support a claim of substantially impaired or effectively eliminated access. The presence of alternative routes, the continued operation of businesses, and the temporary nature of the traffic control measures preclude a finding of a compensable right-of-access taking.

II. Petitioners Are Not Entitled to Mandamus Relief Because the City and Mayor Owe No Enforceable Legal Duty to Provide Individualized Police Protection, and the Claim Is Barred by Collateral Estoppel and Official Immunity.

"Actions for inverse condemnation must be brought to the court through an action in mandamus." *Nolan & Nolan v. City of Eagan,* 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (citations omitted). Under Minnesota law, mandamus may be used in two narrow circumstances: to compel the performance of an official duty that is clearly required by law, or to require a public official to exercise discretion where the law obligates some action. *Mendota Golf LLP v. City of Mendota Heights,* 708 N.W.2d 162, 171 (Minn. 2006) (citing Minn. Stat. § 586.01). However, courts may not use mandamus to control how that discretion is exercised, nor may they direct the specific manner in which a duty is to be carried out. *Id.*

Petitioners seek a writ of mandamus compelling Respondents to provide police protection to their properties and the surrounding area. Pet. ¶¶ 79-80, 85. To obtain mandamus relief under Minnesota law, a petitioner must demonstrate (1) the existence of a public officer's clear legal duty, (2) a public wrong specifically injurious to the petitioner, and (3) the absence of an adequate legal remedy. *Spann v. Minneapolis City Council,* 979 N.W.2d 66, 78 (Minn. 2022) (citing Minn. Stat. §§ 586.01, 586.02). The duty must be "ministerial—that is, absolute, certain, and imposed by law. *Id.*

Petitioners' mandamus claim fails as a matter of law for three independent reasons: (1) Respondents do not owe Petitioners an enforceable legal duty to provide individualized police protection; (2) Petitioners are barred by collateral estoppel from relitigating this issue; and (3) discretionary police decisions are protected by official immunity.

A. No Enforceable Legal Duty Exists.

Official immunity protects individual government actors so they may "perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Kariniemi v. City of Rockford,* 882 N.W.2d 593, 599 (Minn. 2016), 882 N.W.2d at 599-600. Generally, official immunity is determined by: "(1) the conduct at issue; (2) whether the conduct is discretionary or ministerial and, if ministerial, whether any ministerial duties were violated; and (3) if discretionary, whether the conduct was willful or malicious." *Vassallo ex rel. Brown v. Majeski,* 842 N.W.2d 456, 462 (Minn. 2014).

Discretionary decisions are those that involve the exercise of judgment or discretion. *See Johnson v. Morris,* 453 N.W.2d 31, 41 (Minn.1990); *Mowatt v. Hennepin County,* 2002 WL 857733 at *4 (Minn.App., May 7, 2002) (stating that discretionary acts are those that involve "the exercise of individual judgment in carrying out official duties"). In contrast, ministerial decisions are the types of decisions that are absolute, certain, and imperative, and involve merely the execution of a specific duty that arises from fixed and designated facts. *See Rico v. State,* 472 N.W.2d 100, 107 (Minn.1991). The categorization of an act as discretionary or ministerial is a legal question, which the Court determines. *See Kelly v. City of Minneapolis,* 598 N.W.2d 657, 664 (Minn.1999).

Here, Petitioners rely on Minneapolis Code of Ordinances, Title 9, § 171.30, which broadly outlines the City's obligations to preserve public peace and protect persons and property. Pet. ¶ 84.[10] But this ordinance is not self-executing and does not create a private right enforceable by mandamus.

Even if § 171.30 were construed as imposing general public duties, it does not require any specific level of police protection for individual residents or businesses. Minnesota law is clear that there is no constitutional or statutory right to a particular degree of police service. In *Dahlheimer v. City of Dayton,* 441 N.W.2d 534, 537 (Minn. Ct. App. 1989), the Minnesota Court of Appeals held that "[it is] a fundamental principle [that] a municipality cannot

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10. Each police officer shall notice and diligently inquire into and report to the chief of police and city attorney all violations of this Code or of the criminal laws of the state, and take such enforcement action as is authorized by state statute and the Minnesota Rules of Criminal Procedure; shall attend punctually all trials for offenses in regard to which the officer receives a trial notice or subpoena; shall as directed by the chief of police and other supervisory personnel visit or patrol all parts of the city where any violations of the law are occurring or likely to occur; shall arrest any violators of the Code or the criminal laws of this [...]. MCO § 171.30

be held liable for failing to supply general police or fire protection." *Dahlheimer v. City of Dayton,* 441 N.W.2d 534, 537 (Minn. Ct. App. 1989). This principle applies equally to requests for mandamus relief.

The Minnesota Supreme Court's decision in *Spann v. Minneapolis City Council,* 979 N.W.2d 66 (Minn. 2022), offers guidance on the limited scope of mandamus relief against municipal actors. In that case, the petitioners sought to compel the City Council to fulfill an alleged obligation under the Minneapolis City Charter to fund and maintain a police force of a specific minimum size—namely, at least 0.0017 officers per resident. *Id.* at 70. The core question was whether this provision created a ministerial duty that could be enforced through mandamus, or whether it left too much discretion in its implementation.

To obtain mandamus relief or enforce a claimed obligation under a regulatory takings theory, Petitioners must identify a duty that is clearly imposed by law and not subject to discretion. The Minnesota Supreme Court reaffirmed this standard in *Spann v. Minneapolis City Council* 979 N.W.2d 66, 73 (Minn. 2022), where it held that "a writ of mandamus may issue only where the petitioner demonstrates that the government has 'failed to perform an official duty clearly imposed by law.'" *Id.* at 73. The Court in *Spann* considered whether the Minneapolis City Council had a legal obligation under the City Charter to maintain a minimum number of police officers. Because the Charter contained a clear numerical requirement, the Court concluded that the duty was judicially enforceable and supported issuance of mandamus.

In contrast, Petitioners here have not identified a comparable statute, charter provision, or ordinance that imposes a mandatory legal duty on the City to dismantle street barricades, ensure constant access to the intersection of 38th and Chicago, or maintain a specific level or method of police protection. Rather, the City's decisions regarding how to respond to the aftermath of George Floyd's death, through public safety, traffic management, and community engagement, are matters of discretionary policymaking. These types of decisions, unlike the concrete staffing mandate in *Spann,* are not susceptible to judicial enforcement because they lack the requisite clarity and nondiscretionary command.

Accordingly, while Petitioners may have experienced real hardship, the law does not recognize a right to compel governmental action absent a clear, affirmative, and legally imposed duty. *Spann* confirms that the judiciary's role is limited to enforcing duties that are both specific and mandatory; generalized grievances with governmental priorities or policy execution, however significant, fall outside the narrow reach of mandamus jurisdiction.

B. Petitioners Are Collaterally Estopped from Reasserting This Claim.

Respondents further argue that Petitioners are barred from reasserting their police protection theory under the doctrine of collateral estoppel. Pet. Br. at 19; Reply Br. at 2. In an earlier lawsuit, *Cup Foods et al. v. City of Minneapolis,* Court File No. 27-CV-23-17760, Petitioners advanced similar allegations that the City failed to protect their properties from criminal activity. The Hennepin County District Court dismissed those claims, holding that Respondents were immune from suit under the doctrines of statutory and official immunity. Pet. ¶ 86; Decl. Sautter, Ex. 3-4.

Petitioners do not dispute this procedural history in their opposition brief, nor do they address the preclusive effect of the earlier ruling. Reply Br. at 2. The legal and factual issues surrounding police presence and allocation of public safety resources are identical to those previously litigated. Under Minnesota law, collateral estoppel precludes relitigation where a final judgment was rendered on the same issue between the same parties. *Ellis v. Minneapolis Comm'n on Civil Rights,* 319 N.W.2d 702, 704 (Minn. 1982). That standard is met here.

C. Police Resource Allocation Is Discretionary and Protected by Immunity.

The decisions regarding deployment of police personnel and prioritization of emergency responses are inherently discretionary. As Petitioners themselves acknowledge, law enforcement operated under a "priority system" during the relevant time, which factored in available personnel and overall risk. Pet. ¶ 40 n.6. These types of operational judgments fall squarely within the zone of official immunity.

As the Court held in the earlier action involving the same parties, these discretionary decisions are not subject to judicial override. *Cup Foods et al. v. City* *of Minneapolis,* Court File No. 27-CV-23-17760; Decl. Sautter, Ex. 4. In *Cracraft v. City of St. Louis Park,* the Minnesota Supreme Court held that government entities are not liable for failing to enforce laws uniformly or to protect individual members of the public, absent a special duty. *Cracraft,* 279 N.W.2d 801, 805-06 (Minn. 1979). Petitioners do not—and cannot—plead that Respondents owed them a special duty under the *Cracraft* factors, which require an express assurance of protection or individualized reliance on government promises.

Because Respondents had no ministerial duty to provide specific police protection to Petitioners, and because the same issue was decided against Petitioners in an earlier suit, Count II fails as a matter of law. Moreover, the discretionary nature of police operations renders the claim barred by official immunity. Accordingly, the Court finds that Petitioners failed to state a mandamus claim upon which relief can be granted.

III. Petitioners' Claim for Attorneys' Fees Under Minn. Stat. § 117.045 Fails Because They Have Not Established a Taking nor Have They Triggered a Condemnation Proceeding.

In Count III, Petitioners seek an award of reimbursement for costs and expenses, including reasonable attorneys' fees, under Minn. Stat. § 117.045. Pet. ¶ 87.[11] Their claim for attorneys' fees fails, however,

11. 117.045 Compelling Acquisition in Certain Cases. Upon successfully bringing an action compelling an acquiring

because (1) Minn. Stat. § 117.045 does not create an independent cause of action, and (2) Petitioners have not prevailed in nor compelled the initiation of any condemnation proceeding.

A. Minn. Stat. § 117.045 Does Not Authorize a Standalone Claim.

Minnesota law authorizes recovery of attorneys' fees in limited eminent domain contexts. Under Minn. Stat. § 117.045, a property owner may recover reasonable attorneys' fees and litigation expenses when the court determines that the government has taken property and, as a result, commences condemnation proceedings to determine damages. The statute's fee-shifting provision is procedural and derivative—it applies only where an inverse condemnation claim is successful and results in formal condemnation.

Minn. Stat. § 117.045 does not permit a standalone

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authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action. Such costs and expenses shall be allowed only in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Statutes at Large, volume 84, page 1894 (1971), any acts amendatory thereof, any regulations duly adopted pursuant thereto, or rules duly adopted by the state of Minnesota, its agencies or political subdivisions pursuant to law. Minn. Stat. § 117.045.

cause of action for attorneys' fees. Rather, a plain reading of the statute's fee provision is incidental to a successful inverse condemnation claim. Courts have consistently held that petitioners cannot seek fees under this statute unless they prevail on the merits of their takings claim and force the government to initiate condemnation proceedings. *See Minnesota Voters All. v. County of Ramsey,* 971 N.W.2d 269, 278 (Minn. 2022) (requiring that the party "prevail", and that the statute specifically authorizes fees). Petitioners do not cite any case or authority in the record that would support treating Minn. Stat. § 117.045 as an independent basis for relief. Nor do they allege that any formal condemnation proceeding has occurred because of this action.

B. Petitioners Have Not Triggered the Statutory Prerequisites Under Minn. Stat. § 117.045.

Petitioners' inverse condemnation claims have not succeeded. As discussed in Count I, they failed to plead facts sufficient to establish a *per se,* regulatory, or right-of-access taking. *See supra,* Sections I.A-C. Because there is no finding of a taking, there is no basis for awarding attorneys' fees under Minn. Stat. § 117.045.

Respondents emphasize that the plain language of the statute ties fee recovery to a successful demand for just compensation. Petitioners neither prevailed nor compelled Respondents to begin condemnation proceedings. They remain at the pleading stage and have not obtained any judicial determination that their property was taken. As such, the necessary condition for triggering Minn. Stat.

§ 117.045 has not been met.

Additionally, Petitioners do not allege entitlement to fees under any contractual provision, equitable doctrine, or separate statutory authority. Their request rests solely on Minn. Stat. § 117.045, which, does not support a fee award in the absence of a successful taking claim.

Petitioners' request for attorneys' fees under Minn. Stat. § 117.045 is not an independent cause of action and cannot proceed on its own. Because Petitioners have not established that a taking occurred or that Respondents initiated condemnation proceedings, they are not entitled to attorney's fees under the statute. Accordingly, Count III must be dismissed.

ORDER

1. Respondent's Motion to Dismiss is **GRANTED** in all respects, and the Petitioner's Complaint and Writ of Mandamus is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 17, 2025

BY THE COURT:

/s/ Edward T. Wahl
Edward T. Wahl
Judge of District Court

APPENDIX D — PETITION IN THE SUPREME COURT OF THE STATE OF MINNESOTA, FILED MARCH 20, 2026

STATE OF MINNESOTA
IN SUPREME COURT

APPELLATE COURT CASE NUMBER: A25-1219

CUP FOODS, INC., *et al.*,

Petitioners,

vs.

CITY OF MINNEAPOLIS,
AND MAYOR JACOB FREY,

Respondents.

PETITION FOR REVIEW OF COURT OF APPEALS

DATE OF FILING OF COURT OF APPEALS DECISION: February 23, 2026

TO: The Supreme Court of the State of Minnesota:

Petitioners Cup Foods, Inc., et al., request Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

Appendix D

STATEMENT OF LEGAL ISSUES

1. Whether Respondents' actions constituted a per se taking.

The Court of Appeals erroneously held that Respondents' actions did not constitute a per se taking because Respondents did not physically enter Petitioners' properties and did not authorize any third party to physically enter Petitioners' properties.

2. Whether Respondents' actions constituted a regulatory taking.

The Court of Appeals erroneously held that Respondents' actions did not constitute a regulatory taking under *Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651 (Minn. 1974) after concluding Respondents did not substantially invade Petitioners' properties since the barricades only stood for 366 days and were therefore only "occasional" and not "repeated aggravate," and Petitioners suffered indirect harm from Respondents' actions.

The Court of Appeals erroneously held that Respondents' actions did not constitute a regulatory taking under *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978) after concluding the barricades were one of many factors that caused Petitioners' property values to decline; Petitioners continued to operate their businesses; the public could still access Petitioners' businesses; laws did not restrain how Petitioners used their businesses; Respondents' actions did not impose a unique or disproportionate burden on Petitioners' businesses; and Respondents reasonably exercised their general police powers.

3. Whether Respondents' actions constituted a right of access taking.

The Court of Appeals erroneously held that Respondents' actions did not constitute a right of access taking after applying a three-element test that analyzed whether Petitioners suffered a special injury, suffered actual damage, and had reasonably convenient and suitable access to their properties. The court concluded Petitioners did not suffer a special injury but instead suffered the same injury as the public; Petitioners did, however, suffer actual damage because the market value of their properties decreased; but Petitioners had reasonably convenient and suitable access to their properties because it was not nearly impossible to access the properties since Petitioners could access their properties by foot and through alleyways.

CRITERIA GOVERNING REVIEW

Review is appropriate under Minn. R. Civ. App. P. 117, subd. 2(a), (c), (d)(2), and (d)(3). First, this case raises important legal questions that captured the country's attention: was it lawful for government to barricade an entire city intersection for over one year and withdraw police protection from the same intersection? Additionally, is a motion to dismiss converted to a summary judgment motion if the court considers extrinsic evidence that is referenced in a pleading and central to the alleged claims? Second, the lower courts' opinions are misplaced and ignore the reality and gravity of the economic and physical ham that Respondents' actions inflicted on Petitioners. Third, the Court can resolve unanswered legal questions in the takings context that will have a statewide impact. Can a taking occur if the government's actions are justified by its police powers? Does the government need to enact a law authorizing a third party to enter onto an owner's property to constitute a per se taking? What is "reasonably convenient and suitable access"? Finally, the takings questions involved here will continue to recur unless resolved by the Court.

STATEMENT OF THE CASE

Petitioners are business owners within the intersection of 38th Street and Chicago Avenue in Minneapolis. On May 25, 2020, a City of Minneapolis ("City") police officer murdered George Floyd ("Mr. Floyd"). On June 2, 2020, in response to Mr. Floyd's murder, Respondents withdrew police from the intersection and surrounded Petitioners' properties with concrete barricades by placing the barricades at all four entry points at the intersection. The barricades and lack of police prevented vehicles and pedestrians from accessing Petitioners' businesses. Respondents refused to remove the barricades for over one year and withdrew police protection to authorize third parties to overtake the intersection. Petitioners' actions caused Petitioners to suffer extraordinary economic damages and endure traumatic violent crime.

Petitioners filed a writ of mandamus for their takings claims. Respondents filed a Motion to Dismiss. The district court granted Respondents' Motion to Dismiss after concluding Respondents' actions did not constitute a per se, regulatory, or right of access taking. Petitioners appealed. The Court of Appeals affirmed the district court's decision.

ARGUMENT

I. The Court of Appeals Applied the Wrong Legal Standard

The district court's Order granted "Respondents' Motion to Dismiss." The Court of Appeals mistakenly decided the matter under a summary judgment standard because the district court referred to, and relied upon, extrinsic evidence. However, a district court considering extrinsic evidence that was referenced in a complaint and central to the alleged claims does not convert a motion to dismiss to a summary judgment motion. *In re Hennepin Cnty. 1986 Recycling Bond Litig.,* 540 N.W.2d 494, 497 (Minn. 1995). The district court considered Petitioners' extrinsic evidence of an expert appraisal report and affidavits for decreased revenue. Such extrinsic evidence should not cause summary judgment to apply because Petitioners' Writ repeatedly pleaded Respondents' actions decreased Petitioners' property values and revenue, and economic harm is required to show a regulatory and right of access taking. Minnesota courts have a duty "to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *Hoskin v. Krsnak,* 25 N.W.3d 398, 405 (Minn. 2025)

II. Respondents' Actions Constitute a Right of Access Taking

To prove a right of access taking by the closure of a public street, the property owner must prove the owner (1) suffered a special injury; (2) suffered actual damage that measurably decreased the property's market value; and (3) is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction. *Kick's Liquor Store, Inc. v. City of Minneapolis,* No. C4-00-2063R, 2002 WL 1364018, at *2-3 (Minn. Ct. App. June 25, 2002). The Court of Appeals erroneously concluded that Petitioners did not suffer a special injury and still had reasonably convenient and suitable access to their properties. The court misinterpreted *Cnty. of Anoka v. Esmailzadeh,* 498 N.W.2d 58 (Minn. Ct. App. 1993) to reason that Petitioners had reasonably convenient and suitable access because access to Petitioners' properties was not "nearly impossible." The court in *Esmailzahed* stated:

> If access to property in an urban area requires "going around the block," a substantial inconvenience might still be reasonable access. If, however, access has been made so inconvenient as to be nearly impossible, there would not be reasonable access. We hold the trial court erred in failing to focus upon whether [the property owner] has reasonable access from Highway 65.

498 N.W.2d 58, 61-62. Thus, Government action making access “nearly impossible” is sufficient to constitute a regulatory taking, but it is not required. Instead, “going around the block” to access a property might constitute a right of access taking. This is a genuine question of material fact to be decided by a jury and cannot be decided under summary judgment. *See Kick’s,* 2002 WL 1364018, at *2. Petitioners pleaded they could not access their properties, which the lower courts should have accepted as true under Rule 12.02(e). Furthermore, Respondents deciding to withdraw police protection from intersection prevented pedestrians from accessing the properties because the intersection transformed into a violent No Go Zone.

Petitioners suffered a special injury. Only businesses within the intersection—and no other businesses in Minneapolis—suffered the specific harm inflicted by Respondents. In fact, only businesses within the intersection were eligible to receive a $50,000 forgivable loan from Respondents.

III. Respondents’ Actions Constitute a Per Se Taking

A per se taking occurs in two scenarios: (1) when the government physically acquires private property for a public use, or (2) “[w]hen the government . . . imposes regulations that restrict an owner’s ability to use his own property.” *Cedar Point Nursery v. Hassid,* 594 U.S. 139, 147-48 (2021). The latter scenario is at issue here. The United States Supreme Court clarified the meaning of the latter scenario with the following pertinent language:

> The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—*by whatever means*—or has instead restricted a property owner's ability to use his own property.

Id. at 149 (emphasis added). Respondents did not enact a law that authorized a third party to invade Petitioners' properties, so the Court of Appeals concluded that Respondents' actions did not constitute a per se taking. *Cedar Point,* however, does not require the government to enact a law for a per se taking to occur. Here, Respondents adopted a policy or practice of maintaining the barricades and withdrawing police protection as the "means" to authorize third parties to invade Petitioners' properties. Respondents' actions promoted and endorsed third-party interests of providing a space for mourning, preserving public art, and prohibiting a "return to normalcy" in the intersection.

IV. Respondents' Actions Constitute a Regulatory Taking

The *Alevizos* test requires property owners to prove two elements for a regulatory taking: (1) a direct and substantial invasion of the owner's property rights; and (2) that such invasion results in a definite and measurable diminution of the market value of the property. *Alevizos,* 216 N.W.2d at 652. The government's interference of property rights must not be of an "occasional nature" but must be "repeated and aggravated" with "a reasonable probability that they will be continued in the future." *Id.* Here, Respondents removing the barricades after one year does not make the barricades an "occasional" interference. The barricades were rather a "repeated and aggravated" interference because they stood 24 hours a day for 366 days, which caused Petitioners' property values to decrease.

The *Penn Central* test balances three factors to determine if a regulatory taking occurred: (1) the economic impact of the regulation on the owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central,* 438 U.S. at 124. The economic impact factor weighs in favor of a taking. The Court of Appeals ignored Petitioners' appraisal report that concluded that Respondents' actions caused Petitioners' property values to decline by $660,000. The court incorrectly focused on the fact that Petitioners' businesses continued to operate while the barricades remained in place. Petitioners continuing to operate their businesses is irrelevant under *Penn Central.* The court's analysis conflates the categorical takings test with the *Penn Central* test. Courts apply the *Penn Central* test when a "a regulation impedes the use of property without depriving the owner of all economically beneficial use." *Murr v. Wisconsin,* 582 U.S. 383, 393 (2017).

The investment-backed expectations factor weighs in favor of a taking because Petitioners invested their life's work and economic resources into their businesses. Respondents' actions forced Petitioners to close their businesses. The character of the government action weighs in favor of a taking. The Court of Appeals erroneously concluded this factor does not weigh in favor of a taking because Petitioners suffered the same harm suffered by the public, and the Respondents reasonably exercised their general police powers. Petitioners disagree. First, only the businesses within the intersection—and no other businesses in Minneapolis—suffered the specific harm inflicted by Respondents. Second, it is irrelevant that Respondents acted behind their general police powers. The relevant question is whether the use of police powers resulted in a compensable taking. *See Johnson v. City of Plymouth,* 263 N.W.2d 603, 607 (Minn. 1978) (stating, "the operative question is not whether the city of Plymouth exercised its police powers in a reasonable fashion by upgrading Kilmer Lane but rather whether the city's admittedly legitimate police power action unduly restricted vehicular access to the subject property and thereby deprived Petitioners of their right of reasonable access").

CONCLUSION

Petitioners respectfully request this Court review the legal issues in this case.

Dated: March 20, 2026

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