

No. A20-1561

**STATE OF MINNESOTA
IN SUPREME COURT**

CARVIN BUZZELL, JR.,
PETITIONER,

v.

TIM WALZ, GOVERNOR OF MINNESOTA,
RESPONDENT.

**BRIEF OF AMICI CURIAE THE DISTRICT OF COLUMBIA AND THE
STATES OF CALIFORNIA, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, NEW JERSEY, OREGON, VERMONT, AND VIRGINIA IN
SUPPORT OF RESPONDENT**

KATHERINE M. SWENSON

(No. 0389280)

AMRAN A. FARAH

(No. 0395354)

Greene Espel PLLP

222 S. Ninth Street, Suite 2200

Minneapolis, MN 55402

(612) 373-8389

kswenson@greeneespel.com

afarah@greeneespel.com

*Attorneys for Amicus Curiae
the District of Columbia*

KARL A. RACINE

Attorney General for the District of Columbia

LOREN L. ALIKHAN

Solicitor General

CAROLINE S. VAN ZILE

Principal Deputy Solicitor General

CAROLINE W. TAN*

Assistant Attorney General

Office of the Solicitor General

Office of the Attorney General

400 6th Street, NW, Suite 8100

Washington, D.C. 20001

(202) 727-6287

loren.alikhan@dc.gov

**Admitted only in California*

MATTHEW ANDERSON
(No. 0397364)

STEVEN ANDERSON
(No. 017361)

Anderson Law Group PLLC
1010 Dale Street North
Saint Paul, MN 55117
Telephone: (651) 253-2228
matt@andersonlgnm.com
steve@andersonlgnm.com

Attorneys for Petitioner

LAWRENCE R. McDONOUGH
(No. 151373)

1161 Palace Avenue
Saint Paul, MN 55105
(651) 398-8053
mcdon056@umn.edu

JAMES W. PORADEK
(No. 0290488)

Housing Justice Center
Northwestern Building
275 East Fourth Street, Suite 590
Saint Paul, MN 55105
(612) 723-0517
jporadek@hjcmmn.org

*Attorneys for Amici Curiae Housing
Justice Center, HOME Line, Volunteer
Lawyers Network, and Mid-Minnesota
Legal Aid*

KEITH ELLISON
Attorney General
State of Minnesota

LIZ KRAMER
(No. 0325089)
Solicitor General

RICHARD DORNFELD
(No. 0401204)

KATHERINE HINDERLIE
(No. 0397325)

Assistant Attorneys General

445 Minnesota Street, Suite 1400
Saint Paul, MN 55101-2127
(651) 757-1010

liz.kramer@ag.state.mn.us
richard.dornfeld@ag.state.mn.us
katherine.hinderlie@ag.state.mn.us

Attorneys for Respondent

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IDENTITY AND INTEREST OF AMICI CURIAE

The District of Columbia and the States of California, Illinois, Maine, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Virginia (the “Amici States”) file this brief as amici curiae under Rule 129 of the Minnesota Rules of Civil Appellate Procedure in support of respondent.¹ The Amici States represent jurisdictions across the country that are entrusted with ensuring the health and well-being of their communities. Retaining the flexibility to address emergencies is necessary to execute that responsibility. In recent years, there has been perhaps no crisis more pressing than the COVID-19 pandemic, which, as of this writing, has claimed the lives of more than 9,400 people in Minnesota and nearly 780,000 people in the United States. Ctr. for Disease Control & Prevention, *COVID Data Tracker: United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction* (last updated Nov. 28, 2021).² This case addresses the scope of a state’s actions in responding to that crisis—specifically, whether Minnesota’s COVID-19-related restrictions on in-person dining and other businesses qualify as “commandeering” within the meaning of Minn. Stat. § 12.34 (2020), entitling the property owner to compensation. The Amici States submit this brief in support of respondent because the answer is (and should be) no.

¹ No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entities other than amici curiae, their members, or their counsel made a monetary contribution to the brief’s preparation or submission.

² Available at <https://bit.ly/3kqrEpY>.

The Amici States have a significant interest in this Court’s interpretation of “commandeer” in this context. In addition to Minnesota, there are at least 23 other states—including several of the Amici States—with similar laws allowing for the “commandeering” of private property in an emergency, with subsequent compensation to the property owner.³ Among states that do not use the term “commandeer,” several have similar provisions permitting the taking and use of private property in an emergency with compensation.⁴ Like Minnesota, these states have all used their emergency powers to enact similar restrictions on businesses to curb the transmission of COVID-19. And, like Minnesota, these states reasonably interpret their own commandeering provisions to cover either physical occupation or appropriation of property for direct, active use by the government, but not regulatory actions like the closure orders at issue here. This reading

³ See Alaska Stat. Ann. §§ 26.23.020(g)(4), .160(b); Ariz. Rev. Stat. Ann. § 26-303(A)(2); Ark. Code Ann. §§ 12-75-114(e)(4), -124(c); Cal. Gov’t Code § 8572; Colo. Rev. Stat. §§ 24-33.5-704(7)(d), -711.5(4); Fla. Stat. Ann. §§ 252.36(5)(d), .43(3); Ga. Code Ann. § 38-3-51(d)(4); Idaho Code Ann. §§ 46-1008(5)(d), -1012(3); Ind. Code Ann. §§ 10-14-3-12(d)(4), -31(c); Iowa Code Ann. § 29C.6(12); Kan. Stat. Ann. §§ 48-925(c)(4), -933(c); La. Stat. Ann. §§ 29:724(D)(4), :730(E); Mich. Comp. Laws Ann. §§ 30.405-.406; Miss. Code. Ann. § 33-15-11(c)(3); Neb. Rev. Stat. Ann. §§ 81-829.40(6)(d), .57(3); N.J. Stat. Ann. App. A:9-34; N.C. Gen. Stat. Ann. § 166A-19.73(b); N.D. Cent. Code Ann. §§ 37-17.1-05(6)(d), -12(3); 35 Pa. Cons. Stat. §§ 7301(f)(4), 7313(10); 30 R.I. Gen. Laws Ann. §§ 30-15-9(e)(4), -11; Tenn. Code Ann. §§ 58-2-107(e)(4), -115(c); Tex. Gov’t Code Ann. §§ 418.017(c), .152(c); Va. Code Ann. § 32.1-48.017.

⁴ See, e.g., Mass. St. 1950, c. 639, § 5 (not codified in the General Laws) (authorizing the governor to “take possession” of private property in an emergency, “use and employ all property of which possession is taken,” and compensate the owner “for [the property’s] use, and for any injury thereto or destruction thereof caused by such use”); Vt. Stat. Ann. tit. 20, § 11 (permitting the state “to seize, take, or condemn property” and “make compensation for the property seized, taken, or condemned”).

of the term “commandeer” adequately protects property owners in times of emergency without exposing the state to an array of costly compensation claims, which would drain the state’s budget, divert executive and local attention from other priorities, and hamstring future emergency responses.

ARGUMENT

I. An Expansive Understanding Of “Commandeer” Would Strain Minnesota’s Budget And Harm Public Safety.

When emergency calls, states respond. That response—motivated by the need to protect the “lives, limbs, [and] health” of their residents—is among states’ most important obligations. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). Indeed, regulating “for the purpose of protecting the health of its citizens . . . is at the *core* of [a state’s] police power” and obligations. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956 (1982) (emphasis added).

Responding to emergencies, however, requires flexibility. Because the nature of each emergency can be varied and unpredictable, states need every tool at their disposal to address each crisis prudently and efficiently. State legislatures across the country are aware of this need and have enacted measures providing their governors “substantial discretionary authority in the form of emergency powers to deal with anticipated crises.” F. David Trickey, Comment, *Constitutional and Statutory Bases of Governors’ Emergency Powers*, 64 Mich. L. Rev. 290, 290 (1965) (footnote omitted). This authority—and the

corresponding time, resources, and money involved—would be at risk if this Court adopted an expansive understanding of the term “commandeer.”

The COVID-19 pandemic was (and still is) an unprecedented crisis. In the early days, nearly every state responded by placing temporary restrictions on in-person business activity. By April 6, 2020, the District and 49 states had issued orders closing non-essential businesses statewide, and almost as many issued stay-at-home orders and bans on gathering. *See* Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in *Assessing Legal Responses to COVID-19* 14-15 (Scott Burris et al. eds., 2020).⁵ These measures were enacted in the early phases of the pandemic, when information about the disease was scarce, vaccines were not yet available, and personal protective equipment was still in short supply.

Predictably, these regulatory actions affected a broad swath of businesses. *See id.* at 12 (noting that the restrictions limited operations for retail businesses, bars, restaurants, entertainment venues, gyms, and personal care services, among others). An interpretation of “commandeer” that is not limited to physical occupation or appropriation for direct, active use by the government would render those decisions unexpectedly crippling to a state’s budget. And it is not just COVID-19 orders that would be at risk: a broad

⁵ *Available at* <https://bit.ly/30stkZk>. South Dakota was the only state that did not mandate temporary business closures; however, the governor did urge retail businesses to “offer[] business models that do not involve public gatherings, including takeout, delivery, drive-through, curbside service . . . or other innovative business practices that do not involve public gatherings in an enclosed space.” S.D. Exec. Order No. 2020-08 (Mar. 23, 2020), *available at* <https://bit.ly/3nd3m4q>.

interpretation would also threaten measures like mandatory evacuations in response to natural disasters or temporary curfews in response to civil unrest. Indeed, any emergency action that might limit business activity would be jeopardized, no matter how vital to public health or safety.

A. Deeming Minnesota’s restrictions “commandeering” would open the floodgates to substantial compensation claims.

As the Court of Appeals recognized, the statutory term “commandeer” requires direct, active use of private property by the government. *Buzzell v. Walz*, 962 N.W.2d 894, 899 (Minn. Ct. App. 2021). Temporarily restricting business activity to reduce COVID-19 transmission does not qualify. Ordinary meaning comports with this reading. *See, e.g., Commandeer*, Merriam-Webster (last visited Nov. 24, 2021) (defining “commandeer” first as “to compel to perform military service”);⁶ *Commandeer*, The American Heritage Dictionary of the English Language (5th ed. 2020) (last visited Nov. 24, 2021) (defining the term first as “[t]o seize for military or police use; confiscate”).⁷ And so does common sense, because any reading to the contrary would stifle states’ emergency capabilities by subjecting them to potentially enormous payouts.

Minnesota’s swift actions in response to the COVID-19 pandemic mirror those of its sister states. In the early days, nearly every state adopted extensive measures to mitigate the novel coronavirus’s spread, including Minnesota and many of its neighbors. For example, Wisconsin declared a public health emergency, closed entertainment venues, and

⁶ Available at <https://bit.ly/3DnOQws>.

⁷ Available at <https://bit.ly/3DsQ8LE>.

restricted restaurants and bars to pick-up and take-out services. Wis. Emerg. Order No. 12 (Mar. 24, 2020).⁸ Michigan issued stay-at-home orders and placed restrictions on restaurants and bars. Mich. Exec. Order No. 2020-21 (Mar. 23, 2020);⁹ Mich. Exec. Order No. 2020-143 (July 1, 2020).¹⁰ And Ohio, Indiana, and Illinois also restricted restaurants and bars to services that permitted “consumption off-premises,” like pick-up or take-out. *See* Ohio Dep’t of Health Director’s Stay At Home Order (Mar. 22, 2020);¹¹ Ind. Exec. Order No. 20-08 (Mar. 23, 2020);¹² Ill. Exec. Order No. 2020-10 (Mar. 20, 2020).¹³

These orders, though necessary to protect the public health, have had a predictably large effect on the restaurant and food services industries. Across the country, more than 110,000 restaurants and bars closed at some point during the pandemic, and the industry overall lost an estimated \$240 billion in sales. Nat’l Rest. Ass’n, *State of the Restaurant Industry* 3 (2021) (reporting that sales forecasts ended \$240 billion lower than pre-pandemic predictions).¹⁴ In Minnesota, the Governor’s orders affected nearly 11,000 restaurants in the state, which together make up a roughly \$10.7 billion industry. Indep. Rest. Coal., *Help Protect 276,700 Minnesota Jobs By Investing in Minnesota’s Restaurant*

⁸ Available at <https://bit.ly/3CiHNUu>.

⁹ Available at <https://bit.ly/3HhPv4Z>.

¹⁰ Available at <https://bit.ly/3wYKAkN>.

¹¹ Available at <https://bit.ly/3HkK2KB>.

¹² Available at <https://bit.ly/3ndR5Nq>.

¹³ Available at <https://bit.ly/3oJGxoT>.

¹⁴ Available at <https://bit.ly/3x2BYK3>.

and Bar Community 1.¹⁵ Given the size of Minnesota’s restaurant industry and scale of losses suffered during the pandemic, the sheer number of claimants who could seek compensation if the Governor’s restrictions were deemed “commandeering” could easily overwhelm the state’s budget.¹⁶ *See, e.g., Urb. Inst., State and Local Finance Initiative—Minnesota* (reporting that Minnesota’s FY 2020-21 budget included \$48.5 billion in general spending and its proposed FY 2022-23 budget includes \$52.4 billion in general spending).¹⁷

A broad interpretation could also put other, non-COVID-19 related measures at risk. For example, in the summer of 2020, Minnesota used its emergency powers to extend nighttime curfews imposed in Minneapolis and Saint Paul in response to widespread civil unrest. Minn. Emerg. Exec. Order No. 20-71 (June 3, 2020).¹⁸ These curfews prohibited travel in public areas after 10:00 p.m., and although the state did not require stores to close, officials acknowledged “most stores [would] be closed during curfew hours because customers cannot travel to them.” Minn. Multi-Agency Command Ctr., *Frequently Asked*

¹⁵ Available at <https://bit.ly/30FUzQ4>.

¹⁶ To be sure, governments are not insensitive to the impact of COVID-19 on the restaurant industry and have taken pains to offer monetary relief and aid. *See, e.g.,* Minn. Dep’t of Revenue, *COVID-19 Business Relief Payments*, available at <https://bit.ly/32aCFp2> (last visited Nov. 24, 2021) (providing relief payments to eligible businesses, including restaurants and bars, that were required to close temporarily or reduce services); Minn. Dep’t of Emp. & Econ. Dev., *Minnesota Main Street COVID Relief Grants*, available at <https://bit.ly/3qWKk4z> (last visited Nov. 24, 2021) (offering grants to in-state businesses that demonstrated financial hardship from COVID-19).

¹⁷ Available at <https://urbn.is/2Z7x2ac>.

¹⁸ Available at <https://bit.ly/3caZlY6>.

*Questions About the Curfew.*¹⁹ In April 2021, Minnesota again used its emergency powers to issue a temporary curfew in four counties. Minn. Emerg. Exec. Order No. 21-18 (Apr. 12, 2021).²⁰ These actions are typical state responses to civil unrest. For example, Arizona also declared a state of emergency and imposed a similar curfew in the summer of 2020. Ariz. Off. of the Governor, Press Release, *Emergency Declaration, Curfew In Place* (May 31, 2020).²¹ And so did many other municipalities. See Ben Kessler, *Curfews go into effect in cities around the country as George Floyd protests continue*, NBC News (May 30, 2020) (enumerating curfews in Chicago, Cleveland, Columbus, Milwaukee, and Salt Lake City, among others).²² Having to pay businesses routinely for inevitable closures such as these could have a negative impact on similar public safety measures.

States, including Minnesota, also use their emergency powers to keep residents safe during natural disasters, including through mandatory or voluntary evacuations. For example, California regularly evacuates residents in response to wildfires. See, e.g., Cal. Fire, *2021 Incident Archive* (summarizing over 8,300 “incidents” California firefighters and partner agencies faced this year and reminding residents to “always have an evacuation plan in place”).²³ Cities and parishes across Louisiana ordered mandatory and voluntary evacuations ahead of Hurricane Ida in 2021. See Fox 8 Staff, *Where should you go if you’re*

¹⁹ Available at <https://bit.ly/30ugdXB> (last visited Nov. 24, 2021).

²⁰ Available at <https://bit.ly/30nGoyQ>.

²¹ Available at <https://bit.ly/3Fnm1Rl>.

²² Available at <https://nbcnews.to/3qBDD88> (last visited Nov. 24, 2021).

²³ Available at <https://bit.ly/3kBsQH>.

told to evacuate?, Fox 8 News (Aug. 26, 2021).²⁴ And in 2017, nearly 7 million people across Florida, Georgia, and South Carolina were evacuated in preparation for Hurricane Irma, with 54 of Florida’s 67 counties issuing either mandatory or voluntary evacuation orders. *See Fla. Cntys. Found., Hurricane Irma-Evacuation* (last visited Nov. 24, 2021).²⁵ Although necessary for public safety, these measures cost Florida hundreds of millions of dollars in lost tourism revenue as businesses closed and airlines canceled flights. *See How Business Was Battered by Irma*, N.Y. Times (Sept. 11, 2017).²⁶ Three years later, more than 1.5 million people were ordered to evacuate across Texas and Louisiana as the states prepared for Hurricane Laura, with likely similarly profound economic consequences. *See Hurricane Laura Kills at Least 6 People in Louisiana*, N.Y. Times (Aug. 27, 2020).²⁷ These commonsense measures are necessary to safeguard the public health and safety, and Minnesota should not be forced to weigh similar lifesaving actions against the prospect of bankruptcy based on businesses’ “commandeering” claims.

B. Minnesota needs the flexibility to address these varied and escalating threats.

A broad reading of “commandeer” would also constrain future emergency responses, putting the public health, safety, and fisc at risk. First, pandemics are expected to recur. *See Marco Marani et al., Intensity and frequency of extreme novel epidemics*, 118

²⁴ Available at <https://bit.ly/3nfIR7a>.

²⁵ Available at <https://bit.ly/30jSwAW>.

²⁶ Available at <https://nyti.ms/30lkEnG>.

²⁷ Available at <https://nyti.ms/30ojlE5>.

Proc. Nat'l Acad. Sci. U.S. Am. (Aug. 31, 2021), at 1 (concluding that there is a “high probability of observing pandemics similar to COVID-19 . . . which may double in coming decades”).²⁸ Next, states must regularly respond to natural disasters, and evidence suggests they will continue to do so with increasing frequency. According to a United Nations report, there has been a nearly two-fold increase in the number of natural disasters over the past 20 years, jumping from 4,212 events between 1980-1999 (affecting 3.25 billion people) to 7,348 events from 2000-2019 (affecting 4.03 billion people, some more than once). U.N. Off. for Disaster Risk Reduction, *Human Cost of Disasters: An Overview of the Last 20 Years* 6 (2019).²⁹ These crises are costly: Adjusted for inflation, the global economic loss resulting from these disasters rose from \$1.63 trillion between 1980-1999 to nearly \$3 trillion between 2000-2019. *Id.* Finally, civil unrest may also be amplified by future pandemics. Historically, pandemics have been incubators of social unrest, and the shocks caused by the novel coronavirus are predicted to generate additional, separate waves of economic, political, and social crises. See Elise Labott, *Get Ready for a Spike in Global Unrest*, Foreign Pol’y (July 22, 2021).³⁰

State legislatures are aware of the need to plan for crises, and many, including Minnesota, have passed laws granting their governors or local executives the power to

²⁸ Available at <https://bit.ly/3FhqpBh>.

²⁹ Available at <https://bit.ly/30jSN6W>.

³⁰ Available at <https://bit.ly/3kyGM4C>.

declare an emergency and mandate evacuations.³¹ Many states also have evacuation plans in case of hurricanes or other natural disasters. *See* Minn. Exec. Order No. 19-22 (Apr. 4, 2019);³² *see also, e.g.*, Mass. Emerg. Mgmt. Agency, *Hurricane Evacuation Zones*;³³ S.C. Emerg. Mgmt. Div., *Know Your Zone, Updated Hurricane Evacuation Zones*;³⁴ Conn. Div. of Emerg. Mgmt. & Homeland Sec., *Know Your Zone! Shoreline Evacuation Maps*;³⁵ Tex. Dep’t of Transp., *Hurricanes*.³⁶ To the extent that Minnesota’s future emergency responses might limit business activity by forcing store closures, they would also be vulnerable to an expansive understanding of “commandeer.”

These examples underscore how regularly states restrict business activity for a vital reason—to preserve the public’s safety and health—and highlight the cascading effect of a broad interpretation of “commandeer.” They also underscore the longstanding recognition that public health measures are an acceptable, and even expected, use of the state’s police power. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (noting

³¹ *See* Minn. Stat. Ann. § 12.21 (permitting the governor to evacuate residents in emergencies); *see also* Alaska Stat. Ann. §§ 26.23.020, .075 (allowing the governor to declare an emergency and prepare “evacuation plans”); Fla. Stat. Ann. § 252.38 (allowing local authorities to do the same); Me. Rev. Stat. Ann. tit. 37-B, § 742 (permitting the governor to declare an emergency and “[d]irect and compel the evacuation of all or part of the population”); Or. Rev. Stat. § 401.309 (providing local officials the power to “order mandatory evacuations” in emergencies).

³² Available at <https://bit.ly/3pcJFKb>.

³³ Available at <https://bit.ly/3kx282w>.

³⁴ Available at <https://bit.ly/3ooPyn6>.

³⁵ Available at <https://bit.ly/3Cfu6px>.

³⁶ Available at <https://bit.ly/3Ccfffd>.

a state’s police power includes the authority “to enact quarantine laws and ‘health laws of every description,’” including, in that case, a smallpox vaccination requirement (citation omitted); *Robinson v. California*, 370 U.S. 660, 664 (1962) (“The right to exercise [the police] power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.” (quoting *Whipple v. Martinson*, 256 U.S. 41, 45 (1921))); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (“[T]he States retain broad power to legislate protection for their citizens in matters of local concern such as public health” (internal quotation marks and citation omitted). Those essential powers would be threatened by a broad interpretation of the term “commandeer,” which, as a practical matter, could bankrupt Minnesota in the event of an evacuation or pandemic response.

When interpreting a statute, this Court presumes that “the legislature intends to favor the public interest as against any private interest” and considers the statute’s objectives and “the consequences of a particular interpretation.” *State v. Sanschagrin*, 952 N.W.2d 620, 628 (Minn. 2020) (quoting Minn. Stat. Ann. §§ 645.16(4)-(6), .17(5)). These tools of statutory construction favor respondent’s position because a broad understanding of “commandeering” would threaten Minnesota’s emergency response capabilities—contravening the legislature’s intent—and could make emergency response programs around the country vulnerable to limitless compensation claims.

II. Courts In Other Jurisdictions Have Rejected Arguments That COVID-19 Orders Constitute “Commandeering.”

Courts that have considered similar issues generally agree: COVID-19 executive orders that limit business activity are an exercise of the state’s police powers and are not compensable as “commandeering.” Respondent’s position thus comports not only with the statutory text and legislature’s objectives, but also with broader understandings of the term across the country. Adopting a contrary interpretation would be wrong and put Minnesota out of step with many of its sister states.

For example, the Appellate Division of the Superior Court of New Jersey recently rejected a gym owner’s claim that the state’s temporary closure of fitness centers constituted “commandeering” under New Jersey’s Disaster Control Act. *JWC Fitness, LLC v. Murphy*, No. A-0639-20, 2021 WL 4823500, at *7 (N.J. Super. Ct. App. Div. Oct. 18, 2021). Like Minnesota, New Jersey has an emergency management statute that permits the governor to “commandeer and utilize . . . privately owned property necessary to avoid or protect against any emergency,” provided that the state compensates the property owner. N.J. Stat. Ann. App. A:9-34. In rejecting the plaintiff’s claim, the New Jersey court held that the “statutory standard for compensation ha[d] not been implicated” because “commandeer . . . entails seizing the property or taking possession of it.” *JWC Fitness*, 2021 WL 4823500, at *1, *5. Because the challenged orders merely directed gyms to close temporarily, the court concluded that they were not commandeering actions but rather a “mere[] exercise[] [of the state’s] police powers to regulate the use of property in the context of a declared emergency.” *Id.* at *6; see *Marty v. State*, 786 P.2d 524, 533 (Idaho

1989) (rejecting plaintiffs’ compensation claim in part because the commandeering statute “does not provide for compensation unless the [property’s] use or destruction . . . was ordered by the [state],” and the governor’s emergency declaration regarding a local flood “did not refer to the use or destruction of the landowners’ property”); *Farmers Ins. Exch. v. State*, 221 Cal. Rptr. 225, 229-30 (Ct. App. 1985) (rejecting plaintiffs’ claims that the state’s Mediterranean fly eradication program, which involved wide-scale aerial spraying to eliminate the agricultural pest, triggered California’s commandeering provisions, because the program was a “valid exercise of the State’s police power” and damage to plaintiffs’ property was merely “incidental to the exercise of this power”).

The New Mexico Supreme Court also adopted a narrow interpretation of a related public health emergency law because the court prudently recognized the “absurdity” of creating “unlimited liability authorized by the Legislature.” *State v. Wilson*, 489 P.3d 925, 946 (N.M. 2021). In *Wilson*, the court rejected compensation claims brought by small business owners for the temporary closures of their stores during the COVID-19 pandemic. The court considered a provision in New Mexico’s Public Health Emergency Response Act that compensates “the owner of health care supplies, a health facility or *any other property* that is lawfully taken or appropriated by the [state] . . . during a public health emergency.” *Id.* at 942-43 (citing N.M. Stat. Ann. § 12-10A-15 (emphasis added)). In adopting a narrow interpretation of the phrase “any other property,” the court considered the broader policy context, reasoning that because “a public health emergency can affect the entire population” and “anyone and everyone could be a potential claimant,” it was “simply not credible [to adopt a reading implying] that the Legislature . . . intended for

such a potential raid on the public wealth while simultaneously granting broad powers to protect the public health.” *Id.* at 946.

Petitioner’s assertion that cases from other states “confirms [his] interpretation” of “commandeer” is unfounded. Pet’r’s Br. 19. To the contrary, the cases he cites either support respondent’s position or are irrelevant. For example, in *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir. 2001), the Governor of California explicitly purported to “commandeer” an energy supplier’s contractual rights “to be held subject to the *control* and *coordination* of the State of California,” explaining that he was “using [his] emergency powers [under the state’s commandeering provision] to *seize* options to *buy* very inexpensive power.” *Id.* at 1047 (citing Cal. Gov’t Code § 8572) (emphases added). These measures are more akin to direct, active use than regulations that merely limit business activity. Similarly, in *State, ex rel., Missouri Highway and Transportation Commission v. Pruneau*, 652 S.W.2d 281 (Mo. Ct. App. 1983), the Missouri Court of Appeals understood “commandeer” to involve seizing “employees and equipment for use in repairing the country roads”—in other words, *using* those employees and equipment—and even underscored the governor’s “exclusive[.]” “authority to direct the use of the [state agencies’] facilities, personnel, and equipment . . . during periods of declared emergencies.” *Id.* at 288-89. And in *State v. El Paso County*, 618 S.W.3d 812 (Tex. App. 2020), the Texas Court of Appeals discussed commandeering in the context of the governor “leverag[ing] state resources to mitigate and recover from disasters,” which again emphasizes direct, active use. *Id.* at 838, 838 n.10 (citing Tex. Gov’t Code Ann. § 418.017).

Finally, the remaining two cases cited by petitioner concern prison overcrowding, but both use the term “commandeer” only in a descriptive sense, as part of a general recitation of the governor’s emergency powers. *See Cal. Corr. Peace Officers Ass’n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 849-50 (Ct. App. 2008); *Worthington v. Fauver*, 440 A.2d 1128, 1133 (N.J. 1982). Neither case purports to interpret “commandeer” or involve activities that are considered “commandeering,” and in fact, *Worthington* emphasizes the need for executive flexibility in a public health emergency. 440 A.2d at 1134 (acknowledging that “[a]ny grant of executive authority must be construed to accomplish the Legislature’s purpose,” particularly when “those statutes operate to protect the public health, safety and welfare, especially during emergencies” (internal citations omitted)).

The sound dispositions highlighted above recognize the prudent and necessary actions many states took to address a global health crisis and the unique position the executive holds in addressing such emergencies. But these police powers would be of little use if they subjected states to catastrophic liability. The Amici States urge this Court to adopt a sensible reading of “commandeer” that would comport with its sister courts and enable Minnesota to address future crises without fearing financial ruin.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

GREENE ESPEL PLLP

/s/ Katherine M. Swenson
KATHERINE M. SWENSON
(No. 0389280)
AMRAN A. FARAH
(No. 0395354)

222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
kswenson@greeneespel.com
afarah@greeneespel.com
(612) 373-8389

*Attorneys for Amicus Curiae the
District of Columbia*

**OFFICE OF THE ATTORNEY GENERAL
DISTRICT OF COLUMBIA**

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

CAROLINE W. TAN*
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 Sixth Street, NW, Suite 8100
Washington, D.C. 20001

Dated: November 29, 2021

**Admitted only in California*

On behalf of:

ROB BONTA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

ANDREW J. BRUCK
Acting Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c)(1). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 4,151 words, exclusive of the caption and signature block.

/s/ Katherine M. Swenson
Katherine M. Swenson