A20-1561
STATE OF MINNESOTA
IN SUPREME COURT

Carvin Buzzell, Jr. individually, and as owner of Timber Valley Grille, Timber Valley Grille Catering, and Rum River Barn and Vineyards,

Appellant,

v.

Tim Walz, as Governor of the State of Minnesota, and as Chair of the Minnesota Executive Council.

Respondent.

APPELLANT'S OPENING BRIEF

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LEGAL ISSUE

The issue is whether Respondent's use of his "emergency powers" under Minnesota Statutes Chapter 12 constituted a "commandeering" of private property under Minnesota Statutes Section 12.34 when Respondent forced Carvin Buzzell Jr., under threat of imprisonment, to shut down his restaurant, bar, and catering business.

The District Court granted Respondent's motion to dismiss for failure to state a claim, reasoning that commandeer generally means to "seize for military or police use" and equating the term "commandeer" in Minnesota Statutes Sections 12.34 with "government use." The District Court then found that the Complaint did not establish government use of Buzzell's property. Judgment, Index 26 at 6-7.

The Court of Appeals ruled that "the term 'commandeer' as used in Minn. Stat. § 12.34, subd. 1(2), requires direct, active use of private property by the government for emergency management purposes . . . [and] the term does not apply in circumstances such as this one, where the government places restrictions on a person's own use of private property." *Buzzell v. Walz,* A20-1561, at *15 (Minn. Ct. App. June 14, 2021).

Apposite Cases and Statutory Provisions

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007).
State v. Prigge, 907 N.W.2d 635 (Minn. 2018).
Minnesota Statute Section 12.34.
Minnesota Statute Section 645.16.

STATEMENT OF THE CASE

Appellant Carvin Buzzell, Jr. ("Buzzell") filed a complaint on June 2, 2020 against Respondent Governor Tim Walz in his official capacity ("Respondent") and the Minnesota Executive Council, which is not a party on appeal. (Complaint, Index 1) ("the Complaint"). Count 2 of the Complaint was a claim for: "Respondent's Violation of Minnesota Statute § 12.34(2), Commandeering Property During Peacetime Emergency Without Compensation." (*Id.* 11 – 12).

Respondent and the Executive Council filed a motion to dismiss pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure claiming Buzzell failed to state a claim upon which relief can be granted. (Def. Notice Mot. and Mot. to Dismiss, Index 9). The District Court granted the motion to dismiss finding that "commandeer" means "to seize for military or police use; confiscate . . . to take arbitrarily or by force . . . or to force into military service." (*Id.* at 7.)

Buzzell filed an appeal against Respondent, asking the Court of Appeals to expand the District Court definition of "commandeering" to include government taking control of property beyond military enforcement and order Respondent to initiate the compensation process delineated in Minnesota Statutes Sections 12.34 and 9.061. Respondent conceded to the Court of Appeals that forced operation of a "testing center" would have been a commandeering and compensable use of the property. (Resp.'s Brief in Ct. App. at 14.) The Court of Appeals affirmed the order of the District Court but rejected the District Court's definition of "commandeer." Instead, it defined commandeer "as direct,

active use of private property by the government." *Buzzell v. Walz,* A20-1561, at *15 (Minn. Ct. App. 2021).

Buzzell petitioned this Court for review and moved to consolidate this appeal with the appeal in *Doran 610 Apartments, LLC* v. *State of Minnesota ex rel. Walz,* No. A21-0869. This Court granted Buzzell's petition for review but denied the motion to consolidate. Buzzell now respectfully requests this Court interpret the word "commandeer", as used in Minnesota Statute Section 12.34, to include the government act of forcing Buzzell to close his restaurant, bar, and catering business under threat of imprisonment for the purposes of stopping the spread of COVID-19.

STATEMENT OF FACTS

In 2001, Buzzell liquidated his savings and borrowed money to purchase land in Milaca, Minnesota with the intent to start a vineyard. (Complaint, Index 1. ¶ 1). The vineyard failed in 2011 but Buzzell opened a wedding venue using a barn on the property. (*Id*.) In 2018, Buzzell purchased the Highway Café in Milaca taking on another mortgage. He remodeled the café and now owns and operates Timber Valley Grille, a full-service bar and restaurant as well as catering business and event center. (*Id*., ¶ 2). The facility became a popular gathering spot for the larger Milaca area hosting community and family gatherings. (*Id*. Ex. 1).

Beginning on March 13, 2020, Respondent issued a number of Executive Orders ("EO") affecting businesses throughout Minnesota relying on authority from the Minnesota Emergency Management Act ("MEMA"). The first was EO 20-01, "Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect

Minnesotans from COVID-19." (*Id*. Ex. 3). The Executive Council approved the EO pursuant to Minnesota Statutes Section 9.061. (*Id.*) On March 17, 2020 Respondent issued EO 20-04 "Providing for Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation." (*Id*., Ex. 7). In EO 20-04, Respondent declared that restaurants and bars "are closed to ingress, egress, use, and occupancy by members of the public." Again, the Executive Council approved pursuant to Minnesota Statutes Section 9.061. (*Id*., Ex. 8). EO 20 – 04 states in relevant parts:

> "*Pursuant to Minnesota Statutes 2019, section 12.21, subd. 3(1),* the Governor may "*make, amend, and rescind the necessary orders and rules to carry out the provisions*" *of Minnesota Statutes, Chapter 12*. When approved by the Executive Council and filed in the Office of the Secretary of State, such orders and rules have the force and effect of law during the peacetime emergency.

(*Id*., Ex. 8, p. 1, emphasis added).

> Any person who willfully violates such an order or rule is guilty of a misdemeanor and upon conviction *must be punished by a fine not to exceed $1,000 or by imprisonment for not more than 90 days.*

(*Id.* at pp.1-2, emphasis added).

On April 30, 2020, Respondent issued EO 20-48, extending the previously enacted "Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation until May 17, 2020. (*Id*., Ex. 9). On May 13, 2020, the Governor issued EO 20-56 that extended the "temporary" closure of bars and restaurants until May 31, 2020, and directed the Commissioners of Health, Employment and Economic Development, and Labor and Industry to develop a phased plan to achieve the limited and safe reopening of

bars, restaurants, and other places of public accommodation beginning on June 1, 2020. (Complaint, Ex. 10).

On May 27, 2020, the Governor issued EO 20-63, "Continuing to Safely Reopen Minnesota's Economy and Ensure Safe Non-Work Activities during the COVID-19 Peacetime Emergency" that allowed food establishments limited outdoor seating. (*Id.* Ex. 11). As with other businesses negatively impacted by the Executive Orders described above, Buzzell's restaurant, bar, and catering business were effectively closed with the issuance of EO 20-04 on March 17, 2020, and remained closed to indoor dining until the capacity restrictions were put in place after June 1, 2020.

Given no choice, Buzzell has complied with all the applicable Executive Orders, but this forced compliance led to devasting financial impact. Buzzell's monthly gross revenue from the restaurant dropped 75% from the previous year. (Complaint, ¶ 54). Buzzell's monthly gross revenue for all of his business combined dropped 94% from the previous year. (*Id.*) Buzzell did not receive a formal order determining the amount of compensation for the use of his property or actual compensation from the Governor. Buzzell did not receive a receipt or payment from the Executive Council. (Complaint, ¶ 35).

STANDARD OF REVIEW

"When a case is dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim for which relief can be granted, [this Court] reviews the legal sufficiency of the claim de novo to determine whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008); *see also Walsh v. U.S. Bank, N.A,* 851 N.W.2d 598, 606 (Minn. 2014). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). "The showing a plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal." *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003).

Also, "interpretation of a statute is a question of law reviewed de novo." *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). The purpose of statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. "Every law shall be construed, if possible, to give effect to all its provisions." *Id.*

ARGUMENT

The dispositive issue of this appeal is whether the definition of "commandeer" within Minnesota Statutes Sections 12.34 and 9.061 includes the forced shut down of Buzzell's restaurant, bar, and catering business under threat of imprisonment. The Court of Appeals defined "commandeer" narrowly as "direct, active use by the government" and ruled that the Governor did not directly or actively use Buzzell's property to

constitute a commandeering. This definition is both contrary to the plain language of the term "commandeer" and fundamentally flawed within the context of the remaining provisions of the statute.

Instead, the plain meaning of "commandeer" is "to take,"[1] and the context of Minnesota Statute Section 12.34 incorporates principles from "Taking Clause" jurisprudence. Commandeering is akin to a "taking" and includes indirect, nonpossessory government action that *interferes* with inherent property rights to use, dispose of, and access the physical property. Thus, under this more appropriate definition, Respondent commandeered Buzzell's property under Minnesota Statutes Section 12.34 when he forced Buzzell to shut down his bar, restaurant, and catering business under threat of imprisonment.

I. The Language of Minnesota Statutes Sections 12.34 and 9.061 Gives the Government Authority to Commandeer Property and Establishes a Procedure for Compensating Owners of Commandeered Property.

Minnesota Statutes Section 12.34, subdivision 1 gives the governor the authority to: "commandeer, for emergency management purposes . . . personal property and any facilities." A "Facility" includes "any real property, building, structure." Minn. Stat. 12.03 subd. 4f (emphasis added). Commandeer is not defined in Chapter 12.

Minnesota Statutes Section 12.34, subdivision 2 then guarantees "the owner of commandeered property" to be "promptly paid just compensation for its use and all

[1] This is essentially the same definition Buzzell proffered to the lower courts, in line with the Oxford Dictionary definition that "commandeer" means to "[o]fficially take possession or control of (something), especially for military purposes." https://www.lexico.com/en/definition/commandeer. A subset of that definition is: "Enlist (someone) to help in a task, typically against the person's will."

damages done to the property while so used for emergency management purposes."

Minn. Stat. § 12.34, subd. 2 (emphasis added). "Emergency management" is defined as:

> "[T]he preparation for and the carrying out of emergency functions, other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from disasters, from acute shortages of energy, or from incidents occurring at nuclear power plants that pose radiological or other health hazards. These functions include, without limitation, firefighting services, police services, medical and health services, . . . and other functions related to civilian protection, together with all other activities necessary or incidental to preparing for and carrying out these functions.

Minn. Stat. § 12.03, subd. 4 (emphasis added).

Subdivision 2 then outlines the process to determine compensation for the use of commandeered property.

> "The governor or the governing body of the political subdivision concerned, respectively, according to the use of the property, shall make a formal order determining the amount of compensation. The owner may appeal to the district court of the county in which the property was commandeered if, within 30 days from the date of the order, the owner serves upon the governor or the political subdivision concerned and files with the court administrator of the district court a written notice of appeal setting forth the order appealed from and, in detail, the amount claimed as compensation. Upon appeal, the issue is the amount of damages to which the Buzzell is entitled. It may be noticed for trial as in the case of a civil action and the court may require other parties to be joined and to plead when necessary to a proper determination of the questions involved. The cause must be tried without a jury de novo and the court shall determine the damages and the person or persons entitled to them. Except as herein otherwise provided, the trial must be conducted and the cause disposed of according to the rules applicable to civil actions in the district court."

Id. (emphasis added.) Therefore, Subdivision 1 creates the authority to commandeer and Subdivision 2 creates the process to compensate owners of commandeered property.

The Executive Council's authority to approve a governor's emergency orders is articulated in Minnesota Statutes Section 9.061. It has a similar "commandeering" and "use" provision:

> In these emergencies, the Executive Council may, when necessary, commandeer and use any property, vehicle, means of transportation, means of communication, or public service. The owner of any property taken shall be given a receipt for the property and be paid for its use and for any damages inflicted upon the property while in the service of the Executive Council.

This statute is the only authority the Executive Council has to approve a governor's emergency orders. Therefore, any approval of an executive order must be rendered pursuant to this statute. "Commandeer" is also undefined in Chapter 9.

II. The Court of Appeals Erred by Equating "Commandeer" With "Use," Which is Contrary to the Plain Meaning of "Commandeer" and Defies The Principle of Statutory Interpretation That Each Word In a Statute Be Given Independent Meaning.

The purpose of all statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. "Every law shall be construed, if possible, to give effect to all its provisions." *Id.* If statutory text is clear and unambiguous, the plain language of the statute controls and "shall not be disregarded under the pretext of pursuing the spirit." *Id.* Thus, "[s]tatutory interpretation begins by assessing whether the statute's language, on its face, is ambiguous." *State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018) (quotation omitted). Here, the definition of "commandeer" is attainable through the plain meaning and context of the statute and the Court of Appeals' definition unnecessarily and inappropriately renders portions of the relevant statutes superfluous.

1. The Common Definitions of Commandeer Demonstrate That Commandeer Means "to Take" Rather Than "To Use."

As identified above, the word "commandeering" is not defined in Minnesota Statutes. Thus, this Court may consider dictionary definitions to determine the plain and ordinary meaning of a statutory term. *State v. Alarcon*, 932 N.W.2d 641, 646 (Minn. 2019). In reaching its flawed definition of commandeer, the Court of Appeals cited several dictionary definitions. However, the dictionary definitions cited by the Court of Appeals do not support a "direct, active use" definition at all. Instead, the dictionary definitions cited by the Court of Appeals further support the idea that a "commandeering" is a different concept entirely from the subsequent use of whatever property is commandeered.

For example, the Court of Appeals cited the American Heritage Dictionary, which states that commandeer means to "seize for military or police use; confiscate . . . take arbitrarily or by force . . . force into military service." *Buzzell v. Walz*, A20-1561, at *10 (Minn. Ct. App. June 14, 2021) (emphasis added) (citing *The American Heritage Dictionary of the English Language* 370 (5th ed. 2018)). The American Heritage definition therefore explains that the commandeering is the taking, confiscating, or seizure of property. The commandeering is *not* the act of using the property that was taken or confiscated, which necessarily occurs *after* the property in question is taken.

Similarly, the Court of Appeals cited the definitions in Merriam-Webster's Dictionary, which define the word "commandeer" as: "to compel to perform military service," "to seize for military purposes," or "to take arbitrary or forcible possession of."

Id. (citing *Merriam-Webster's Collegiate Dictionary* 248 (11th ed. 2014)). Again, the Merriam-Webster definitions only clarify that the "commandeering" is the compelling, taking, seizure or exercise of control over property, *not the use thereof*.

The Court of Appeals concluding from those definitions that "commandeering" is a "direct, active use" is in opposition to the definitions it cited. Indeed, none of the definitions from either dictionary contains the words "direct" or "active." And, the only reference to the word "use", is meant to elaborate on the subsequent utilization of what was already commandeered. Thus, the common meaning of commandeer only supports the conclusion that a commandeering is a taking.

2. The Structure of Sections 12.34 and 9.061 Differentiates Between "Use" and "Commandeer."

The structure of both Sections 12.34 and 9.061 and their respective utilization of the terms "commandeer" and "use" clearly show the legislative intent to differentiate between "commandeer" and "use". Again, Subdivision 1 creates the authority to commandeer and Subdivision 2 creates the process to compensate owners of commandeered property. *See supra* § I.

This structure demonstrates that the Legislature understood "commandeer" to be broader than "direct and active use by the government" because: (a) commandeer is a grant of government authority whereas use can be by the public generally; (b) the term "use" is tied to statutory damages; (c) venue is tied to the single county where the commandeering occurred; and (d) Minnesota Statute Section 9.061 expressly differentiates between commandeer and use.

a. To "commandeer" in Minnesota Statute Section 12.34 is a grant of authority specific to the governor whereas the "use" of the commandeered property need not be a government use to be compensable.

The structure of Section 12.34 requires the conclusion that "commandeering" is the governor's action of taking property, while the "use" refers to how the property is employed for the emergency management purpose. The statute itself is titled "**Compensation for Property Taken**." As the title of the statute therefore makes clear, that power to commandeer is akin to "take." Minn. Stat. § 645.49 (though the headnote is not part of the statue, it contains "catchwords to indicate the contents of the section").

On the other hand, there is no requirement in Subdivision 2 that the subsequent use after the commandeering actually be a *government* use in order to qualify for compensation. Indeed, the statute belies any such requirement, directing that compensation be paid for "damages done to the property while so used for *emergency management purposes.*" This anticipates that after the commandeer, the "use" of the property would include any "functions related to civilian protection, together with all other activities necessary or incidental to preparing for and carrying out these functions." Minn. Stat. § 12.03, subd. 4 (defining "emergency management"). Thus, the statute plainly provides compensation for damages for the use of the property even if the use was not directly by the government. In other words, the government takes the property, the general public uses the property, and the owner of the commandeered property is justly compensated.

Respondent has conceded that the compensable "use" of commandeered property includes use by actors other than the government by admitting that a forced operation of a

"testing center" would have been a compensable use. (Resp.'s Brief in Ct. App. at 14.) In Respondent's own hypothetical, those "using" the testing center would be any person in the state of Minnesota who wants a COVID-19 test. Therefore, Respondent understands that use by the public generally is a compensable use under Minnesota Statute Section 12.34.[2]

Because commandeer is expressly an act of authority granted to the governor, whereas the statute explicitly presumes the "use" will be by the public generally, it follows that the two words must have different meanings. The Court of Appeals erred by giving the two words the same meaning.

b. The term "use" in Minnesota Statute Section 12.34 is tied to damages and is expressly a fact issue for a trial court.

According to the plain language of the statute, the owner of commandeered property is compensated for its use and all damages while so used. By utilizing the conjunctive "and" it tied the use to the damages. The governor must make a formal order determining the amount of compensation "according to the use of the property"—not the commandeering of property. Minn. Stat. § 12.34, subd. 2. That compensation order can be appealed to the District Court, which then holds a court trial to "determine the damages and the person or persons entitled to them." *Id.* The statute expressly made "use" a damages issue meant for the finder of fact. Minn. State. § 12.34, subd. 2 ("Upon appeal, the issue is the amount of damages to which the Buzzell is entitled.") Thus, the

[2] This is also in line with the express purpose of the Minnesota Statutes Chapter 12, which is to provide "financial assistance . . . to eligible applicants in the state, as a result of natural or other disasters . . ." Minn. Stat. § 12.02, subd. 1(4).

"use" of the commandeered property is only relevant to how much Buzzell may be compensated, not whether the government commandeered the property in the first place. Under the Court of Appeals' definition, the commandeering and the use are conflated into the same inquiry—how the property was used. This is an absurd result contrary to the express language of the statute and its structure. *See* Minn. Stat. § 12.02, subd. 1(4).

Certainly, there may be times there is a "commandeering" without a "use." This is not unique nor a flaw in the statute, as any legal claim requires proof of damages to survive even if liability is proven. *See Mesojedec v. Smith*, 260 N.W.2d 184, 185 (Minn. 1977) ("Even if the jury had found negligence, there would have been nothing perverse in its finding no causal relationship and no damages"); *See also Dunn v. National Beverage Corp.*, 745 N.W.2d 549, 556 (Minn. 2008) (upholding jury verdict that defendant violated a statute but plaintiff suffered no damages from violation). By analogy, the "commandeering" is the conduct of the governor triggering liability (the taking); and the "use" is relevant to the fact issue of the damages.[3]

c. The venue to appeal the governor's compensation order is tied to the county where the property was commandeered, not where it was used.

To further underscore the distinction between use and commandeer, the owner of commandeered property may appeal the governor's compensation order in the county where the property was commandeered—not the county (or counties) where the property

[3] It makes no difference that the closures were "temporary" in nature, as even temporary diminution of property is a calculable damage. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989) ("Generally, if the damage to land is a temporary or continuing injury, the measure of damages is the diminution of the rental value of the land until the time of trial.")

was used. Minn. Stat. § 12.34, subd. 2. Thus, venue is tied to the act of commandeering, not the subsequent use. This further shows that the legislature understood commandeering could be identified as a fixed event occurring in a single county, as opposed to an ongoing act that could span multiple counties across the state. *See* Minn. Stat. § 12.34, subd. 1(2) ("motor vehicles, tools [or] medical supplies" may be commandeered).

If "commandeered" were meant to be synonymous with "direct, active use", the legislature would have anticipated multiple counties in which to appeal the compensation determination.[4] Thus, the purposeful decision to tie venue to the commandeering rather than the use of the property is indicative of the legislature's understanding and intention that the two terms had different meanings.

d. Minnesota Statute Section 9.061 similarly ties "use" to damages and relates "commandeer" to "take".

The distinction between "use" and "commandeer" is every bit as obvious in the Executive Council's authority articulated in Minn. Stat. § 9.061:

> In these emergencies, the Executive Council may, when necessary, commandeer and use any property, vehicle, means of transportation, means of communication, or public service. The owner of any property taken shall be given a receipt for the property and be paid for its use and for any damages inflicted upon the property while in the service of the Executive Council.

[4] The Legislature, by tying venue to the county where the property was taken, established a single county to venue the appeal, eliminating any opportunity to forum or judge shop. The Court of Appeals' decision eliminates the brilliance of the Legislature's venue decision, and creates an opportunity for plaintiffs to shop for favorable judges and counties. *See State v. Rasner*, 382 N.W.2d 568, 569 (Minn. Ct. App. 1986) (citing district court: "This Court will not allow a defendant . . . to blatantly Judge-shop.").

According to the Court of Appeals' definition of commandeer, the Executive Council has the authority to "actively and directly use" and to "use" property. This definition renders "commandeer" meaningless, making the statute repetitive and redundant, in direct contravention of the basic tenets of statutory construction. *See* Minn. Stat. § 645.16.

Instead, the context clearly supports the idea that "commandeer" means "take". Thus, the Executive Council was given authority to "take and use any property." To quash any doubt that "commandeer" means "take", the statute requires that the "owner of property taken" be compensated for its use. The statute therefore expressly relates "taken" to "commandeered."

Section 9.061 is the *only* statutory authority the Executive Council has to approve a Governor's Emergency Order. Thus, when the Executive Council approved the Governor's Orders, it did so under this compensation for commandeering statute—a statute which clearly equates commandeered with "taken".

3. The Court of Appeal's Definition of Commandeer Makes "Commandeer" Synonymous with "Use" and Therefore Superfluous.

Not only is the Court of Appeal's definition of "commandeer" contrary to the plain meaning of the word and structure of the statute, it is also contrary to basic principles of statutory interpretation. "[W]henever possible, no word, phrase or sentence should be deemed superfluous, void or insignificant." *Owens v. Federated Mut. Implement & Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983). Thus, in statutory interpretation, "when different words are used in the same context, [this Court assumes]

that the words have different meanings so that every word is given effect." *State v. Thompson*, 950 N.W.2d 65, 69 (Minn. 2020) (citing *Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013)) (eternal quotes emitted); *see also* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions."). Statutory interpretation "requires [this Court] to give effect to each word and phrase of a statute." *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016) (distinguishing the word "voluntary" from "ordered" and "assigned" in same statute to avoid rendering "voluntary" superfluous *without first finding ambiguity* in the statute).

Ignoring this principle of statutory interpretation, the Court of Appeals defined "commandeer" as "direct, active use" when the word "use" is already an operative word within the statute. The Court of Appeals gave essentially the same meaning to two separate words utilized by the legislature in two very different ways. When the term "commandeer" is reduced to "use", it loses its effect in the statute. (*See supra* Section II.2.b & d.) Instead, commandeer is a "taking", which includes indirect, nonpossessory interference with the possession, enjoyment, or value of private property. Minn. Stat. § 117.025, subd. 2 (2020). Thus, "commandeering" property is not limited to just the government's use of property, but includes government interference with the owner's use of the property.

Furthermore, the Court of Appeals' definition would render the "use" provision of Minnesota Statutes Section 12.34, subdivision 2 meaningless. The express language of Subdivision 2 provides just compensation to those whose commandeered property was used for emergency management purposes. The phrase "emergency management" is

exceptionally broad, encompassing "all activities necessary or incidental to" . . . any "functions related to civilian protection." Minn. Stat. § 12.03, subd. 4. In other words, when read together, just compensation is not limited by the statute to only those circumstances in which a "direct and active use by the government" is demonstrated. Instead, the statute defines compensable use of property to include all activities incidental to functions related to civilian protection.

The Court of Appeals' ruling improperly creates an additional preliminary burden, thereby only guaranteeing just compensation for those whose property was actively and directly used by the government. This undermines the express language of the statute that provides compensation to those whose property was used in "all activities necessary or incidental to [any] functions related to civilian protection." The Court of Appeals thereby disqualified certain individuals from the compensation that the statute clearly intended them to receive. Therefore, by equating "commandeer" with "direct, active use by the government" the Court of Appeals rewrote the statute to be far more restrictive than its express language requires and rendered provisions of the statute meaningless.

4. Other Jurisdiction Interpretations of Their "Commandeering" Laws are Irrelevant, But Often Support the Conclusion that "Commandeer" Does Not Mean "Direct, Active Use By the Government.

The District of Columbia was granted leave to file an amicus curiae brief, with the intent to convince this Court that the Court of Appeals' "interpretation comports with a common-sense reading of "commandeer" in other state statutes." (D.C. Req. Amicus Curiea Support Resp. at 4.) In Minnesota, the interpretation of other states' similar statutes is only relevant after a finding that the statute at issue is ambiguous. *Compare*

State v. Zais, 790 N.W.2d 853, 863 (Minn. Ct. App. 2010) (finding ambiguity and considering interpretation of similar statutes) *with State v. Zais*, 805 N.W.2d 32, 38 (Minn. 2011) (finding no ambiguity and only reading plain meaning of the statute). Respondent has never argued that the statute is ambiguous and therefore this line of reasoning is not relevant. *Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315, 321 n.6 (Minn. 2018) ("We note that neither Phone Recovery Services nor respondents have asserted that [the statute] is ambiguous, and having determined that the Legislature's intent is apparent from the plain and unambiguous language, our process of construction is at an end.")

In any event, to the extent this Court will consider the statutes and interpretation of other states, other states distinguish between "commandeer" and "use", which only confirms Buzzell's interpretation. In California, the Governor is authorized to "commandeer or utilize" any private property or personnel during an emergency. *See Duke Energy Trading & Marketing v. Davis*, 267 F.3d 1042, 1047 (9th Cir. 2001). In interpreting this statute, California Courts have equated "utilize" with "use", rather than "commandeer" with "use". *See California Correctional Peace Officers Assn. v. Schwarzenegger*, 163 Cal. App. 4th 802, 811 (Cal. App. 2008) (citing California Gov. Code, § 8572 and stating "Governor also may commandeer or use any" private property).

Similarly, Texas, Missouri, and New Jersey courts all distinguish between "commandeer" and "use" as contained in their state statues granting authority to commander private property. *See State, ex rel., Missouri Highway and Transp. Com'n v. Pruneau*, 652 S.W.2d 281, 287 (Mo. App. 1983) ("county court claimed authority to

commandeer, seize and use property, . . . [but n]o right is given a county to commandeer the Commission's employees and equipment for use in repairing the county roads."); *See also Worthington v. Fauver*, 88 N.J. 183, 193, 440 A.2d 1128, 1133 (N.J. 1982) (New Jersey "Governor is authorized to commandeer and utilize any personal services and any privately owned property…"); *See also State v. El Paso County*., 618 S.W.3d 812, fn 10 (Tex. App. 2020) (citing Tex. Gov't Code Ann. § 418.017 and stating Texas governor can "commandeer or use private property.").

III. The Context of Minnesota Statutes Sections 12.34 and 9.061 Require the Conclusion that a "Commandeering" is Analogous to a Constitutional Taking.

Minnesota Courts "consider a statute as a whole to harmonize and give effect to all its parts." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (quotation omitted). In the absence of statutory definitions, courts "give words their plain and ordinary meaning." *In re Krogstad*, 958 N.W.2d 331, 334 (Minn. 2021) (quotation omitted). However, technical words and phrases are interpreted "according to [their] special meaning." Minn. Stat. § 645.08 (1). A word's meaning within a statute "depends on how it is being used, only if more than one meaning applies within that context does ambiguity arise." *Krogstad*, 958 N.W.2d at 334. When interpretating a specific word in a statute, the Court also will interpret and define other words within the statute. *See Prigge*, 907 N.W.2d at 639. Therefore, the context of the entire statute includes the meaning of all words therein, and this analysis is germane to the plain meaning of the words rather than a statutory construction principle meant to interpret an ambiguous

word. *Id.* at 640 ("The whole-statute canon, by contrast, does not require ambiguity before it may be applied.")

Minnesota Statute Section 12.34 clearly borrows language from the "Takings Clause" of the Minnesota Constitution, mirrors the compensation structure of the Takings Clause, and operates to fill the gap of the emergency exception therein. Thus, the definition of "commandeer" must fit Takings Clause jurisprudence. *Kremer v. Kremer*, 912 N.W.2d 617, 623 (Minn. 2018) ("We presume that statutes are consistent with the common law and that the Legislature does not intend to abrogate or modify a common-law rule unless it does so by express wording or necessary implication of the statute.").

1. Both Minnesota Statute Sections 12.34 and 9.061 Contain Legal Terms Derived From The Takings Clause.

The Minnesota Constitution provides that: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. 1, § 13. Minnesota Statutes state that a "'taking' and all words and phrases of like import include every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property." Minn. Stat. § 117.025, subd. 2 (emphasis added). As detailed above, the plain meaning of "commandeer" is a word of "like import" to "taking." In fact, Minnesota Statutes § 12.34 is entitled "Assistance Required; **Compensation for Property Taken**; Penalties." (emphasis added).

Furthermore, Minnesota Statutes Section 12.34 mirrors the framework of the Minnesota Takings Clause, stating that "owners of commandeered property must be

promptly paid just compensation for its use and all damages to the property while so used for emergency management purposes." Similarly, Section 9.061 states that the Executive Council "may, when necessary, commandeer and use any property" . . . and "the owner of any property taken shall be given a receipt for the property and be paid for its use and for any damages."

Both Sections 12.34 and 9.061 contain the terms "taking", "just compensation", "property", and "use" either in the text or title. These are phrases inescapably tied to constitutional takings, and as such are technical words that must be interpreted "according to [their] special meaning." Minn. Stat. § 645.08 (1).

Thus, in drafting a statute meant to compensate property owners for the use of their property during a state of emergency, the Minnesota Legislature used words and phrases of like import to "taking" and chose to incorporate constitutional concepts engrained in Minnesota "takings" jurisprudence. As such, Minnesota Statute Section 12.34 must be understood in the context of "takings" jurisprudence.

2. Section 12.34 Expressly Made "Use" A Damages and Fact Issue, Which Mirrors Takings Jurisprudence.

As discussed in Sections II.2.a-b above, the structure of Minnesota Statutes Section 12.34 separates the commandeering of property from the "use" of property, expressly making the later a fact issue related to damages. This mirrors the division of the respective taking and use in a "takings" claim. *Compare* Minn. Stat. § 117.025, subd. 2 (defining "taking") *with* Minn. Stat. § 117.025, subd. 11 (defining "public use").

Takings jurisprudence similarly separates a "taking" from the compensation owed for use and damages. As this Court explained:

> "[U]nder Minnesota law the question of whether or not a governmental agency has exceeded its authority to such a degree as to amount to a taking of private property is a question of law to be determined in the initial instance by the trial court. Only then is the jury asked to decide what amount of money will adequately compensate the property owner."

Alevizos v. Metropolitan Airports Comm, 298 Minn. 471, 484 (Minn. 1974) (*Alevizos I*).[5] In determining proper compensation, "[t]he evidence on any market value diminution and what may have caused it [is] . . . for the trier of fact . . . to resolve." *See Alevizos v. Metropolitan Airports Commission*, 317 N.W.2d 352, 357 (Minn. 1982) (*Alevizos II*).

The structure of Section 12.34 separating the issue of commandeering property from the fact issues of use and damages mirrors the same distinction of a "takings" claim. Indeed, the "highest and best use of the property" is a jury question related to damages and testimony considering the "original plans for the property and its historical use" is admissible to prove damages. *County of Ramsey v. Stevens*, 283 N.W.2d 918, 923-27 (Minn. 1979) (ruling that a land-owner's testimony that he "planned to use the property for a bar-restaurant" was relevant to damages after the constitutional taking had been established). Therefore, as in a takings claim, Minnesota Statutes Section 12.34 makes the "use" of Buzzell's property relevant to the compensation and damages rather than the threshold legal issue of whether Buzzell's property was commandeered.

[5]*See also Dale Properties, LLC v. State*, 638 N.W.2d 763, 768 (Minn. 2002) (J. Anderson concurring) (discussing eminent domain cases in which the taking is conceded and the issue is damages versus inverse condemnation cases in which the issue is whether taking occurred.)

3. The Authority to Commandeer Fills the Gap of the "Emergency Exception" to Governmental Taking.

In takings jurisprudence, a regulation that "is a proper effort to protect the health, morals, or safety of the community which has the effect of prohibiting a particular use of a property" is not a "taking." *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553 (Minn. 1996). Thus, the government need not compensate a property owner if it took the property to protect the community from an emergency. This exception created a compensation gap for the innocent landowner whose property rights have been interfered with by government action during an emergency.

Minnesota Statutes Sections 12.34 and 9.061 fill that gap. Rather than exempting the state from compensating a property owner for a taking during an emergency, the existence of an emergency is a prerequisite to the authority to commandeer, and an express requirement to the right of compensation. Minn. Stat. § 12.34 (governor may commandeer for emergency management purposes). The direct connection to the emergency exception combined with the Legislature's use of Takings Clause terms of art demonstrates an intent to fill the gap left in takings jurisprudence and compensate owners for the government taking and use of their property during an emergency.

Therefore, within the context of the statutes at issue, "commandeer" mirrors the concept of a "taking". In fact, Louisiana Courts have compared the language in its commandeering statute[6] to the language of Louisianna takings jurisprudence. *La Bruzzo*

[6] Louisiana law grants the government authority to "commandeer or utilize any private property if … necessary to cope with the disaster or emergency". La. Stat. Ann. R.S. § 29:724(D)(4) (2003).

v. State, 165 So.3d 166, 172 (La. App. 2014). After drawing the comparison in terminology, the court in *La Bruzzo* ruled that that "commandeering is, in fact, a particular kind of statutory taking." *Id.*

IV. The Governor Shutting Down Buzzell's Restaurant and Bar is Sufficient Interference With Buzzell's Possession, Enjoyment, and Value of His Property to Be a Commandeering Under Minnesota Statutes Section 12.34.

Having established that the plain meaning of "commandeer" is "to take" and the context of the statutes clearly incorporates the operative language from the "Takings Clause" of the Minnesota Constitution, this Court's precedent regarding government takings is highly illustrative and should be binding in determining whether the Executive Orders at issue here are a "commandeering" within the meaning of Sections 12.34 and 9.061. It is clear that Respondent commandeered Buzzell's property when he forced a shutdown of Buzzell's bar, restaurant, and catering business under threat of imprisonment because (1) the shutdown directly interfered with Buzzell's inherent property rights and (2) the shutdown directly infringed upon the economic exploitation of Buzzell's property.

1. "Property" Includes Rights to Possess, Use, and Dispose Of the Property.

A "taking" is any interference "with the possession, enjoyment, or value of private property." Minn. Stat. § 117.025, subd. 2. Property is mor than just the "physical thing" or tract of land. As explained by this Court:

> "Property is more than the physical thing--it involves the group of rights inhering in a citizen's relation to the physical thing. Traditionally, that group of rights has included the rights to possess, use, and dispose of property."

Alevizos I, 298 Minn. at 845-46. Thus, "direct and substantial invasion of [] property rights of such a magnitude [that one] is deprived of the practical enjoyment of the property" is considered a taking of the property. *Alevizos I*, 298 Minn at 487. As such, commandeering property includes more than taking just the physical thing, it includes taking the "group of rights inhering in a citizen's relation to the physical thing." *Id.* In *Alevizos I*, the "right to use one's property" was "taken" by the government when it built an airport near private property. *Id.* at 486.

a. Respondent directly and substantially interfered with Buzzell's right to use and dispose of his property.

Here, Respondent's orders forcing the closure of Buzzell's bar, restaurant, and catering business under threat of imprisonment were unquestionably a direct and substantial invasion of Buzzell's right to use his property. In *Alevizos I*, a far less burden existed, but it was enough to demonstrate a taking that the government's act caused nearby noise, fumes, and inconveniences. Here, Respondent interfered with Buzzell's inherent right to use his property in a far more substantial and detrimental manner than the airport in *Alevizos I* because it expressly ordered Buzzell to stop his only use of the property through a mandatory shutdown. Indeed, prohibition of use is indisputably a taking of property. *See Zeman*, 552 N.W.2d at 553 (explaining that government need not compensate for a taking when prohibition of use of property was enacted for an emergency).

Respondent did not simply act in a way that made Buzzell's preferred use less profitable, Respondent expressly prohibited Buzzell from using his bar, restaurant, or

catering business as a bar, restaurant, or catering business. Moreover, it directly interfered with the use of the other personal property within the establishment, from tables and chairs to perishable food items. Much of the food inventory had to be destroyed, thereby further interfering with his right to use and dispose of his property.

b. Respondent's Orders directly and substantially interfered with the right to access Buzzell's property.

Another inherent property right is the right to reasonable access to physical property. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 606 (Minn. 1978) ("Like other property rights, the right of reasonable access can be infringed or 'taken' by the state, giving the property owner a constitutional right to compensation."). The reasoning is that the government's action of limiting access to the property "attempts to forbid the owner from making a use of his property..." *Id.* at 606-07. The right to reasonable access is "taken" by the government when it reroutes a roadway away from a commercial business. *Johnson Bros. Grocery, Inc. v. State Dept. of Highways by Spannaus*, 229 N.W.2d 504, 505, 304 Minn. 75, 77-78 (Minn. 1975); *See also County of Anoka v. Blaine Bldg. Corp*., 566 N.W.2d 331 (Minn. 1997).

This Court has explained that limiting access to property infringes upon the inherent rights of the property and forbids the owner from using the property. Here, Respondent's Executive Order's did not just interfere with access to Buzzell's property, it criminalized access to his property and expressly forbid the use thereof.[7] Certainly, if

[7] Buzzell would prove in his damages trial in the district court that several times police officers acting under color of law entered his property to ensure he was not using it as a restaurant, bar, or catering business.

government action that makes it harder (but not criminal) for patrons to access a restaurant is a taking, then so too is a government action that forces that same establishment to shutdown—thereby clearly prohibiting access to patrons—and makes it a crime to access that same establishment. *See Vermillion State Bank v. State*, 895 N.W.2d 269, 271 (Minn. Ct. App. 2017) (indicating in dicta that "loss of highway access" which limited a restaurant's ability to pay its mortgage and "forced the restaurant to close" was a "taking").

According to this Court's clear directive that "property" is a broad term which includes the property rights to access, possess, use, and dispose of the physical thing, Respondent's Executive Orders unquestionably commandeered Buzzell's property by taking his inherent rights to the property.

2. "Taking" Includes Acts of Interference with Economic Exploitation or Diminution of Market Value of Property and Does Not Require "Direct Appropriation" Or "Physical Invasion".

Even if there was not a "direct" taking of Buzzell's property, this Court's interpretation of a "taking" is not limited to such a direct taking and instead includes indirect interference with property. *See Dale Properties, LLC*, 638 N.W.2d at 765 (citing *Johnson v. City of Plymouth*, 263 N.W.2d at 605). A "'taking" of property for which compensation must be paid does not require an actual physical taking." *In re Pet. for Estab., Cty. Ditch #78*, 233 Minn. 274, 281 (Minn. 1951). A "taking" can occur even if the government does not "directly appropriate or physically invade private property" but imposes some regulation that "curtails some potential for the use or economic exploitation of private property." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d

623, 632 (Minn. 2007) (citing *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)). "In limited circumstances, government regulation of property may result in a taking." *Id.*

This Court has routinely held that when a regulation "benefits a specific public or governmental enterprise, a property owner who suffers a substantial and measurable decline in market value as a result of the regulations must be compensated." *Interstate Cos. v. City of Bloomington*, 790 N.W.2d 409, 413 (Minn. Ct. App. 2010) (citing *McShane v. City of Faribault*, 292 N.W.2d 253, 258-59 (Minn. 1980)) *order granting review vacated* (Minn. 2011). Therefore, Respondent's efforts to frame the shutdown as any other regulation of bars and restaurants does not prevent this Court from finding that the regulation is a taking.[8] (Resp. App. Resp. Br. 4-5).

3. The District Court Erred by Dismissing Buzzell's Lawsuit for Failure to State a Claim Because of Fact Issues Regarding Use and Economic Viability.

The major concern of this Court when deciding if government regulation is a taking is whether:

> "the state, in the exercise of its police power, *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*."

Westling v. County of Mille Lacs, 581 N.W.2d 815, 823 (Minn. 1998) (emphasis added). 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

[8] Of course, this was not just another regulation against the restaurant industry. The Emergency Orders are an exceptionally rare exercise of executive powers only allowable when there exists an underlying State emergency.

borne by the public as a whole." *Wensmann Realty*, 734 N.W.2d at 632 (Minn. 2007) (citing *Westling*, 581 N.W.2d at 823).

In *Wensmann*, this Court ruled that a fact question existed regarding whether a golf course owner was forced to bear the burden of the public as a whole, and therefore, suffered a taking, when the municipal government would not rewrite its comprehensive plan to allow the golf course to become a residential development. 734 N.W.2d at 641. Using the *Penn Central* factors[9], this Court determined that it was possible the government action of refusing to alter its comprehensive plan to accommodate the plans of the new golf course owner went "too far" and could consequently be a taking. *Id.* It remanded for a finding on the fact issues surrounding reasonable use. *Id.*

The facts here are far more egregious than those in *Wensmann*. In *Wensmann*, the government simply refused to change its laws to accommodate a new use. Here, the government criminalized the historic use of Buzzell's property. In *Wensmann*, the government aimed to preserve the public's interest in golfing, a recreational sport mainly reserved for the wealthy. Here, the government tried to stop the spread of a contagious and deadly virus. In *Wensmann*, the government permitted the economically sustainable use of operating a golf course. Here, the bar and catering service were closed completely, and the restaurant was forced to operate as an entirely new business venture—take out and delivery—resulting in a 94% drop in monthly gross revenue for his businesses. If a city's refusal to change its laws to allow a golf course turn into an apartment complex

[9] (1) Economic impact, (2) investment-backed expectations, and (3) the character of the government action. *Wensmann Realty*, 734 N.W.2d at 632.

"goes too far," then the state's complete shutdown and criminalization of Buzzell's historical use of his property certainly "goes too far", too.

Thus, as was the case in *Wensmann*, there are fact issues here indicating that a commandeering and compensable use occurred, and the District Court erred in dismissing Buzzell's lawsuit for failure to state a claim under Minn. R. Civ. P. 12.02(e). Simply put, Buzzell should be granted the opportunity to prove he personally was forced to "bear the burden" of combatting COVID-19 that "should be borne by the public as a whole." *Wensmann Realty*, 734 N.W.2d at 632.

CONCLUSION

The plain meaning of commandeer, the structure of Minnesota Statutes Sections 12.34 and 9.061, and the clear incorporation of Takings Clause jurisprudence support only the conclusion that to "commandeer property" means to "take property," and includes the Takings Clause definition of a taking. Therefore, Respondent's authority to commandeer property under Minnesota Statute Section 12.34, subdivision 1 includes (1) interfering with a property owner's rights to use and access property and (2) interfering with the economic exploitation of private property.

Consequently, Respondent commandeered Buzzell's property under Minnesota Statute Section 12.34 by criminalizing his right to use and access his property and criminalizing the economic exploitation of his property. Buzzell was forced to bear the burden of making the public safer from the spread of COVID-19 when he was forced to shut down his business and suffer 94% monthly revenue losses. Buzzell therefore has a right to just compensation for the use of his commandeered property under Minnesota

Statutes Section 12.34, subdivision 2. Buzzell respectfully requests that this Court reverse the decision of the District Court dismissing the commandeering claim for failure to state a claim, and remand to the District Court so that Respondent be ordered to provide a compensation order as prescribed by Minnesota Statutes Section 12.34, subdivision 2.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant certifies that this opening brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13-point, proportionately-spaced typeface utilizing Microsoft Word and contains 8,520 words, including headings, footnotes and quotations. In addition, no paper copies of this brief will be filed with the Court in compliance with this Court's March 20, 2020 Order.

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