No. 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,

Petitioner,

vs.

Tim Walz, as Governor of the State of Minnesota, and as Chair of the Minnesota Executive Council and the Minnesota Executive Council, duly organized under Minnesota Statute 9.011,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUE

I. Does the governor "commandeer" property within the meaning of the Minnesota Emergency Management Act (MEMA) by issuing emergency executive orders temporarily limiting occupancy at public accommodations that posed high-risk of COVID-19 transmission?

The court of appeals held that the governor does not "commandeer" property under MEMA by issuing executive orders during a peacetime emergency that subject a business owner to operating restrictions. Appellant Add. at 16–17.

Apposite Authorities:

Minn. Stat. § 12.34 (2020).

STATEMENT OF THE CASE

Between March 2020 and July 2021, Respondent Governor Tim Walz—along with nearly every other governor—exercised his statutory emergency powers to address the specific and deadly exigencies posed by the COVID-19 pandemic. COVID-19 is primarily spread from person-to-person contact through respiratory droplets. To mitigate disease transmission, the Governor limited the operations of high-risk public accommodations. The Governor understands that these necessary measures were difficult for many, but especially bars, restaurants, and event centers. Unfortunately, the pandemic transformed these cherished community fixtures into potent grounds for infection.

Appellant Carvin Buzzell, Jr. owns a wedding venue, and a bar and restaurant. Executive orders temporarily limited both businesses' operations. In this lawsuit, Buzzell does not challenge the Governor's statutory authority to impose temporary limitations on bars, restaurants, and event centers. Rather, Buzzell sued the Governor and the Minnesota Executive Council, claiming, among other things, that he is entitled to compensation because the Governor "commandeered" his businesses. Ramsey County District Court Judge Laura Nelson dismissed all claims and the court of appeals affirmed.

Buzzell asserts that his hospitality businesses were commandeered within the meaning of Minnesota Statutes section 12.34 (2020). Commandeering's plain meaning, however, precludes Buzzell's claim. Commandeering requires the governor or the governor's designee to seize and directly use private property for an emergency management purpose. And the Governor undisputedly did not seize and directly use Buzzell's businesses for emergency management. Buzzell's alternative commandeering

interpretation is unavailing because it baselessly attempts to import constitutional takings analysis into section 12.34 while failing to give full effect to each of its subdivisions.

STATEMENT OF FACTS

I. PEACETIME EMERGENCY AUTHORITY

The Minnesota Emergency Management Act (MEMA) gives governors emergency management authority. Minn. Stat. ch. 12 (2020). MEMA has its roots in the Minnesota Civil Defense Act of 1951. The original law empowered governors to respond to disasters caused "by enemy attack, sabotage or other enemy hostile action." 1951 Minn. Laws ch. 694. During the next fifty years, the Legislature expanded the law's scope to address new types of disasters and emergency responses. *See* 1953 Minn. Laws ch. 745 § 2; 1976 Minn. Laws ch. 266 § 1; 1979 Minn. Laws ch. 2 § 2; 1980 Minn. Laws ch. 611 § 1. In 1996, the Legislature changed to the law's title to the Minnesota Emergency Management Act in recognition of its broader reach. *See* 1996 Minn. Laws ch. 344. Following the 2001 terrorist attacks, the Legislature again expanded MEMA to address new threats. 2002 Minn. Laws ch. 402.

Since 1951, governors of every political stripe have issued peacetime emergency executive orders to respond to natural disasters and other emergencies where local resources were insufficient.[1] Governor Walz exercised these peacetime emergency powers

[1] *See*, *e.g.*, Executive Order (EO) 91-25 (Nov. 2, 1991), www.leg.mn.gov/archive/execorders/91-25.pdf (declaring a peacetime emergency in response to the 1991 Halloween Blizzard); EO 15-09 (Apr. 23, 2015), www.leg.mn.gov/archive/execorders/15-09.pdf (responding to avian flu).

to combat the spread of the deadly COVID-19 virus, which as of the date of this brief has killed more than 762,994 people in the United States, including 9,093 Minnesotans.[2]

While MEMA authorizes broad emergency management powers, only one provision authorizes the seizure of private property for emergency management use by the government. Section 12.34 permits the governor or his designees to "commandeer" certain types of private property "[w]hen necessary to save life, property, or the environment." Minn. Stat. § 12.34, subd. 1. If property is commandeered, its owner "must be promptly paid just compensation for its use and all damages done to the property while so used for emergency management purposes." *Id.*, subd. 2. This language has remained substantially unchanged since the Civil Defense Act's enactment in 1951. *Compare* 1951 Minn. Laws ch. 694 § 304 ("the Governor, may, when necessary to save life or property . . . commandeer, for the time being, any motor vehicle, tools, appliances or any other property"), *with* Minn. Stat. § 12.34, subd. 1 (2020).

II. MINNESOTA'S COVID-19 RESPONSE FOR BARS, RESTAURANTS, AND EVENT CENTERS

To mitigate COVID-19 transmission, Governor Walz used his MEMA authority to limit the operations of high-risk public accommodations, including restaurants, bars, and event centers. While these businesses are always subject to health and safety regulations, the Governor's executive orders created additional occupancy limitations and distancing

[2] *CDC COVID Data Tracker*, Centers for Disease Control, (Nov. 18, 2021), https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/42YG-E6CN]; *Situation Update for COVID-19*, Minnesota Department of Health (Nov. 18, 2021), www.health.state.mn.us/diseases/coronavirus/situation.html [https://perma.cc/2U39-RCX6].

requirements. Throughout this difficult time, the Governor has consistently sought to balance the safe operation of these valued businesses with their disease transmission risk.

A. Restaurants, Bars, and Event Centers Are Highly Regulated Under Normal Circumstances.

Businesses that serve food and alcohol, and host large groups, risk disease transmission and food-borne illness. As a result, restaurants, bars, and event centers are highly regulated. Bars and restaurants must hold licenses to serve food or intoxicating liquors, Minn. Stat. §§ 157.16, 340A.401 (2020), and are subject to numerous regulations and inspections, *see, e.g.*, Minn. Stat. § 157.20, subd. 2 (2020) (requiring annual inspections for "high-risk" establishments); Minn. R. chs. 4626, 7515 (2019) (restaurant and bar regulations). In addition, bars and restaurants must obtain permits that include occupancy limits. *See* Minn. R. 7511.0090, subp. 1 (2019) (incorporating the 2018 International Fire Code with specific amendments); Minn. State Fire Code § 105.1 (requiring permits for businesses that operate kitchen hoods, industrial ovens, and open flames).

B. The Governor's Executive Orders Placed Additional Limitations on High-Risk Public Accommodations to Mitigate COVID-19 Transmission.

COVID-19 is primarily spread from person-to-person contact through respiratory droplets that are produced when an infected person coughs, sneezes, or exhales. Index No. 11 at 23–29. The transmission risk is heightened by the contact's duration, physical proximity, and setting, including the setting's ventilation and airflow. *See id.* at 28–29,

58–71, 83–84. As a result, limiting contact between people from different households is critical to COVID-19 spread prevention. *See id.* at 94.

The Governor first declared a peacetime emergency to address the COVID-19 pandemic in March 2020. *See* EO 20-01 (Mar. 13, 2020).[3] The Governor subsequently issued several orders citing sections 12.21 and 12.32, which permit governors to issue orders and rules with the force and effect of law upon approval by the Executive Council, for authority. As a critical component of this response, the Governor limited public occupancy at businesses with a high risk of COVID-19 transmission, including prohibiting on-premises consumption at restaurants and bars. EO 20-04 ¶ 1 (Mar. 16, 2020). Although prohibiting on-site dining, the order encouraged restaurants and bars to continue delivery and takeout food service.[4] *See id.* ¶ 2. After 71 days, outdoor dining was permitted, followed by indoor dining nine days later. EO 20-63 ¶ 7.c.viii (May 27, 2020); EO 20-74 ¶ 7.c (June 5, 2020).

To target high-risk situations but allow businesses to operate as much as safely possible, the Governor, in consultation with Minnesota Department of Health, continued to vary occupancy restrictions, social distancing requirements, and closing times for places of public accommodation. *See* EO 20-99 (Nov. 19, 2020) (temporarily pausing indoor and outdoor dining); EO 20-103 (Dec. 17, 2020); EO 21-01 (Jan. 6, 2021) (opening to 50 percent occupancy with 10:00 p.m. closures); EO 21-07 ¶ 3 (Feb. 12, 2021) (allowing

[3] Governor Walz's executive orders are available at www.leg.state.mn.us/lrl/execorders/eoresults?gov=44.

[4] In April 2020, the Legislature passed a bill allowing bars and restaurants to provide takeout beer and wine. 2020 Minn. Laws ch. 75.

establishments to stay open until 11:00 p.m.). Restaurants and bars were permitted to provide delivery and takeout for the entirety of the peacetime emergency. *See* EO 20-04 ¶ 2; EO 20-63 ¶ 7.c.iv; EO 20-99 ¶ 7.c.iii.A.1.

No order required a bar, restaurant, or event center to host government personnel or otherwise required affirmative use of a facility for government-directed activity. Instead, the orders limited the operation of certain businesses if they chose to continue providing services during the peacetime emergency.

The Legislature and Governor terminated the peacetime emergency effective July 1. Act of June 30, 2021, ch. 12, art. 2, § 23, 2021 Minn. Laws 1st Spec. Sess.

III. PROCEDURAL BACKGROUND

On June 2, 2020, Buzzell filed a complaint in Ramsey County District Court against the Governor and the Executive Council alleging, in part, that the Governor had commandeered his bar and restaurant and event center by limiting their operations and that he must be compensated pursuant to Minn. Stat. § 12.34. *See* Resp't Add. at 12. Buzzell also alleged his property had been taken pursuant to Article I, Section 13 of the Minnesota Constitution and asserted an independent claim for relief under Article I, Section 8 of the Minnesota Constitution (the "remedies clause"). *Id.* at 11–12.

The district court dismissed all three claims for failing to state a claim on which relief could be granted.[5] *See* Appellant Add. at 1–9. The district court held that Buzzell could not claim his businesses were commandeered because section 12.34's plain language

[5] The district court also denied a motion for partial summary judgment brought by Buzzell on his commandeering claim. Appellant Add. at 8.

requires that the property be affirmatively used by the government. *Id.* at 8. The district court also held that the Executive Council was not a legal entity capable of being sued in its own name, that Buzzell failed to state a takings claim, and that Buzzell could not state an independent claim under Article I, Section 8 of the Minnesota Constitution. *Id.* at 3–8.

Buzzell appealed only the decision that he is not owed compensation for commandeered property pursuant to section 12.34.[6] In a precedential opinion, a unanimous court of appeals panel affirmed. *Buzzell v. Tim Walz Governor of Minn.*, 962 N.W.2d 894 (Minn. Ct. App. 2021). The court held that the governor does not "commandeer" property under MEMA by implementing operating restrictions on businesses through peacetime emergency executive orders. Appellant Add. at 16–17. The court of appeals determined that, under the statute's plain language, "commandeer" requires direct, active use of private property by the government for emergency management purposes. *Id.* at 11.

ARGUMENT

This Court reviews de novo whether a complaint sets forth a legally sufficient claim for relief, accepting all alleged facts as true and construing all reasonable inferences in the nonmoving party's favor. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). This Court also reviews questions of statutory interpretation de novo. *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 33 (Minn. 2015).

That de novo review leads irrefutably to affirmance in this case. Commandeering, within the meaning of Minn. Stat. § 12.34, subd. 1(2), requires that the governor or the

[6] Because Buzzell does not appeal the district court's determination that the Executive Council is not a legal entity subject to suit, the Governor is the only Respondent.

governor's designee seize and directly use private property for an emergency management purpose. This plain meaning interpretation of commandeering is confirmed by the dictionary definitions and etymology, section 12.34's structure, and relevant legislative history. This plain meaning interpretation precludes Buzzell's commandeering claim. Temporary occupancy restrictions do not constitute commandeering because such restrictions limit private use of private property as opposed to seizing private property for direct use by the government. Buzzell's alternative commandeering interpretation is unavailing because it baselessly attempts to import constitutional takings analysis into section 12.34 and fails to give full effect to each subdivision of that section.

I. SECTION 12.34'S PLAIN LANGUAGE RENDERS BUZZELL'S CLAIM INELIGIBLE FOR COMPENSATION.

In the absence of a statutory definition, Minnesota courts generally turn to the statutory phrase's plain meaning. *See State v. Leathers*, 799 N.W.2d 606, 609 (Minn. 2011); Minn. Stat. § 645.08(1) (2020). Commandeering's plain meaning requires government action that seizes or expropriates private property for direct use by government or its agents. These fundamental characteristics are confirmed by dictionary definitions, section 12.34's structure, and relevant legislative history. These sources further make clear that temporary changes to existing health and safety regulations do not constitute commandeering.

A. Commandeering's Plain Meaning Requires that the State Seize Private Property for Direct Government Use.

The statutory language at issue provides that the governor may "commandeer, for emergency management purposes . . . any motor vehicles, tools, appliances, medical

supplies, or other personal property and any facilities." Minn. Stat. § 12.34, subd. 1(2). If property is commandeered, the statute describes how the government should compensate the owner for "use and all damages done to the property." *Id.*, subd. 2.

The statute does not define commandeer. This Court should give commandeer its plain and ordinary meaning. *Allan*, 869 N.W.2d at 33. A dictionary is an appropriate starting place for identifying plain and ordinary meaning. *See Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016). Commandeer means to "seize for military or police use; confiscate;" "To take arbitrarily or by force;" "To force into military service." Commandeer, *American Heritage Dictionary* (5th ed. 2018). A second dictionary concurs: "To compel to perform military service;" "to seize for military purposes;" "to take arbitrary or forcible possession of." Commandeer, *Webster's Third New International Dictionary, Unabridged* (2017).

Dictionaries of the Minnesota Civil Defense Act of 1951's vintage also offer similar definitions. 1951 Minn. Laws ch. 694 § 304. They provide that commandeer means to "compel to perform military service; to seize for military purposes;" or "to take arbitrary or forcible possession of." Commandeer, *Webster's New International Dictionary of the English Language* (1943); Commandeer, *Webster's Third New International Dictionary* (1964) (same definitions). The word itself was reportedly adapted from Afrikaans. Commandeer, *Webster's New International Dictionary of the English Language* (1943) (from the Boer word "kommandeeren"). In that original context, commandeering referred

to a conscription system that pressed Afrikaners into "kommando" militia service and required them to provide their own equipment.[7]

The types of property that section 12.34 identifies for possible commandeering also are consistent with the term's lexical and etymological characteristics. Motor vehicles, tools, appliances, medical supplies, personal property, and facilities all could be pressed into direct government service. Minn. Stat. § 12.34, subd. 1(2). These specific expressions necessarily exclude adjustments to existing regulations. *See Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 718 (Minn. 2014) (stating "the expression of one thing is the exclusion of another"). MEMA's "emergency management" definition, referenced in section 12.34, subd. 1, likewise focuses on activities involving direct participation or service:

> [P]reparation for and the carrying out of emergency functions, other than functions for which military forces are primarily responsible . . . . These functions include, without limitation, firefighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency human services, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services, implementation of energy supply emergency conservation and allocation measures, and other functions related to civilian protection, together with all other activities necessary or incidental to preparing for and carrying out these functions.

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[7] *See generally* Sandra Swart, *"A Boer and His Gun and His Wife Are Three Things Always Together": Republican Masculinity and the 1914 Rebellion*, 24 J.S. Afr. Stud. 737, 739 (1998) ("At first [the Dutch East India Company] . . . relied on local farmers and the indigenous people who volunteered or were forced to join a *kommando*. In the nineteenth century *trekboer* communities, the commando system became the dominant military mode. Members of the commando were expected to provide their own mount and saddlery, rifle and 30 rounds of ammunition.").

Minn. Stat. § 12.03, subd. 4 (2020). Functions such as firefighting or policing or chemical weapons defense are activities in which commandeered property could be directly used in support of a state emergency response. These functions do not encompass a limitation on private activity that a private party was already performing. That both section 12.34 and section 12.03 govern property that can be directly pressed into government service supports the conclusion that adjustments to existing limitations the use of private property are not commandeering.

Interpreting commandeer to require direct government use of private property further "harmonize[s] and give[s] effect to all" of section 12.34's subdivisions. *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (quoting *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958)). Section 12.34 has two relevant subdivisions, with the first authorizing compulsive service of people or property, and the second requiring payment for any property so used:

> Subdivision 1. Emergency powers. When necessary to save life, property, or the environment during a national security emergency or during a peacetime emergency, the governor, the state director, or a member of a class of members of a state or local emergency management organization designated by the governor, may:
>
> (1) require any person, except members of the federal or state military forces and officers of the state or a political subdivision, to perform services for emergency management purposes as directed by any of the persons described above; and
>
> (2) commandeer, for emergency management purposes as directed by any of the persons described above, any motor vehicles, tools, appliances, medical supplies, or other personal property and any facilities.

> Subd. 2. Compensation. The owner of commandeered property must be promptly paid just compensation for its use and all damages done to the property while so used for emergency management purposes. 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. . . .

Minn. Stat. § 12.34, subds. 1–2.

Subdivision two illuminates the meaning of commandeer in subdivision one. Subdivision two assumes that "use" of private property by the government is a fundamental component of commandeering. Subdivision two also contemplates that the commandeered property is employed in a situation where it could be damaged. *Id.*, subd. 2. Subdivision one separately identifies "motor vehicles, tools, appliances, [and] medical supplies" as types of property that can be commandeered for "emergency management purposes." *Id.*, subd. 1(2). In each case, the government could seize and directly use, and damage during that use, these types of property. The state, for example, could transport equipment in a privately owned "motor vehicle[]," administer tests using privately owned "tools," or store vaccines in a privately owned refrigeration "appliance." Read as a whole, these provisions suggest that commandeering is applicable only to property that can be physically used by government in an emergency response and damaged during that use. A limitation on private property use, by contrast, does not involve any direct use in the state's emergency

response and the limitation does not create the possibility of property damage by the government. *Id.*

B. Legislative History Confirms Commandeer's Plain Meaning Requires Direct Use.

When appropriate, courts may consider legislative history "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16(7) (2020); *Save Lake Calhoun*, 943 N.W.2d at 178–79 (applying the statute's plain meaning while considering legislative history). In this instance, relevant legislative history is consistent with section 12.34's plain language. Legislative history shows that the Legislature envisioned compensation only for direct property use by the government.

Following the 2001 terrorist attacks, Minnesota Statutes chapter 12 was amended to specifically address bioterrorism and novel disease threats. 2002 Minn. Laws ch. 402, art. 1. The floor debates in both chambers show that legislators agreed that section 12.34 would facilitate the physical seizure and use of property by the state during a health crisis. In the Minnesota Senate, bill author Senator John Hottinger expressly stated, in response to a proposed amendment, that the legislation was necessary for the governor to physically "take over" facilities for the purpose of administering vaccines:

> Do you really want to go home and say if there's an emergency, the governor, who has this authority to declare and do all of these things if it's a security emergency, can't do so because it's related to a health outbreak? That a smallpox outbreak couldn't be handled because we couldn't have emergency authority to take over facilities to administer vaccines, that we didn't have authority to take over medical supplies, so that those vaccines would be available to people. . . . There's a definition for facilities in here. The law already provides for

> compensation. . . . Senator Pariseau would like us to take away those protections.[8]

During the House floor debate, Representative Jim Abeler elaborated on other types of appropriate property commandeering that might occur:

> I think it's good that our legislative intent on this matter is taken to borrow someone's shovel or their garage or maybe their cart or some other tool that you would appropriately use for an emergency management kind of thing. So they can dig a hole and bury something or otherwise help in a rescue effort or do a quarantine effect, but not to go after the things that are the artifacts of their home like their antiques, or their plates or their special wares that they may own including firearms and other things.[9]

Both the Senate and House debates suggest that legislators were concerned that the state lacked tools to quickly access the facilities, equipment, and materials necessary to respond to a virus rapidly spreading through the state's population. Separately, some House members expressed apprehension that the state might seize property including private residences and firearms.[10] These debates show that the Legislature was focused on balancing the state's need to quickly access essential resources with protecting certain

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[8] Senator John Hottinger, Minn. Sen., Floor Debate, 82nd Minn. Leg., Reg. Sess. (Apr. 3, 2002, 1:40:56), www.leg.state.mn.us/lrl/media/file?mtgid=822281.

[9] Representative Jim Abeler, Minn. H., Floor Debate, 82nd Minn. Leg., Reg. Sess. (May 18, 2002, 55:00), www.house.leg.state.mn.us/hjvid/82/2420.

[10] *See, e.g.*, Representative Kevin Goodno, Minn. H., Floor Debate, 82nd Minn. Leg., Reg. Sess. (May 16, 2002, 17:46), www.house.leg.state.mn.us/hjvid/82/2419; Representative Mike Osskopp, Minn. H., Floor Debate, 82nd Minn. Leg., Reg. Sess. (May 16, 2002, 20:42); Representative Richard Mulder, Minn. H., Floor Debate, 82nd Minn. Leg., Reg. Sess. (May 16, 2002, 22:35); Representative Kevin Goodno, Minn. H., Floor Debate, 82nd Minn. Leg., Reg. Sess. (May 18, 2002, 45:44).

property types from confiscation.[11] There is no suggestion in the debates that the Legislature intended to compensate business owners whose own property use had been limited by lawful orders regulating business activities.

II. BUZZELL'S COMMANDEERING DEFINITION IS TEXTUALLY UNMOORED.

The Court should reject Buzzell's expansive commandeering interpretation. Buzzell's approach improperly attempts to import constitutional takings analysis even though no statutory language or legislative history supports this theory.[12] It also fails to give full effect to each of section 12.34's subdivisions. Finally, Buzzell's interpretation would further risk absurd, impossible of execution, or unreasonable results by paralyzing the state's ability to decisively address emergencies by requiring a *Penn Central*-style takings analysis for every property owner subject to temporary changes to existing regulatory schemes.

A. Buzzell's Argument that Section 12.34 Is a Codified Exception to Principles in Takings Jurisprudence Is Unfounded.

Buzzell argues incorrectly that the plain language definition of "commandeer" is "to take," and the definition necessarily incorporates aspects of Takings Clause jurisprudence. Appellant Br. at 7. Yet, Buzzell also admits that the same takings jurisprudence would disqualify his situation from constitutionally mandated compensation (as the district court found). *Id.* at 24; Add. at 6–7. Buzzell surmises that section 12.34 was intended to fill a

[11] The Minnesota Emergency Health Powers Act passed with broad legislative support. It passed in the Minnesota Senate with a 55 to 3 vote and a 117 to 16 vote in the Minnesota House. Minn. Sen. J., 82nd Leg., Reg. Sess. 7041 (2002); Minn. H.J., 82nd Leg., Reg. Sess. 8927 (2002).

[12] Buzzell did not make this argument before either the district court or court of appeals.

"gap" to provide compensation when a taking would not be found because the regulation "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." *See Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553 (Minn. 1996). Buzzell provides no legislative history or direct statutory language to support his theory. Instead, he relies on several convoluted arguments that misuse statutory interpretation principles.

1. Buzzell Provides No Evidence the Legislature Intended Commandeering to Fill a Gap in Takings Jurisprudence for Emergency Health Regulations.

Both federal and Minnesota courts analyze case-specific, regulatory takings under the three-part *Penn Central* test. Under *Penn Central*, a court must review: (1) the economic impact of the regulation on the person suffering the loss; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character or nature of the government action to assess whether the complained of action effected a taking of private property for public use. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Zeman*, 552 N.W.2d at 552; *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007) ("We believe that the appropriate focus of the character inquiry should be on 'the *nature* rather than the merit of the governmental action.'"). Where the state action was reasonably taken to promote "the health, safety, morals, or general welfare," regulations that destroy or adversely affect recognized property interests are generally upheld. *Penn Cent. Transp. Co.*, 438 U.S. at 124–25. The Governor presumes that this long-established rule is what Buzzell refers to as the "emergency exception." Appellant Br. at 24–25.

Buzzell admits, at the outset, that his restaurant was not "taken" under the state or federal constitutions. Indeed, courts throughout the country have appropriately weighed the health and safety implications of pandemic restrictions under *Penn Central*'s third factor against the other two factors and concluded that pandemic related closures were not takings. *See TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 840 (W.D. Tenn. 2000) ("On balance, the Court finds that Defendants' need to effectively and quickly respond to the COVID-19 pandemic . . . outweighs any other considerations warranting a finding that the Order amounts to a taking."); *Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 814 (D. Minn. 2020) (considering all three factors and finding the safety and temporary nature of the regulation determinative), *appeal pending* (No. 21-1278 8th Cir.); *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 784 (W.D.N.Y. 2020) (weighing all three factors).

Buzzell provides no support for his logical leap that the Legislature not only specifically intended to incorporate Takings Clause jurisprudence into section 12.34, but that it did so to fill a gap in cases where the government otherwise appropriately issued health and safety regulations. The Legislature first authorized the governor to commandeer property during emergencies in 1951 more than two decades before the U.S. Supreme Court determined the three-pronged *Penn Central* framework within which Buzzell argues "commandeering" fills a gap. Buzzell provides no evidence that the 1951 legislature, or any subsequent legislature in modifying the provision, envisioned "commandeering" to provide some remedy that was otherwise unavailable under the state and federal

constitution. Buzzell's complex conclusions about the Legislature's motivations are unsupported.

2. Buzzell's Argument Convolutes Statutory Interpretation Principles.

Buzzell misemploys or convolutes statutory interpretation principles in an attempt to ground his argument in the statute. Buzzell's argument relies on incorporating language from section 12.34's headnotes, ignoring the scope of definitions from other chapters, and pointing to another state's interpretation of its commandeering statute.

First, Buzzell argues that section 12.34 includes a reference to takings by citing the Revisor's headnote, which includes "Compensation for property taken." Appellant Br. at 12. But section headnotes are mere catchwords. Minn. Stat. § 645.49 (2020). They are not part of the statute and, therefore, do not determine a statute's scope or meaning. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 303 n.24 (Minn. 2000). Although headnotes may be relevant to determine legislative intent if they were part of the legislative process, Buzzell provides no indication the Legislature used this or a similar heading in any of its amendments to the provision since 1951. *See Minn. Express, Inc. v. Travelers Ins. Co.*, 333 N.W.2d 871, 873 (Minn. 1983). More importantly, as argued below, "take" is a common verb, and its use cannot and does not necessarily connote the constitutional term "takings."

Second, Buzzell claims that section 12.34's use of words that also are central in takings jurisprudence, such as "taking," "property," "use," and "just compensation," supports his theory. Appellant Br. at 22. Buzzell claims that these terms are "of like

import" to "taking" and therefore, under Minnesota Statutes section 117.025, subdivision 2, should be defined as every interference "with the possession, enjoyment, or value of private property." *Id.* at 21–22. Buzzell's argument ignores the scope of the definitions in chapter 117. Section 117.025 clarifies that its definitions only apply to chapter 117 and "any other general or special law authorizing the exercise of the power of eminent domain." Minn. Stat. § 117.025, subd. 1 (2020). Therefore, for chapter 117's definition to be applicable, one must assume that section 12.34 authorizes the power of eminent domain. This circular reasoning should not inform the Court's statutory interpretation. To the extent that Buzzell argues that the mere presence of several common words in both section 12.34 and takings jurisprudence shows that the two are inextricably bound, he lacks support for that assertion.

Third, Buzzell cites statements from the Louisiana Court of Appeals in *La Bruzzo v. State* interpreting Louisiana's emergency commandeering statute. Appellant Br. at 24–25 (citing *La Bruzzo v. State*, 165 So.3d 166, 168 (La. Ct. App. 2014)). This case, discussing a Louisiana statute and Louisiana law, is neither controlling nor persuasive. Even if Louisiana's interpretation were to be considered, by simply calling commandeering a taking, a court does not necessarily adopt Buzzell's theory that commandeering statutes were intended to provide compensation for the emergency implementation of reasonable health and safety regulations. A "taking" can be used to reference not only regulatory action under *Penn Central*, but also includes physical appropriation or occupation of property by the government. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In *La Bruzzo*, on which Buzzell relies, the real property in question

was "commandeered" for the construction of a levee and floodwall and bridge repair, not simply subjected to operating restrictions. *La Bruzzo v. State*, 165 So.3d 166, 168 (La. Ct. App. 2014). Similarly, in New Jersey the intermediate appellate court found "commandeering" to be akin to a physical, not regulatory, taking. *See JWC Fitness, LLC v. Murphy*, No. A-0639-20, __ A.3d __, 2021 WL 4823500, at *5 (N.J. Super. Ct. App. Div. Oct. 18, 2021).

B. Buzzell's Interpretation Fails to Give Full Effect to Section 12.34 and Adds Words that the Legislature Did Not Supply.

Buzzell's interpretation further creates two problems. It fails to give full effect to section 12.34 by moving the "use" determination solely into the second subdivision. In addition, it extends the statute's applicability by adding members of the general public to the otherwise limited list of actors that may engage in commandeering.

1. Buzzell's Interpretation Moves Commandeering's "Use" Requirement from the First to the Second Subdivision.

Buzzell attempts to eliminate commandeering's "use" requirement by claiming that commandeering "is a different concept entirely from the subsequent use[.]" He claims that "use" is only an issue for the finder of fact. Appellant Br. at 10, 13. This interpretation, however, fails to give full effect to section 12.34 by subsuming separate questions into a single inquiry under subdivision two. Minn. Stat. § 645.16 (2020) ("Every law shall be construed, if possible, to give effect to all its provisions."); *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 383 (Minn. 2020) ("A statute should be interpreted to give effect to all of its provisions."). Specifically, Buzzell's

interpretation eliminates the "use" requirement in the first subdivision while inventing a new one for the second subdivision.

Buzzell's interpretation eliminating subdivision one's "use" requirement creates several problems. As discussed above, commandeering's plain meaning requires direct use by the government. *See supra* Section I(A). However, even if the word itself did not require use, the first subdivision as a whole requires that the commandeered property be seized for "emergency management purposes" as directed by the governor or the governor's designee. Minn. Stat. §12.34, subd. 1(2). In this way, the first subdivision provides the conditions necessary to trigger a compensation determination under subdivision two.

Buzzell's attempt to move the entire "use" determination into the second subdivision likewise is not supported by section 12.34's text. The second subdivision does not direct the governor or the governing body to determine whether "use" has occurred. The second subdivision reasonably assumes "use" has occurred given the first subdivision's requirements. This leaves only a single question for the second subdivision: how much compensation is associated with the level or degree of "use" that already has occurred. Minn. Stat. § 12.34, subd. 2. If the owner of the commandeered property subsequently disagrees with the governor or governing body's determination, he or she may appeal the compensation order to the district court. Yet, the only issue for the district court is again "the amount claimed as compensation" owed for the commandeered property's "use and all damages done to the property[.]" *Id.* Thus, "use" operates as a condition precedent for a subdivision two compensation determination.

Buzzell also argues that Cal. Gov't Code § 8572 supports his claim that commandeering within the meaning of Minn. Stat. § 12.34 distinguishes between "commandeering" and "use." There are several problems with this assertion. First, the California and Minnesota statutes are not identical. California authorizes its governor "to commandeer or utilize any private property" during a state of emergency. Cal. Gov't Code § 8572 (West 2020). Minnesota, by contrast, permits the governor to "commandeer [property] for emergency management purposes[.]" Minn. Stat. § 12.34, subd. 1. To the extent any distinction exists in California, there is none in Minnesota. Second, Buzzell cites California cases that do not distinguish between commandeering and use. Instead, *Duke Energy Trading* addresses whether the governor was preempted from commandeering wholesale electricity purchases "to be held subject to the control and coordination of the State of California." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1047 (9th Cir. 2001). The other California case cited by Buzzell has little to do with commandeering at all.[13]

Duke Energy Trading does, however, illustrate that cases involving commandeering statutes have implicated situations where private land and commodities were directly seized for government use. *Id.; see also Marty v. State*, 786 P.2d 524, 533 (Idaho 1989) (flooding a farm field); *Sid-Mar's Rest. & Lounge, Inc. v. State ex rel. Governor*, 142 So.

[13] *California Correctional Peace Officers Association*'s only reference to commandeering occurs in a general summary of California's Emergency Service Act. That case addresses whether the governor may declare an emergency in certain contexts. It does not deal with a commandeering claim. *Cal. Corr. Peace Officers Ass'n. v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 849–50 (2008).

3d 188, 193 (La. 5th Cir. Ct. App. 2014) (constructing a flood pumping station). Indeed, efforts to recast valid regulatory activities as commandeering have been rejected by California courts. In *Farmers Insurance Exchange*, national insurance companies claimed that they were entitled to compensation because that state's insect spraying program had "commandeered" customer vehicles by causing auto body paint erosion. *Farmers Ins. Exch. v. California*, 221 Cal. Rptr. 225, 227, 229–30 (Cal. Ct. App. 1985). The court rejected the claim because a valid exercise of police power is "non-compensable." *Id*. at 230.

2. Buzzell Baselessly Attempts to Expand Section 12.34's Applicability.

Buzzell next asserts that section 12.34 requires the governor or the governing body to provide compensation when commandeered property is used by the general public. Appellant Br. at 12. Buzzell reasons that subdivision two mandates such compensation because the provision does not expressly limit its applicability to government action. *Id.* Buzzell's argument ignores the total absence of support for that assertion in the legislative history,[14] as well as the multiple indications in the text of the statute that the government must direct the commandeering.

Buzzell's interpretation ignores the fact that "commandeering" is fundamentally a governmental activity. Subdivision one expressly states that the commandeering for emergency management purposes must be directed by the governor or the governor's

[14] Buzzell provides no explanation for why the Court should "add words to the statute that the Legislature did not supply" by adding "general public use" into subdivision two. *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 504 (Minn. 2021).

designee—not a private party. Minn. Stat. § 12.34, subd. 1(2). That makes sense given that MEMA is intended to organize and regulate state activity as opposed to private parties. *See generally* Minn. Stat. §§ 12.04. .09, .21 (creating duties for the public safety department and the governor). And commandeering's plain meaning limits its applicability to government action. *See, e.g.*, Commandeer, *American Heritage Dictionary* (5th ed. 2018) ("seize for military or police use; confiscate"). Given this near singular focus on government, it makes little sense to assume that the Legislature intended to extend the statute to apply to private party actions absent express language.

Finally, as a practical matter, the Governor's executive orders never permitted members of the general public to "use" Buzzell's businesses except as paying customers. *See* EO 20-04 ¶ 2; EO 20-63 ¶ 7.c.iv; EO 20-99 ¶ 7.c.iii.A.1 (prohibiting on-site dining while encouraging delivery and takeout food service).

C. Buzzell's Interpretation Leads to Absurd, Impossible, or Unreasonable Results.

Buzzell's interpretation causes "absurd, impossible of execution, or unreasonable" results. Minn. Stat. § 645.17(1); *Save Lake Calhoun*, 943 N.W.2d at 178–79 (applying the statute's plain meaning while considering an alternative statutory reading's unreasonable results). First, Buzzell's interpretation would hold Minnesota's ability to comprehensively respond to emergencies hostage to financial realities. Second, Buzzell's commandeering definition—requiring the state to engage in factually intensive analysis for every potentially impacted party—is impossible to apply in fast-moving emergency situations.

Third, Buzzell's definition provides no reasonable limitation on what may be considered commandeering.

Forcing the state to compensate all property owners impacted by COVID-19 mitigation orders would defeat the purpose of declaring an emergency. Minnesota has more than 12,000 accommodation and food service businesses. Index No. 11 at 76. The state has an additional 50,000 retail trade businesses and 32,000 arts, entertainment, and recreation businesses. *Id.* Buzzell's interpretation would require the Governor to issue formal orders determining compensation for each of them. Given the state's finite resources, a more probable outcome is Minnesota simply would be unable to meaningfully respond to the exigencies presented.

Buzzell's definition importing takings analysis into the definition of "commandeering" also would render the statute impossible to execute. Minn. Stat. § 645.17. Buzzell's definition asks the governor, in the midst of weighing the efficacy and propriety of various emergency responses, to apply a complex and fact-based inquiry. *See DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011) (noting that takings inquiry is highly fact-specific). Incorporating Takings Clause jurisprudence into the definition of commandeer would require the governor, at a minimum, to forecast the economic impact of the emergency executive action and the extent to which it interfered with reasonable, distinct investment-backed expectations for all potentially impacted personal property and facilities. *See Penn Cent. Transp. Co.*, 438 U.S. at 124; *Zeman v. City of Minneapolis*, 552 N.W.2d at 552. It is doubtful that the Legislature intended the governor to perform these complex calculations and sift through

evolving regulatory takings caselaw while responding to emergencies ranging from pandemics, to civil unrest and terrorist attacks. *See* Minn. Stat. §§ 12.34, subd. 1; 12.31, subds. 1–2 (including terrorist incidents and civil disturbances in the declaration of peacetime emergencies).

Finally, Buzzell's definition of "commandeering" has few limitations in its application. Buzzell admits that his conception of commandeering is incredibly broad, stating that "the statute defines compensable use of property to include all activities incidental to functions related to civilian protection." Appellant Br. at 18. Under Buzzell's theory, which does not require any type of direct or affirmative use of property, the state would face endless litigation over whether various emergency actions, in both the public health and other contexts, constituted "commandeering" under Buzzell's expansive definition. Courts would be asked to answer questions such as: Did the state commandeer airlines' fleets during the stay-at-home orders that greatly reduced travel at the onset of the pandemic? *See* EO 20-20 (Mar. 25, 2020). During the civil unrest following George Floyd's murder, did the Governor commandeer all businesses in the Cities of Minneapolis and Saint Paul for several hours by instituting a curfew? *See* EO 20-65 (May 29, 2020). Litigation aside, if Buzzell's definition were to be adopted, in future emergencies, future governors may hesitate to order an evacuation during a forest fire or spring flood event for fear of "commandeered" property claims. Or a county emergency manager may be chilled from ordering a natural gas shut-off following a localized leak or explosion because it might impact operations of other businesses in the area. Adopting an amorphous standard,

such as that offered by Buzzell, would be detrimental to all emergency response, which by its nature requires swift, decisive action.

Forcing the governor to engage in this fact-specific analysis and compensate all property owners impacted by COVID-19 mitigation orders would defeat MEMA's purpose. Instead of facilitating Minnesota's emergency response, section 12.34 would paralyze the state by forcing the governor to engage in takings analysis for thousands of businesses.[15] Applying commandeering's plain meaning avoids this self-defeating outcome. The Court should reject Buzzell's invitation to expand section 12.34 at the expense of evidence-based public health measures.

III. THE COURT NEED NOT ADOPT THE COURT OF APPEALS' DIRECT, ACTIVE USE INTERPRETATION TO DETERMINE NO COMMANDEERING OCCURRED.

In finding Buzzell's property was not commandeered, the court of appeals determined that, under the statute's plain language, "commandeer" requires direct, active use of private property by the government for emergency management purposes. Appellant Add. at 11. Buzzell spends much of his brief fighting against that definition. But this Court need not adopt such a clarifying definition to determine that Buzzell's restaurant,

[15] Nothing prevents the Legislature from voluntarily offering relief to businesses affected by the COVID-19 pandemic. *See, e.g.*, 2020 Minn. Laws 7th Spec. Sess., ch. 2, art. 1 (providing economic relief for businesses adversely affected by the COVID-19 pandemic). The Governor has advocated for such relief. *See, e.g.*, Press Release, Office of Governor Tim Walz, Governor Walz Convenes Special Session of Minnesota Legislature to Pass COVID-19 Relief for Small Businesses, Workers, Families (Dec. 9, 2020), www.mn.gov/governor/news/index.jsp?id=1055-457740.

bar, and event center were not commandeered. Buzzell's claims fail under almost any definition of commandeering that this Court could adopt.

Buzzell alleged that for 71 days his bar and restaurant was limited to offering take out, before being allowed to provide patio service on May 27, 2020. *See* Resp't Add. at 2. Buzzell alleged that as a result of the executive orders, revenues from his bar and restaurant dropped 75%, compared to 2019 revenues, during those closures. *Id.* at 3, 10. Buzzell also claimed that he did not earn any revenue from his event center during the 71 days, but did not provide a comparison to pre-pandemic revenues. *See id.*at 10. Buzzell did not allege that any government agent physically occupied the property at any point or that the government required Buzzell employ his property for a specific purpose.[16]

Taking the facts as true and construing all reasonable inferences in Buzzell's favor, dismissal was appropriate under a litany of potential interpretations of the statute. *See Walsh*, 851 N.W.2d at 606. For example, applying the standard set forth in New Jersey, that "commandeer" authorizes the government to seize private property akin to a physical taking, Buzzell's claims fails because there was no physical use, occupation, or appropriation of his property by the government. *JWC Fitness, LLC*, 2021 WL 4823500, at *5. Buzzell's claim also fails under the available dictionary definitions because the government did not "seize," "confiscate," or "take arbitrary or forcible possession of" his hospitality businesses. Even if the Court were to adopt Buzzell's theory and ignore the

[16] While Buzzell had to follow certain requirements if he chose to provide take-out, such as requiring that patrons socially distance while waiting for food, he was not required to provide take-out service. *See* EO 20-04 ¶ 7.

health and safety purposes of the COVID-19 restrictions, it is not certain that a regulatory taking would exist, considering that the restrictions were temporary and always allowed certain business activities to continue. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 342 (2002) ("[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim.").

Because emergency restrictions on business operations cannot reasonably be considered "commandeering" under the language of the statute, Buzzell's claim fails under almost any standard the Court may adopt.

CONCLUSION

For the foregoing reasons, the Governor respectfully requests that the Court affirm the district court's judgment.

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