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 REPLY BRIEF

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INTRODUCTION

Although well-researched and thoroughly supported, Buzzell's argument is neither "complex" nor "convoluted" as stated by Respondent. (Resp. Br. at 17, 19). Buzzell's argument is simple. Commandeer does not mean use. Use means use. Commandeer means take. Take is akin to a constitutional "take" because of the constitutional principles engrained in the statute.[1] The governor commandeered Buzzell's restaurant, bar, and catering business when he criminalized the operation thereof. This analysis is in line with other State Courts, like Louisianna and New Jersey, which have interpreted their commandeering statutes under that exact same framework.

It appears that Respondent is not defending the "direct, active use by the government" definition of commandeer. Instead, Respondent argues: "Commandeering's plain meaning requires government action that seizes or expropriates private property for direct use by the government or its agents." (Resp. Br. at 9). It is unclear if Respondent believes that "direct use by the government or its agents" is part of the definition of subdivision one's "commandeer" or if Respondent is expressly requesting this Court read "direct" and "by the government or its agents" as additional elements into the subdivision two "use" requirement. In any event, Respondent's amorphous, vague, and internally inconsistent argument attempting to defend the Court of Appeal's erroneous definition of "commandeer" has several fatal problems.

[1] The issue before this Court is of first impression with de novo review. Of course, Respondent is correct that Buzzell's argument has matured over the course of litigation and appeal. However, Buzzell has always argued that commandeer and use are two separate inquiries and that "commandeer" means "take" or "enlist in a task."

First, Respondent incorrectly claims that Minnesota Statute Section 12.34, Subdivision 1 contains a so-called "use requirement." Respondent's entire argument is built upon this faulty foundation. Second, the dictionary definitions universally cited by all parties contradict the "direct, active use" definition and the cases of other jurisdictions expressly support the interpretation that "commandeering" is akin to a constitutional taking. Third, Respondent relies heavily upon two legislators' comments from 2002, which are irrelevant because the statute is not ambiguous and the statutory language predates those comments by 50 years. Fourth, Respondent made a lengthy and irrelevant policy argument in an unconvincing attempt to argue that Buzzell's interpretation is "absurd." Instead, Respondent therein highlighted the absurdity of its interpretation. Finally, Respondent appallingly continues to frame the Executive Orders—which criminalized the operation of Buzzell's business—as mundane, typical government regulation of the restaurant industry. This argument is intellectually dishonest and attempts to rewrite history, as no party believed in the Spring and Summer of 2020 that these shutdown orders were typical restaurant regulations.[2]

REPLY ARGUMENT

I. Respondent's Argument is Built Upon the False Premise That Minnesota Statutes Section 12.34, Subdivision 1 Contains a "Use Requirement."

Respondent attacked Buzzell's interpretation of Minnesota Statute Section 12.34, alleging it "eliminates the 'use' requirement in the first subdivision while inventing a new

[2] Had this case not been dismissed on a Rule 12 motion, Buzzell would have had the opportunity to develop a record and swiftly dispel this notion.

one for the second subdivision." (Resp. Br. at 22.) Respondent goes on to allege "several problems" created by Buzzell's alleged "elimination of subdivision one's 'use' requirement." (*Id.*) This argument made by Respondent suffers a fatal flaw: there is no use requirement in subdivision one. The "use requirement" only exists in subdivision two.

This Court has long and routinely held that a statute's silence on an issue unambiguously removes that issue from the statute. *See Strib IV, LLC v. Cnty. of Hennepin*, 886 N.W.2d 821, 826 (Minn. 2016) (single-member LLCs unambiguously not eligible for "Green Acre classification" when relevant statute did not expressly give single-member LLC "Green Acre classification"). Pursuant to this general rule, this Court rejected an interpretation of the Domestic Abuse Act that would have "read[] an exclusivity requirement into" a statute by incorporating language from one subdivision into another subdivision. *Beardsley v. Garcia*, 753 N.W.2d 735, 738 (Minn. 2008).

Here, subdivision one is silent regarding "use":

> "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."

Minn. Stat. § 12.34, subd. 1. The statute refers to "use" only in subdivision two. *Id.*, subd. 2. Paradoxically, it is Respondent's interpretation that eliminates the so-called use requirement in the second subdivision and invents a new one for the first subdivision.

This fundamental flaw in Respondent's reasoning highlights the exact problem with Respondent's and the Court of Appeals' interpretation of the statute—it conflates the two subdivisions and transplants "use" from subdivision two into subdivision one. This Court has already rejected a similar attempt to read an "exclusivity requirement" from one subdivision to another within the Domestic Abuse Act in *Beardsley*, 753 N.W.2d at 738. This Court should similarly reject Respondent's attempt to read a "use requirement" from subdivision two into subdivision one of Minnesota Statute Section 12.34.

II. The Plain Meaning of "Commandeer" is "To Take" Rather Than "Direct, Active Use."

A. The Dictionary Definitions Universally Cited Contradict the "Direct, Active Use" Definition.

The Court of Appeals, Respondent, and the parties joining in the Amicus Briefs all cite dictionary definitions of "commandeer" then simply ignore those definitions in their respective analyses. Respondent cited definitions of commandeer equating it to a seizure or a taking. (Resp. Br. at 10.) The District of Columbia cited definitions equating commandeer to compelled service and seizure. (D.C. Amicus Br. at 5.) Without analysis to support the logical leap, Respondent and the District of Columbia attempt to convince this Court that those dictionary definitions—contrary to the actual words of the dictionary—support the "direct, active use" definition.

In reality, no party has presented this Court with a dictionary that defines "commandeer" as "direct, active use." Instead, every dictionary definition cited by every party defines "commandeer" as a taking or a seizure. In fact, Merriam-Webster expressly equates "commandeering" to a constitutional taking by providing the following example

of the word in a sentence: "The city commandeered 60 acres of the property by eminent domain for a new high school."[3]

Thus, Buzzell's interpretation of the statute is the only interpretation proffered that actually applies the plain meaning of "commandeer" according to the consensus of the dictionary definitions cited—"commandeer" means "to take." To accept the "direct, active use" definition, this Court would have to ignore the plain meaning of "commandeer." *See Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016) (stating that dictionary important in defining plain meaning of word).

B. The Plain Language of the Statute Differentiates "Commandeering" From "Use."

Respondent claimed that Buzzell's definition of commandeer "ignores the fact that 'commandeering' is fundamentally a government activity." (Resp. Br. at 24.) This is patently false. Buzzell argued extensively that commandeering is a grant of authority specific to the government by the express language of the statute. (Buzzell's Opening Br. at 12-13). This is the essence of Buzzell's argument that "commandeering" is a distinct principle from "use," which is plainly not a grant of authority in the statute. Minn. Stat. § 12.34, subd. 2. Instead, the statute expressly authorizes the general public's use of commandeered property.

By the express language of MEMA, the subsequent "use" of commandeered property must be for an "emergency management purpose." Minn. Stat. § 12.34, subd. 2. A permissible use for emergency management purpose expressly includes "functions

[3] *Commandeer*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/commandeer. (last accessed 12/8/2021).

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. This clearly includes use of the commandeered property by nongovernment actors. For example, the governor could commandeer an event center to be used as a bomb shelter for civilian protection. The general public, not the government, would use the event center and there could be no serious argument that the event center was never commandeered.

Indeed, the Court of Appeals and Respondent agreed that the subsequent use of commandeered property could include nongovernment actors through the "mess hall" or "testing center" hypotheticals. (Resp. Br. in Ct. App. At 14). In these hypotheticals, nongovernment actors would be fed and tested for COVID-19 in property commandeered by the government. Thus, the subsequent use of the commandeered property was understood by all parties to include general public use as a function of civilian protection. Only now, on appeal to the Supreme Court, is Respondent claiming that the subsequent use be limited to government actors in order for a commandeering to have occurred. Respondent's argument that the subsequent "use" of commandeered property must be by the government in order for the property to have been commandeered in the first place is circular, inconstant, and contrary to the express language of the statute.

C. The New Jersey Case Cited in the Amicus Brief of the District of Columbia Mirrors the Analysis Proffered by Buzzell that "Commandeering" is Akin to a Constitutional Taking and is a Separate Concept from "Use".

The Amicus Brief of the District of Columbia goes to great lengths to try to convince this Court that every state court that has ruled on this issue has ruled that "commandeer" means "direct, active use by the government." (D.C. Amicus Br. at 13-16). However, it

fails to cite a single case that has adopted a "direct, active use by the government" definition of "commandeer." Instead, the cases cited in the Brief directly contradict that argument and instead confirm that commandeering statutes are akin to constitutional takings.[4]

For example, the New Jersey Appellate Court stated that: "to 'commandeer' property entails seizing the property or taking possession of it akin to a physical taking under the constitution." *JWC Fitness, LLC v. Murphy*, No. A-0639-20, 2021 WL 4823500, at *12 (N.J. Super. Ct. App. Div. Oct. 18, 2021) (emphasis added). It came to this conclusion, in part, because of the context of the statute and the Merriam-Webster definition of "commandeer" explains commandeering as an exercise of government's eminent domain power. *Id.*, at *12 (citing "*Commandeer, Merriam-Webster*, https://www.merriam-webster.com/dictionary/comma-ndeer).

The New Jersey Court expressly reasoned that the fact that the terms "utilize" and "commandeer" are both in the statute meant they have independent definitions. *Id.* at *13 (defining "utilize" as "use"). The New Jersey Court then ruled:

> "Accordingly, in the context in which the words are used, the most reasonable understanding of the statute is that it authorizes the government to seize private property or take possession of it akin to a physical taking under the constitution, i.e., to "commander" the property, and thereafter "utilize" the property for the governmental purpose of avoiding or protecting against an emergency."

Id. at 13. Thus, The New Jersey Court interpreted the New Jersey commandeering statute in line with New Jersey's takings clause jurisprudence—which is the exact interpretation

[4] Louisianna did not sign on to the District of Columbia's Amicus Brief. As explained in Buzzell's Opening Brief at 24-25, Louisianna Courts ruled that its commandeering statute is a statutory taking.

of Minnesota's commandeering statute that Buzzell proffered: commandeering is a constitutional taking that happens prior to the subsequent use.

However, the New Jersey Emergency Statute differs from MEMA in an important way: the New Jersey Statute expressly guarantees compensation for "the physical taking, destruction, or utilization of private property." *Murphy*, A-0639-20, at *18-19 (emphasis added) (citing New Jersey statutes). Thus, the New Jersey Emergency Statute expressly limits compensation for a "physical taking," giving the New Jersey Court reason to limit commandeering to a "physical taking" under the constitution.

On the other hand, MEMA has no such express "physical taking" limitation for just compensation. Instead, Minnesota's compensation structure is much broader than New Jersey's, guaranteeing compensation for the "use" and "damages while so used." Minn. Stat. § 12.34, subd. 2.[5] Thus, there is no support within MEMA for this Court to limit "commandeering" to include only physical takings under Minnesota's constitution.

Furthermore, Minnesota Courts have long held that its takings clause is broader than the federal and includes temporary takings. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989). New Jersey does not recognize temporary takings under its constitution. *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 282, 296-98 (2001). This was a major component for the New Jersey Court to rule that the New Jersey Orders requiring fitness centers operate outside was not a constitutional taking under New Jersey

[5] The District Court understood this in its reasoning, stating: "compensation for commandeered property is tied to the use of that property under the statute . . .." (Appellant's Add. – 9.)

law. *Murphy*, A-0639-20, at *25-27. Therefore, the narrower New Jersey Takings jurisprudence supported the narrower application of "commandeering." Minnesota's taking jurisprudence is broader, and therefore Minnesota Statute Section 12.34's reference to constitutional takings incorporates the broader Minnesota takings jurisprudence.

D. Minnesota Case Law Supports Buzzell's Interpretation of Commandeering to Include Constitutional and Common Law Principles.

Respondent claims that Buzzell has no support for defining "commandeering" in the context of takings clause jurisprudence even though the rest of the statute clearly uses takings clause language. (Resp. Br. at 18.) This is patently false. This Court has long ruled that "when the legislature uses a phrase [it] assume[s] the legislature is aware of the common law understanding of the phrase and that the legislature intended to use the phrase according to its commonly understood meaning." *Gassler v. State*, 787 N.W.2d 575, 586 n.11 (Minn. 2010); *In re Welfare of D.D.S.*, 396 N.W.2d 831, 832 (Minn. 1986).

As stated in Buzzell's Opening Brief, Minnesota's "whole-statute" doctrine requires this Court interpret words of a statute in the context of the surrounding words. *State v. Prigge*, 907 N.W.2d 635, 639 (Minn. 2018). Technical words get special meaning. Minn. Stat. § 645.08 (1). Here, "commandeering" is in a statute surrounded by technical words with special common law meanings under takings clause case law. *See* Minn. Stat. § 12.34 ("Compensation for Taking"; "just compensation," public use, private property). Therefore, "commandeering"—a word of like import to "taking"— must be understood within the context of the takings clause phrases. *See Hous. & Redevelopment Auth. of Duluth v. Lee*, 852 N.W.2d 683, 690-91 (Minn. 2014) (looking to surrounding words and

phrases to determine whether the "phrase 'conflicts with' in Minn. Stat. § 504B.177(b) has a technical meaning that refers to the doctrine of conflict preemption.") Thus, under the "whole-statute" doctrine consistently used by this Court to define words within a statute, it is clear Minnesota Statute Section 12.34 is a takings statute and should be interpreted as such.

On the other hand, Respondent wants this Court to believe that a commandeering only occurs upon a physical "expropriation" of property by the government that is subsequently used directly by the government or its agents. (Resp. Br. at 9.) This interpretation is squarely at odds with this Court's longstanding directive that legislatively granted authority to take private property be "strictly construed" to allow the government to take "only such an estate or interest . . . as is necessary to accomplish the purpose." *Fairchild v. City of St. Paul*, 46 Minn. 540, 544, 49 N.W. 325, 326 (1891) (stating "when an easement is sufficient, no greater estate can be taken" when statute authorized government taking of private property); *see also Hebert v. Fifty Lakes*, 744 N.W.2d 226, 231 (Minn. 2008) (rejecting city's argument that "eminent domain provision in [Minn. Stat. § 508.02] include acquisition by de facto taking" and instead required formal proceedings under Minn. Stat. § 117).

Contrary to the long-standing principle that statutorily granted government taking of private property only be as intrusive as needed, Respondent wants this Court to interpret commandeering in a matter that gives the government the incredible of power to permanently dispossess private business owners of their business and retain ownership of

the business past the end of the declared emergency.[6] For, Respondent argues, anything less is not a commandeering. That level of power is not necessary to accomplish the "emergency management purpose" for the which the commandeering must further. Thus, consistent with this Court's 130-year tradition, it must reject the highly intrusive interpretation proposed by Respondent.

III. Respondent's Legislative History Argument is Legally Inapplicable and Factually Irrelevant.

Respondent cited to two legislators' comments during the 2002 amendments to MEMA as some sort of evidence regarding statutory interpretation. These two legislators' comments are irrelevant to the interpretation of Minnesota Statutes Section 12.34 for two reasons: (1) no party has alleged the statute is ambiguous, and (2) the "commandeer" and "use" language of the statute predate the cited legislators' comments by half a century. Furthermore, the historical context of the statute supports the conclusion that it was created to fill the gap of compensation created by the emergency exception to takings clause jurisprudence.

A. The Legislative History in Irrelevant to the Interpretation of Minnesota Statute Section 12.34 Because the Language is Unambiguous.

Respondent cited the comments of two individual state senators during the 2002 floor debates when Minnesota Statute Section 12.34 was expanded to cover bioterrorism and novel diseases. (Resp. Br. at 14-15). However, "contemporaneous legislative history"

[6] Expropriate means "to transfer (the property of another) to one's own possession." *Expropriate*, Merriam-Webster: https://www.merriam-webster.com/dictionary/expropriating. (last access 12/8/21).

is only relevant to construe an ambiguous statute. Minn. Stat. § 645.16(7); *Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315, 321 n.6 (Minn. 2018) (interpreting unambiguous statute limited to words of statute). Neither party has argued the statute is ambiguous because it is not. Thus, the legislative history is irrelevant.

B. The Language of the Statute at Issue was Minnesota Law for 50 Years Prior to the Comments Made by the State Senators Cited by Respondent.

MEMA was preceded by the Minnesota Civil Defense Act, which was enacted in 1951. (App. Repl. Add. - 12-13 (1951 Minn. Laws Ch. 694 § 304).) Section 304, subdivision 1 of the Act gave the governor authority to "commandeer, for the time being, any motor vehicle, tools, appliances or any other property." (App. Repl. Add. - 13) Subdivision 2 then created the process for just compensation to the "owner of any property so commandeered for the use thereof and all damages done to the property while so used." (App. Repl. Add -13.) The process was identical to that which still exists as Minnesota Statute Section 12.34, subdivision 2.

The Civil Defense Act became law in 1951. The comments of two legislatures cited by Respondent were made over 50 years later in 2002. There can be no serious contention that comments made in 2002 by two entirely new legislators have any bearing on the intent of the legislature from the 1940s and 1950s. In fact, the original language in subdivision two only verifies that the original legislatures understood "commandeered" property to be a different concept than "used" property. The statute then was worded slightly different: "owner of any property so commandeered" rather than today's "owner of commandeered property." *Compare* Minn. Stat. § 12.34, subd. 2 1951 Minn. Laws Ch. 694 § 304 subd.

2. However, the operation is the same: the owner of property that was commandeered by the governor must be promptly paid just compensation for the use thereof and damages from the use thereof.

C. The Emergency Exception for Taking Clause Jurisprudence Predates *Penn Central* and Ties into the 1951 Civil Defense Act.

Respondent argued that Buzzell has no support for the contention that MEMA and the Civil Defense Act sought to close the gap in takings jurisprudence that prevented property owners from receiving compensation when their property was taken in an emergency. (Resp. Br. at 18.) It argued that the emergency exception did not exist until *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), thus Minnesota legislatures could not possibly have intended the fill the gap in 1951. This contention is demonstrably false. This Court in *Zeman v. City of Minneapolis*, discussed the longstanding emergency exception in takings clause analysis, citing U.S. Supreme Court cases from 1887, 1915, and 1928. 552 N.W.2d 548, 553 (Minn. 1996) (citing *Mugler v. Kansas*, 123 U.S. 623, 661-62 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928)).

In fact, the 1950 Minnesota Legislature would likely have been very aware of the *Mugler* emergency exception, as this Court cited it in three separate cases in the 1940s to uphold as constitutional the government's taking of property to protect the community. *See State v. Sportsmen's Country Club*, 214 Minn. 151, 157 (1943) (citing *Mugler* and granting injunction when operation of bar that was "nuisance [that] affects the health, morals, or safety of the community"); *see Abeln v. City of Shakopee*, 224 Minn. 262, 267

(1947) (citing *Mugler* and ruling the constitution does not prevent government from enacting laws for the "protection of the public health, welfare, and morals"); *see Anderson v. City of St. Paul*, 226 Minn. 186, 190 (1948) (citing *Mugler* and ruling that "the sale of intoxicating liquor" was a "danger to the community" and prohibiting the sale of liquor was constitutional.) Indeed, this Court first cited *Mugler* in 1927 to uphold as constitutional the "condemnation of One Buick Sedan Automobile upon the ground that it was unlawfully used in the transportation of intoxicating liquor." *State v. Thornson*, 170 Minn. 349, 350, 352 (1927).

From the 1920s through the end of the 1940s, this Court had used *Mugler* to deny compensation to property and business owners who were harmed by government action or taking of property rights when that action or taking was meant to protect public health and safety. It is not a "logical leap" to suggest that the 1950 legislature was aware of these rulings when it specifically granted just compensation for property owners whose property would be taken and damaged by government action when "necessary to save life or property." (App. Repl. Add. - 12). In fact, this Court presumes the legislature was aware of those rulings. *Gassler*, 787 N.W.2d at 586 n.11. Therefore, there exists ample evidence that the legislature intended to "close the gap" created by the emergency exception and address the exact injustice Buzzell faces when he suffered serious harm by government action during an emergency.

IV. Respondent's "Absurd Results" Section is an Irrelevant Policy Argument Masquerading as Legal Analysis.

Respondent argued Buzzell's interpretation would lead to absurd, impossible, or unreasonable results. (Resp. Br. at 25). However, "the consequences of a particular interpretation" is a principle of statutory construction only relevant after a finding of ambiguity, which neither party has argued. Minn. Stat. § 645.16(6); *see in re Kleven*, 736 N.W.2d 707, 711 (Minn. Ct. App. 2007) (considering absurdity of an interpretation only after finding the statute ambiguous). Thus, the entire line of argument is irrelevant here.

Furthermore, Respondent's argument fails to actually articulate any absurd results from Buzzell's interpretation. It argues that the government should not have to be aware of takings clause jurisprudence, (Resp. Br. at 26), and that it would be an absurd result for the government to have to compensate every business owner it harmed in its Executive Orders. (Resp. Br. at 25-28 (citing "financial realities" and the tens of thousands of businesses effected). However, neither of these outcomes are absurd.

A. Respondent Should Know the Limits of Government Power Before Exercising Government Power.

The takings clause is a limit on government power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922) (taking occurs when regulation "goes too far"). Respondent's suggestion that it would be "impossible" for the government to know the limits of its power before acting is a troubling suggestion. (Resp. Br. at 26.) This Court expects even small municipalities across the state to abide by takings clause analysis and provide procedures for just compensation to property owners when a government entity "goes too far." *See Moorhead Economic Development Authority v. Anda*, 789

N.W.2d 860, 868 (Minn. 2010) (describing "quick-take" procedure for eminent domain powers compared to the standard lengthy process.) There is no reason the governor of the State of Minnesota should be blind to taking clause analysis when the action of the governor's office similarly, "goes too far" and ignore the process of just compensation established by the legislature. Of course, in Minnesota Statute Section 12.34, subdivision 1, "commandeering" is not a limit but an express grant of authority. There is nothing absurd about a governor having to know the scope of the office's authority.

B. Respondent's Suggestion That It Should Be Absolved of Its Statutory Obligation to Pay Just Compensation Because It Commandeered Potentially Thousands of Facilities is Absurd.

Respondent has cited financial realities and the breadth of those affected by the Orders as reasons why it would be absurd to pay just compensation to all those whose property was commandeered. (Resp. Br. at 25-28.) As a preliminary matter, this argument is unfounded because Minnesota Statute Section 12.34, subdivision 2 guarantees just compensation for the use of commandeered property and damages while so used. Therefore, the definition of "commandeer" does not establish the right to just compensation, it merely opens the door. Contrary to Respondent's repeated inaccuracy, Buzzell is not asking this Court for compensation. Buzzell is asking this Court to order Respondent to issue a "compensation order" for the use of Buzzell's commandeered property as required by Minnesota Statute Section 12.34, subdivision 2. Any owner of

"commandeered property" would still need to establish use and damages while so used to qualify for just compensation.[7]

Furthermore, this argument highlights the true absurdity of Respondent's position. Respondent wants to avoid its clearly articulated obligation to promptly pay just compensation to commandeered property owners simply because its Orders harmed too many people. This interpretation leads to the absurd result of the government commandeering in the thousands to avoid justly compensating the one property owner whose facility it actually needed. *See American Family Insurance v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000) ("Finally, courts should construe a statute to avoid absurd results and *unjust consequences*.")

To avoid paying property owners, all the government would have to do is commandeer as much property as possible. For example, if the State of Minnesota was suffering a shortage of ambulances, the governor would have full authority to commandeer a few trucks from any private car lot and compensate the lot owner for the use of the trucks. Minn. Stat. § 12.34, subds. 1 & 2. The governor could then allow those trucks to be used by a private hospital to transport COVID-19 patients. However, under Respondent's argument, the governor would be better suited to order a temporary halt on the sale of all vehicles in Minnesota by any private party or dealer for the purpose of preserving the

[7] Importantly, there is no statutory requirement that the property be "directly and actively used by the government" to trigger just compensation. *See* Minn. Stat. § 12.34, subd. 2. Reading those requirements into the statute creates an additional burden not included in the plain language of the statute and effectively rewrites it to be far more restrictive that the statute itself is written.

government's ability to use any vehicle it deems necessary to transport COVID-19 patients. That way, tens of thousands of people across the state would have suffered damages, but no one would have recourse unless the government actually drove the vehicle. This would be absurd and unjust. *See Schroedl*, 616 N.W.2d at 278; *see also Kleven*, 736 N.W.2d at 711 (rejecting an interpretation of the Vulnerable Adults Act that would have resulted in an application permitting progressively greater mistreatment the more vulnerable an adult is.)

The ambulance hypothetical also highlights the absurdity of a "direct, active use by the government" definition of "commandeer." The governor could order the physical removal of every single truck in every single car dealership by private hospital staff to be used by private hospitals to transport COVID-19 patients. Under Respondent's definition of commandeer, no commandeering would have ever occurred to trigger just compensation for the use of the vehicles because the hospital, rather than the government, directly and actively used the vehicles. And, because tens of thousands of vehicles were commandeered, Respondent would argue it would not have to pay just compensation because too many people were harmed.

Therefore, Respondent's interpretation, not Buzzell's, leads to absurd and unjust results.

C. Respondent's Argument Disparately Impacts Communities of Color.

The Amicus Brief of the Housing Agencies alleges that Buzzell's interpretation will disparately affect communities of color in housing matters. (Housing Amicus Br. at 7).

This argument is misguided, irrelevant, and contrary to the basic facts that communities of color were disproportionately hurt by the government shutdowns.

Nearly 20 percent of businesses in Minnesota were minority-owned firms as of 2017.[8] Nationally, 41 percent of black-owned businesses and a 32 percent of Latinx-owned businesses permanently closed during the pandemic.[9] In Minnesota, Latinx-owned businesses were impacted greater by the pandemic than white businesses and reported a much greater difficulty in accessing government resources than white businesses.[10]

Furthermore, Black and Latinx workers were more vulnerable to layoffs than white workers, particularly because of their higher representation in the food industry.[11] In Minnesota, 60 percent of black workers and 50 percent in Indigenous works filed for at least one week of unemployment insurance since the pandemic began.[12] Over 25 percent of black workers filed for multiple weeks of unemployment in the summer of 2020 after the shutdown orders were put in place, a number that improved to 10 percent after June, 2020.[13] Only 1 percent of white workers have filed for multiple weeks of unemployment

[8]https://www.minneapolisfed.org/article/2021/despite-recent-gains-minnesotas-entrepreneurs-of-color-face-persistent-barriers. (last accessed 12/8/2021).
[9]https://www.nber.org/reporter/2020number4/covid-19-small-business-owners-and-racial-inequality. (last accessed 12/8/2021).
[10] Rodolfo Gutierres, Impact of COVID-19 on Latino-Owned Firms in Minnesota. Dec. 29, 2020. Accessed via https://conservancy.umn.edu/handle/11299/218207. (last accessed 12/8/2021).
[11] https://mn.gov/covid19/data/data-by-race-ethnicity/index.jsp. (last accessed 12/8/2021).
[12] https://mn.gov/covid19/data/data-by-race-ethnicity/index.jsp. (last accessed 12/9/2021).
[13] https://mn.gov/covid19/data/data-by-race-ethnicity/index.jsp. (last accessed 12/8/2021).

since the June, 2020.[14] Clearly, the governor's orders shutting down the restaurant industry disparately impacted communities of color.

Thus, to the extent the housing issues are even relevant here, the concerns of the housing agencies are balanced by the fact that minority-owned businesses also have a stake in recovering just compensation for Respondent's commandeering of their property.

IV. Respondent's Continued Assertion that The Shutdown Orders Were Merely Extensions of Typical Restaurant Regulations Is Internally Inconsistent and Intellectually Dishonest.

Respondent continues to frame the governor's shutdown orders as nothing more than typical government regulation. Citing licensing requirements, inspections, and capacity limitations for buildings, Respondent claims that restaurants are "always subject to health and safety regulations." (Resp. Br. at 4). Respondent claimed that that the shutdown orders were only "temporary", (Resp. Br. at 9), and were merely "adjustments to existing regulations." (Resp. Br. at 11.) This argument is both internally inconsistent and intellectually dishonest.

First, the "temporary" nature of the Executive Orders is completely inconsequential to whether a commandeering took place. There is no statutory authority for permanent government action pursuant to MEMA. Because the Executive Orders are only authorized during a declared emergency, any use of commandeered property authorized thereunder can only be temporary. The legislature created the compensation structure in Minnesota Statute Section 12.34, subdivision 2 knowing that the subsequent use of the commandeered

[14] https://mn.gov/covid19/data/data-by-race-ethnicity/index.jsp. (last accessed 12/8/2021).

property would necessarily be temporary because permanent use would exceed the statutorily granted authority. Therefore, the temporary nature of the Executive Orders commandeering Buzzell's property is nugatory though true.

Second, all parties acknowledged that the Executive Orders contained drastic measures enacted under special circumstances. In support of the Executive Order 20-04, the governor stated that the pandemic "threatens the lives of Minnesotans." (Compl., Index 1, Ex. 7). In its Brief, Respondent argued that the shutdown orders were "necessary measures" to combat the "deadly exigencies posed by the COVID-19 pandemic." (Resp. Br. at 2). The District of Columbia and the ten states joining it stated that the "COVID-19 pandemic was (and still is) an unprecedented crisis." (D.C. Amicus Br. at 4 (emphasis added).) Yet, Respondent also wants this Court to believe that the shutdown orders were merely "temporary changes to existing health and safety regulations" that the government apparently could have imposed on restaurants without a pandemic for justification. (Resp. Br. at 9). Essentially, Respondent wants this Court to believe that it responded to an unprecedented crisis by declaring a state of emergency so that it could simply alter existing regulations in a matter that could have been done absent an emergency.

This argument defies credibility and common sense. Respondent has conceded that it banned and criminalized[15] the operation of a bar, restaurant, and caterer for 71 days. (Resp. Br. at 6). There can be no serious contention that the absolute prohibition of onsite drinking and eating in a bar and restaurant is a mere extension of the typical regulations

[15] *See State v. Hanson*, Court File No. 24-CR-21-137 for pending criminal trial of restaurant owner who violated Executive Orders during the shutdown.

bars and restaurants always navigate. The Executive Orders were far from licensing, capacity, or food storage regulations meant to protect a patron from the restaurant. (Resp. Br. at 5 (citing Minn. Stat. §§ 157.16, 157.20, 340A.401 and fire codes).) Instead, the Executive Orders completely banned and criminalized the only operations of Buzzell's businesses—serving food and alcohol to guests at the establishment—to protect the public from the spread of COVID-19.

To that end, had Buzzell been given an opportunity to build his case before the Rule 12 dismissal, the evidence would have proven he lost 94 percent of expected revenue during the shutdowns and had to sell property to keep his businesses alive. (Compl., ¶ 54). Clearly, the Orders were not typical restaurant regulations and no one—not even the governor—believed that when the Orders were enacted.

CONCLUSION

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,

Dated: December 9, 2021

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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 5,737 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.

Dated: December 9, 2021

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