STATE OF MICHIGAN
IN THE SUPREME COURT

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| MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., and MIRAGE CATERING, INC., Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>v<br><br>ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services, PATRICK GAGLIARDI, in his official capacity as Chair of the Michigan Liquor Control Commission, and GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,<br><br>Defendants. | Supreme Court No. 165169<br><br>Court of Appeals No. 358755<br><br>Court of Claims No. 21-000126-MZ<br>HON. ELIZABETH L. GLEICHER<br><br>Macomb Co. Case No. 2021-001836-CZ<br>HON. JAMES M. BIERNAT, JR. |

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**DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

DANA NESSEL
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Darrin F. Fowler (P53464)
Daniel Ping (P81482)
Assistant Attorneys General
Attorneys for Defendants-Appellees
Corporate Oversight Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

Page

**Cases**

**Statutes**

**Other Authorities**



**Rules**



**Constitutional Provisions**

## STATEMENT OF JURISDICTION

Defendants-Appellees concur with the statement of jurisdiction provided by Plaintiffs-Appellants. This Court has jurisdiction to consider Plaintiffs' application pursuant to MCR 7.305.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Court of Claims Act gives the Court of Claims exclusive jurisdiction over claims for money damages against the State and its officials, except as otherwise provided by law. Although Plaintiffs assert a right to jury trial to assess the just compensation owed for certain takings, there is no constitutional or statutory right to a jury trial for the claims Plaintiffs alleged. Was jurisdiction proper in the Court of Claims?

   Plaintiffs' answer: No.

   Defendants' answer: Yes.

   Court of Claims' answer: Yes.

   Court of Appeals' answer: Yes.

2. The Takings Clause of the Michigan Constitution provides that private property may not be taken for public use without just compensation. Plaintiffs allege that Defendants took their property without just compensation by way of indoor-occupancy restrictions necessitated by the exigencies of the COVID-19 pandemic. Did Plaintiffs, in challenging these mitigation efforts, state a viable takings claim?

   Plaintiffs' answer: Yes.

   Defendants' answer: No.

   Court of Claims' answer: No.

   Court of Appeals' answer: No.

3. Michigan law provides immunity from tort liability for state actors such as Defendants. Appellants have alleged Defendants have committed two torts. Did Appellants properly plead in avoidance of Defendants' immunity and, if so, otherwise state viable tort claims against the Defendants as a matter of law?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Claims' answer: No.

   Court of Appeals' answer: No.

## INTRODUCTION

This putative class action, brought by Mount Clemens Recreational Bowl, Inc., K.M.I., Inc., and Mirage Catering, Inc. (Plaintiffs), seeks to impose takings liability on the State for its response to the COVID-19 pandemic—namely, Defendants' orders temporarily restricting indoor dining at restaurants. Plaintiffs maintain these orders constitute a regulatory taking for which they are constitutionally entitled to compensation, as well as a jury trial.

As both courts below duly recognized, the legal premise of this lawsuit is unfounded. Settled law makes clear that a compensable taking does not, as a matter of law, arise from the State's exercise of its police power to protect the public health and safety from imminent and deadly threats like COVID-19. And for good reason. Such liability would force the government to choose between letting the pandemic blaze through the citizenry unchecked or face bankruptcy for its efforts to mitigate the same. And while that threshold legal point is alone dispositive of Plaintiffs' claims, further analysis only confirms that they fail as a matter of law. Discovery in this case cannot change that legal conclusion.

Courts across the country are in accord, routinely dismissing COVID-related takings claims. The Court of Claims and the Michigan Court of Appeals rightly reached that same conclusion here. So too was each court correct in dismissing Plaintiffs' tort-based claims and rejecting their challenge to the Court of Claims' jurisdiction over this case. Further review is neither needed nor warranted. This Court should deny Plaintiffs' application for leave to appeal.

## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

### A. The nature of the COVID-19 pandemic and the State's response

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a family of viruses that cause respiratory illnesses), but the strain is novel. The virus is highly contagious, spreading easily from person to person through respiratory droplets, and can cause severe illness and death. When COVID-19 hit the United States in 2020, there was no general or natural immunity built up in the population, and few treatments existed to combat the disease itself. During the period relevant to this case, no vaccine was widely available.

On March 10, 2020, in anticipation of the pandemic spreading in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to her under Michigan law.[1] With this authority invoked, the Governor began to issue executive orders to stem the spread of COVID-19, which included placing certain restrictions on gatherings and on public access to food service establishments and other places of public accommodation. These orders consistently permitted—indeed, encouraged—food service establishments to continue to serve the public through pick-up and delivery service, and allowed gatherings to occur and on-premises dining service to be offered to varying extents

[1] All executive orders can be found at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

as pandemic conditions permitted.[2] At the same time, Michigan's Department of Health and Human Services (DHHS) issued emergency orders under the distinct and independent authority provided by Michigan's Public Health Code, MCL 333.1101, *et. seq*., to protect the public health as the needs of the State required.[3] These orders reinforced the measures put in place by the Governor's orders, including their temporary restrictions on indoor dining and gatherings to mitigate the virus's spread.[4]

Governor Whitmer continued issuing executive orders to combat the spread of COVID-19, constantly and carefully recalibrating the orders' mitigation measures to meet the ever-changing demands of the pandemic, until early October 2020, when the Michigan Supreme Court handed down its decision in *In re Certified Questions*, 506 Mich 332 (2020). Soon thereafter, Michigan, much like the rest of the country,

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[2] See, e.g., E.O.s 2020-5, 2020-9, 2020-11, 2020-20, 2020-21, 2020-42, 2020-43, 2020-59, 2020-69, 2020-70, 2020-77, 2020-92, 2020-96, 2020-110, 2020-115, 2020-143, 2020-160, 2020-176, 2020-183.

[3] All MDHHS emergency orders can be found at: https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/mdhhs-epidemic-orders.

[4] See, e.g., Emergency Order Pursuant to MCL 333.2253 Regarding Executive Orders 2020-11, 2020-20, and 2020-21, https://www.michigan.gov/documents/coronavirus/DHHS_Order_Incorporating_EOs_into_epidemic_finding_final_4-2-20_002_685693_7.pdf. As summarized in Defendants' Brief in Support of their Motion for Summary Disposition before the Court of Claims, the restrictions on gatherings for indoor dining were informed by public health experts' identification of such gatherings as high risk in this pandemic, given the inability to mask consistently when eating or drinking and the heightened risk of transmission that attends sustained indoor gatherings more generally. (See Defs' MCOA App'x, pp 5-11.)

was on the precipice of a second wave of cases and deaths.[5] In the face of rapidly increasing COVID-19 infections and related hospitalizations, DHHS issued a public health order on November 15, 2020, targeting indoor social gatherings and other group activities.[6] Under that order, food service establishments were not permitted to offer indoor-dining services on premises, but could still offer outdoor dining, delivery, and pickup services.[7] DHHS's January 22, 2021, Order loosened these restrictions on gatherings for the purpose of indoor dining, allowing such gatherings at 25% capacity except between the hours of 10:00 p.m. and 4:00 a.m.[8] On March 2, 2021, DHHS issued a subsequent Order loosening these restrictions further, allowing 50% capacity at food service establishments for indoor dining and extending the hours for such gatherings until 11:00 p.m.[9] These updates were "designed to balance reopening while controlling the spread of COVID-19" and were based on improving hospital capacity, overall case rates, and test positivity rates.[10]

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[5] See Preamble, Emergency Order Under MCL 333.2253 – Gatherings and Face Mask Order (Dec 7, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-546790--,00.html.

[6] Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (Nov 15, 2020), https://www.michigan.gov/documents/coronavirus/2020.11.15_Masks_and_Gatherings_order_- _final_707806_7.pdf.

[7] *Id*. § 3.

[8] Emergency Order Under MCL 333.2253 – Gatherings and Face Mask Order (Jan 22, 2021), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-550215--,00.html

[9] Emergency Order Under MCL 333.2253 – Gatherings and Face Mask Order (Mar 2, 2021), https://www.michigan.gov/coronavirus/0,9753,7-406- 98178_98455-553387--,00.html.

[10] See *MDHHS: Updated MDHHS Orders Expand Restaurant Capacity, Increase Gathering and Capacity Limits, Allow for Expanded Visitation at Residential Care*

According to researchers at the University of Michigan, restrictions on gatherings and social distancing measures may have prevented over 100,000 COVID-19 cases in Michigan over the 2020 holiday season and saved thousands of lives.[11]

As Michigan headed into the spring of 2021, it began to experience another surge in cases, necessitating that the 50% capacity and 11:00 p.m. curfew restrictions on indoor dining, and certain other limitations on gathering, remain in place until June 1, when the curfew restriction expired.[12] By June 22, 2021, all restrictions on indoor dining and gatherings had been lifted.[13]

### B. Proceedings Below

On June 7, 2021, Plaintiffs filed their summons and complaint with the Macomb County Circuit Court containing three counts: (1) regulatory taking, (2) tortious interference with contract, and (3) tortious interference with a business

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*Facilities* (Mar 2, 2021), https://www.michigan.gov/coronavirus/news/2021/03/02/updated-mdhhs-orders-expand-restaurant-capacity-increase-gathering-and-capacity-limits-allow-for-ex.

[11] *Strict public health measures during holidays likely saved lives in Michigan, U-M researchers say* (Jan 28, 2021), https://news.umich.edu/strict-public-health-measures-during-holidays-likely-saved-lives-in-michigan-u-m-researchers-say/#:~:text=Increased%20social%20distance%20measures%20over,of%20Michigan%20School%20of%20Public.

[12] Emergency Order Under MCL 333.2253 – Gatherings and Face Mask Order (May 24, 2021), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-560465--,00.html.

[13] Recission of Emergency Orders (June 17, 2021), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455_98456_103043-562057--,00.html.

relationship. (Appellants' MCOA App'x, pp 32(a)–34(a).) Plaintiffs styled the complaint as a class action, stating they intended to represent the interests of approximately 17,000 "similarly situated food-service establishment businesses throughout Michigan." (*Id.* at 31(a).)[14] Plaintiffs filed a jury demand with their complaint. (*Id.* at 36(a)–37(a).) On June 15, 2021, Defendants filed a notice of transfer to the Court of Claims. (*Id.* at 38(a)–39(a).) On July 9, 2021, Defendants filed their motion for summary disposition, arguing Plaintiffs failed to state claims upon which relief could be granted and did not plead viable tort claims. (*Id.* at 6(a).) On July 16, 2021, Plaintiffs filed an emergency motion to transfer the case back to the Macomb County Circuit Court on the basis of their claimed right to a jury trial. (*Id.* at 16(a).)

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[14] It bears noting that, prior to the filing of the instant lawsuit, another suit was filed in Macomb County Circuit Court alleging these same claims against Defendants by an association ("MCRBBA") purporting to comprise restaurants, bars, and banquet halls in Macomb County and represented by Plaintiffs' counsel here; the association's full membership was not identified in the suit, but court filings indicate that, of the instant Plaintiffs, at least Mount Clemens Recreational Bowl, Inc. was a member. The case was transferred to the Court of Claims, which rejected the plaintiff's challenge to its jurisdiction and dismissed the suit for lack of standing. The Court of Appeals affirmed, and the matter is now pending on application in this Court. *Macomb County Restaurant, Bar & Banquet Ass'n v Hertel*, Docket No. 165042. This Court can take judicial notice that, in the context of that appeal, MCRBBA submitted a document by which Appellant Mount Clemens Recreational Bowl purportedly assigned to MCRBBA the very claims it raises here. While Defendants are skeptical about the legal effect of that assignment, particularly in the context of the takings claim, resolution of that concern here is unnecessary given the defects in the claims applicable to all Plaintiffs. In any event, the presence of this purported assignment only further counsels against granting leave in this case.

Court of Claims Judge Gleicher simultaneously denied Plaintiffs' emergency motion to transfer the case back to the circuit court and granted Defendants' motion for summary disposition on September 14, 2021. (*Id.* at 13(a).) The court held that its jurisdiction over Plaintiffs' claims was proper, noting that Plaintiffs had "failed to establish their right to a jury trial on any of the claims pled in the complaint." (*Id.* at 8(a).) The court also found that Plaintiffs failed to state a takings claim, and that their tort claims were barred by immunity. (*Id.* at 11(a)–12(a).)

Plaintiffs appealed by right to the Court of Appeals. In a unanimous decision issued November 17, 2022, that court affirmed in all respects. The opinion contained three holdings that frame the parties' questions presented in the instant application.

*First*, it held that the Court of Claims properly denied Plaintiffs' motion to transfer the case back to the circuit court. Plaintiffs had attempted to avoid the Court of Claims' jurisdiction by invoking statutory rights to a jury trial, MCL 600.6421(1), but those statutes had no application where (1) Defendants never allegedly "acquired" the property; (2) the takings claims arose under an inverse-condemnation theory; and (3) the jury trials in question, even if applicable, would have related only to the amount of just compensation owing—not the threshold matter of whether a taking occurred. (Slip op at 4–6.)

*Second*, the Court of Appeals confirmed that no taking occurred under the non-categorical regulatory takings theory Plaintiffs advanced. Applying its decision in *Gym 24/7 Fitness, LLC v Michigan*, ___ Mich App ___ (2022) (Docket No.

355148), the court recognized that under ample state and federal precedent, including the balancing test articulated in *Penn Central Transportation Co v New York City*, 438 US 104 (1978), Plaintiffs' claim failed as a matter of law. (Slip op at 6–9.)

*Third*, and finally, the Court of Appeals affirmed the Court of Claims' holding that Plaintiffs had failed to plead in avoidance of governmental immunity with respect to their tort claims. It held that no defendant was alleged to have acted in a way that satisfied any of the five statutory exceptions to governmental immunity. (Slip op at 10–11, citing *Mack v City of Detroit*, 467 Mich 186, 195 n 8 (2002).) The court further held that, even if there existed an exception for "ultra vires" activity as Plaintiffs claimed, it would not apply here for numerous reasons. (Slip op at 11–12.)

This application for leave to appeal followed.

## ARGUMENT

### I. Jurisdiction was proper in the Court of Claims.

#### A. Standard of Review

Challenges to jurisdiction of the Court of Claims require interpretation of the Court of Claims Act. *Doe v Dep't of Transp,* 324 Mich App 226, 231 (2018). Questions of statutory construction, including of the Court of Claims Act, are reviewed de novo. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth,* 468 Mich 763, 767 (2003).

### B. This case was properly transferred to the Court of Claims.

Plaintiffs challenge to the Court of Claims' jurisdiction is limited to their regulatory takings claim; they do not contend that court lacked jurisdiction over their tort claims (and rightly so). Plaintiffs' limited challenge is premised on their belief that they are entitled to a jury trial on the issue of just compensation. But as both courts below duly recognized, this challenge is misguided for several independently sufficient reasons.

Plaintiffs' claims are all against State officers in their official capacities, making them claims against the State itself. *Mays v Snyder*, 323 Mich App 1, 88 (2018). This puts Plaintiffs' claims squarely within the exclusive jurisdiction of the Court of Claims as set forth in the Court of Claims Act:

> Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1).]

Some version of this text has existed for more than a half century. Over that time, various plaintiffs have attempted to assert a right to trial by jury against the State. But there is no fundamental right to a trial by jury against the State under Const 1963, art 1, § 14. *Freissler v State*, 53 Mich App 530, 535 (1974). As the *Freissler* court explained, this is because the State is a sovereign that is immune from suit, meaning it can control through legislation the extent to which it will be subjected to jury trials. *Id.* at 533. When parties attempt to assert a right to trial

by jury against the State, "the question is not whether there would ordinarily be a right to a jury trial as between private parties, but whether there is a specific right to a jury trial *against the state*." *Elia Cos v Univ of Mich Regents*, 335 Mich App 439, 457 (2021).

Plaintiffs attempt to invoke the exception under the Court of Claims Act provided in MCL 600.6421(1) as the basis for their assertion the claims belong in circuit court. That exception states:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue. [MCL 600.6421(1).]

The first sentence of MCL 600.6421(1), which was added by the Legislature in 2013, is instructive. It makes clear the Legislature's intent that other changes to the Act were not to be construed as expanding or limiting any rights to a jury trial existing prior to those legislative amendments.[15] Since these amendments also included having Court of Appeals judges—who traditionally do not preside over jury trials—replace circuit court judges in performing the Court of Claims' functions,

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[15] The Court of Claims moved from the Ingham County Circuit Court to the Court of Appeals under 2013 PA 164, effective November 12, 2013. The text of MCL 600.6421 was modified through 2013 PA 205 to include the first sentence, which made clear that the change did not expand existing jury trial rights, effective December 18, 2013.

there is an obvious logic to this recitation. In the pre-amendment era, a circuit judge could preside over a trial involving claims against the State for which no jury trial is available, as well as claims submitted to a jury, without bifurcation. See, e.g., *Freissler*, 53 Mich App at 533–534, and *Lumley v Bd of Regents for the Univ of Mich*, 215 Mich App 125, 133 (1996). The 2013 amendments split these two functions, giving nonjury claims against the State to Court of Appeals judges in the Court of Claims and jury claims against the State to trial courts in the appropriate venue. Section 6421(1) simply clarified that Court of Appeals judges were not taking on responsibility for jury trials; it did not create any new rights.

Plaintiffs' primary argument for removal back to the Macomb County Circuit Court is their alleged right to jury trial on their takings claim that was "otherwise provided by law," MCL 600.6421(1). (App for Lv, pp 7–8.) Plaintiffs then point to three statutes they say may include such a right: the Uniform Condemnation Procedures Act (UCPA), the Condemnation by State Act (CSA), and the State Agencies Act (SAA). (App for Lv, pp 16–17.)

Before Plaintiffs' argument in this regard is considered, it bears emphasis that Plaintiffs advanced their takings claim in the Complaint entirely under Const 1963, art 10, § 2. The Complaint makes no mention of any of the statutes Plaintiffs now look to as support for their jurisdictional argument.[16]

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[16] Indeed, it makes sense that Plaintiffs would not have invoked these statutes in their Complaint, as the statutes provide no basis for the claims they allege. See, e.g., *Miller Bros v Dep't of Nat Res*, 203 Mich App 674, 690 (1994) ("[W]hen the state affects a taking merely by depriving an owner of all beneficial use of property, the

There can be no dispute that there is no right to a jury trial on the takings claim as pleaded in the Complaint. Claims for compensation under the takings clause belonged in the Court of Claims prior to the 2013 amendments, and nothing in MCL 600.6421 changed this. It has long been established that there is no constitutional right to a jury trial under the takings clause. *Hill v Mich*, 382 Mich 398, 405–406 (1969).

Although the 1908 version of the Michigan Constitution did provide for jury trials related to governmental takings, the landscape changed when this right was not included in the 1963 Constitution. *City of Kalamazoo v KTS Indus,* 263 Mich App 23, 29–30 (2004). Nothing about Plaintiffs' foray into the Magna Carta and Michigan's pre-Statehood wilderness, (App for Lv, p 18), changes this simple and settled point of law: Plaintiffs have no constitutional right to a jury trial on the claims they have alleged.

Thus, Plaintiffs have turned to a series of condemnation statutes in an effort to graft a jury right onto their Complaint. (See App for Lv, pp 13–17.) Plaintiffs primarily rely on the UCPA. But in so doing, they argue into the teeth of precedent. Without citation to any case supporting their request, Plaintiffs ask this Court to reject as wrongly decided *Lim v Department of Transportation*, 167 Mich App 751, 755 (1988), which held that "the Court of Claims is the exclusive forum to adjudicate [inverse-condemnation] claims" and that "[t]he UCPA has no application

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state does not *acquire* the property 'taken.' Such a taking may violate the constitution, but it does not violate the UCPA.").

to inverse condemnation actions initiated by aggrieved property owners" but instead "only governs actions initiated *by an agency* to acquire property on the filing of a proper complaint and after the agency has made a good-faith written offer to purchase the property." Even before the Court of Appeals reaffirmed the validity of *Lim*'s underlying logic in this case, *Lim* had been repeatedly cited for the proposition that takings claims belong in the Court of Claims.[17]

Before this Court, Plaintiffs argue only that *Lim*'s holding is "inconsistent with the plain language of the UCPA" because that statute "provides standards for the determination of just compensation in all eminent domain cases." (App for Lv, p 14.) But the Court of Appeals examined the text of the UCPA and concluded, correctly and consistent with *Lim*, that the UCPA does not reach so broadly. First, Plaintiffs allege a regulatory taking, but the UCPA applies only to property physically "acquired" by the State. MCL 213.52(2). The statute repeatedly, and exclusively, refers to the acquisition of property by the State. Second, Plaintiffs' claim is one for *inverse* condemnation, to which the UCPA does not apply.[18] Third,

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[17] See *Gleason v Michigan Dep't of Transp*, 256 Mich App 1, 2 (2003); *Dep't of Natural Resources v Holloway Const Co,* 191 Mich App 704 (1991); *Bond v Dep't of Natural Resources*, 183 Mich App 225 (1989).

[18] Plaintiffs allege that the UCPA purports to apply more broadly, invoking the following language in MCL 213.52(1): "This act provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation." (App for Lv, p 14 & n 93.) But the context of the UCPA establishes that "condemnation actions" refers to condemnation actions initiated by the agency, not an inverse-condemnation action initiated by the property owner. See, e.g., MCL 213.52 (making a "condemnation action" a necessity "[i]f property is to be acquired by an agency," and referring to inverse-condemnation

the UCPA grants a jury trial only "as to the issue of just compensation." MCL 213.62(1). Plaintiffs admit as much. (App for Lv, p 14, "Upon closer inspection, *at least with respect to just compensation*, there is no principled reason to hold that the UCPA should not apply to regulatory takings cases." (emphasis added).) As explained *infra*, the issue of just compensation would arise only after Plaintiffs have proven that a compensable taking has occurred (which they have not and cannot as a matter of law). The UCPA, even if it had some application here, does not purport to attach a jury right to that threshold legal determination or to deprive the Court of Claims of jurisdiction over it. Accordingly, the Court of Appeals was correct to reaffirm *Lim* and to reject Plaintiffs' attempted reliance on the UCPA.

Plaintiffs also rely upon the CSA and SAA, two public acts that pre-date both the UCPA and the Court of Claims Act, but they offer a tangled, threadbare argument about those statutes' vitality in the present context. Plaintiffs offer no discussion of these statutes' text, abandoning any associated claim. (See *id.* at 15–16.)

Regardless of this forfeiture, Plaintiffs cannot use the procedures outlined in the CSA and SAA as a means to get around the unfavorable outcome they face under the UCPA, as the UCPA "defines the *exclusive* means by which government is empowered to judicially condemn and acquire property." *Miller Bros*, 203 Mich App at 687 (emphasis added), citing MCL 213.75 ("All actions for the acquisition of

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actions as "action[s] for a constructive taking or de facto taking," which the UCPA explicitly is intended to avoid).

property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act.").

Even assuming that the UCPA left the procedures of the CSA or SAA some measure of independent vitality relevant to the instant jurisdictional question, Plaintiffs fail to explain why *Lim*'s outcome and rationale would not apply with equal force to them, given that those statutes (like the UCPA) pertain to government-initiated actions to acquire property, not claims by businesses of the sort at issue in this case. Indeed, as the Court of Appeals correctly concluded, these laws simply do not apply to the type of regulatory takings claim advanced here. (Slip op at 5, citing MCL 213.1 and MCL 213.23.)

Moreover, for all three statutes—the UCPA, the CSA, and the SAA—Plaintiffs concede that they are merely sources "from which *just-compensation procedure* could be derived." (App for Lv, p 15 (emphasis added). See also *id.* ("These acts . . . established a right to a jury trial on the issue of just compensation.").) Just compensation is the *remedy* on a condemnation claim. Under Plaintiffs' own theory, if they have any right to a trial by jury, it is on only the remedy—the amount of compensation owed for the taking—and not on the preceding question of liability, i.e., whether Defendants committed a taking for which compensation must be granted. This claimed jury right, even if accepted as true, does nothing to change the fact that whether the State has committed a compensable taking is a legal determination that the Court of Claims Act puts squarely and solely in the hands of the Court of Claims. Nor is there any basis to

somehow allow Plaintiffs to skip that threshold legal determination; the question of liability is indisputably contested here. (See Part II, *infra*.)

Within the parlance of the statutes upon which Plaintiffs now rely, there has been no condemnation of property nor any other exercise of eminent domain authority. There has simply been an exercise of the State's police power in an attempt to protect Michiganders from a deadly pandemic. The Court of Claims Act makes clear, and Plaintiffs' own arguments do not dispute, that the Court of Claims alone can determine whether Plaintiffs have adequately pleaded a takings claim. Everything that may follow a taking—such as a statutory procedure to determine just compensation—is not now before this Court, or any other. Simply put, Plaintiffs cannot frustrate legislative intent and forum-shop their way out of the Court of Claims' exclusive jurisdiction merely by pointing to a jury-trial right that plainly does not apply to their Complaint and that, even by its own terms, would exist only to fashion a remedy for a takings claim they purport to allege.

Lastly, as noted above, Plaintiffs ask this Court to direct the Macomb County Circuit Court to hear their case without even addressing why this should be true for their tort claims. The Court of Claims properly observed that Appellants waived this issue below. (Appellants' MCOA App'x, p 7(a).) And Plaintiffs continued that waiver before the Court of Appeals and before this Court. The absence of argument for this proposition likely flows from the fact there is no authority for it. Claims for money damages belong in the Court of Claims. *Lumley*, 215 Mich App at 125; *Elia Cos*, 335 Mich App at 458 (explaining that a right to a jury trial against the State

exists only "where the Legislature clearly intended to submit those claims to the circuit court's jurisdiction[;] . . . [o]therwise, the Court of Claims has exclusive jurisdiction over claims against the state for money damages") (citation omitted). For the reasons set forth above, this fundamental and well-settled principle controls the jurisdictional inquiry here, and the Court of Claims correctly rejected Plaintiffs' bid for transfer to the Macomb County Circuit Court.

## II. The Court of Appeals correctly held that Plaintiffs failed to state a claim under the Takings Clause of the Michigan Constitution.

### A. Defendants' challenged exercise of the police powers to combat COVID-19 does not implicate the Takings Clause.

Both the U.S. Constitution and Michigan's Constitution require just compensation for the taking of private property for "public use." US Const, Am V; Const 1963, art 10, § 2. These Takings Clauses are "substantially similar," and they should "generally be interpreted coextensively." *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 555 n 22, remanded on other grounds, 480 Mich 910 (2007), citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184 n 10 (1994) ("Because the federal guarantee is no more protective than the state guarantee in the instant case, we do not examine the provision separately."). Thus, case law under the federal takings clause is instructive in the present matter even though Plaintiffs advance their claim under only the Michigan Constitution.

There are "two types of 'categorical takings' regarding regulatory action that generally will be deemed per se takings for Fifth Amendment purposes." *Cummins v Robinson Twp*, 283 Mich App 677, 707 (2009) (cleaned up), citing *Lingle v Chevron*

*USA Inc*, 544 US 528, 538 (2005). To allege a *physical* taking (which is *per se* "categorical"), the owner must "suffer a permanent physical invasion of her property—however minor." *Id.*, citing *Lingle*, 544 US at 538. To allege a categorical *regulatory* taking, a regulation must "completely deprive an owner of all economically beneficial use of her property." *Cummins*, 283 Mich App at 707, quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 (1992).

Apart from these "two relatively narrow categories," only one type of regulation can be compensable as a taking: a non-categorical regulatory taking. *Id.* The question whether there is a non-categorical regulatory taking is governed by *Penn Central Transportation Co v New York City*, 438 US 104 (1978). *Cummins*, 283 Mich App at 707, citing *Lingle*, 544 US at 538. The Court in *Penn Central* established a balancing test that requires a reviewing court to engage in a case-specific inquiry based on three factors:

> (1) the character of the government's action,
>
> (2) the economic effect of the regulation on the property, and
>
> (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.
>
> [*Cummins*, 283 Mich App at 707, citing *K & K Constr, Inc v Dep't of Nat'l Res*, 456 Mich 570, 577 (1998), which was quoting *Penn Central*, 438 US at 124.]

Plaintiffs focus on the third of these theories—a non-categorical regulatory taking under *Penn Central*.[19]

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[19] Fleetingly, Plaintiffs' allegations could be taken to suggest a categorical regulatory taking under *Lucas*. (See App for Lv, p 4 (alleging Defendants' regulatory action "rendered [their] property valueless").) By and large, however,

Regardless, this Court need not even reach the frameworks of analysis from *Lucas* and *Penn Central* to conclude that the Court of Appeals' opinion is sound. This is because there is no taking as a matter of law where, as here, the challenged action comprises an exercise of police power directed to protect the community's health and safety by limiting the use of that property where its use may pose a danger to the community more generally. This principle is found in both federal and state case law, and it is dispositive here.

Multiple federal courts have relied on this settled principle in rejecting takings challenges to COVID-19 health orders in other states. As one such court aptly summarized:

> The Supreme Court has consistently stated that the Takings Clause does not require compensation when a government entity validly exercises its police powers. . . . Several circuit courts, including the Sixth Circuit, have also specifically held that actions the government performs pursuant to its police power, as compared to its power of eminent domain, cannot constitute a taking for "public use." . . . The Court finds that because the Closure Order was a legitimate exercise of Defendants' police powers, it was not a taking for "public use" and therefore the Takings Clause does not require compensation.
>
> [*TJM 64, Inc v Harris*, 526 F Supp 3d 331, 337 (WD Tenn 2021) (citations omitted).]

See, e.g., *Case v Ivey*, 542 F Supp 3d 1245, 1282 (MD Ala, 2021) ("And there is no taking for 'public use' when the government acts pursuant to its police power. . . . Thus, pursuant to Alabama's police power, [the State] Defendants 'reasonably

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they allege a non-categorical regulatory taking in both name and description. (E.g., *id.* at xviii (stating question presented as "whether a non-categorical regulatory taking has occurred").)

concluded that the health, safety . . . or general welfare would be promoted by' ordering the temporary closure of [owners' barbershop] business."); *Underwood v City of Starkville*, 538 F Supp 3d 667, 680 (ND Miss, 2021) ("[T]he doctrine of necessity applies to the case sub judice. The COVID-19 pandemic presents a grave and deadly threat to the public, and this was perhaps even more so during the early months of the crisis, when the events of this case took place. . . . the Defendant in this case was justified in its actions to stem the spread of the disease. Consequently, the Defendant is immune from liability for these specific actions."); *Alsop v Desantis*, No. 8:20-cv-1052, 2020 WL 9071427, *3 (MD Fla, Nov 5, 2020) ("Because Governor DeSantis's executive orders under Section 252.36 reasonably and temporarily exercise the police power to promote public health, the plaintiffs cannot state a claim for a regulatory, temporary 'taking' based on expected profit that was impeded briefly during an emergency.") (Defs' MCOA App'x, p 112.). See also *Skatemore v Whitmer*, 40 F4th 727, 739 (CA6, 2022) (listing cases in support of the proposition that "the overwhelming majority of caselaw indicates that [pandemic-era] regulations are not takings").[20]

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[20] For examples of federal recognition of this general principle in various other contexts, see, e.g., *United States v Droganes*, 728 F3d 580, 591 (CA 6, 2013) (explaining that "the government's seizure and retention of property under its police power does not constitute a 'public use' " and thus is not a compensable taking, and "[t]his rule does not admit of any exceptions") (cleaned up); *McCutchen v United States*, 145 Fed Cl 42, 51 (2019) ("[I]t is well established that there is no taking for 'public use' where the government acts pursuant to its police power, *i.e.*, where it criminalizes or otherwise outlaws the use or possession of property that presents a danger to the public health and safety."); *Nat'l Amusements Inc v Borough of Palmyra*, 716 F3d 57, 63 (CA 3, 2013) (categorically rejecting claim that a taking had occurred from government-mandated five-month closure of flea market in

The state supreme courts that have examined the issue have also dismissed such claims, independent of whether there was a "non-categorical taking" under *Penn Central*. E.g., *State v Wilson*, 489 P 3d 925, 940 (NM 2021) ("Since there is no taking where this exception applies, the [public health orders], as reasonable use regulation to prevent injury to the public health, are insulated from further takings analysis. Thus, the Real Parties' arguments for *Penn Central* inquiries below cannot avail them at this time") (cleaned up);[21] *Friends of Danny DeVito v Wolf*, 227 A3d 872, 895–896 (Pa, 2020) (relying on *Tahoe-Sierra Pres Council Inc v Tahoe Reg'l Plan Agency*, 535 US 302 (2002) ("[T]he Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to protect the lives, health, morals, comfort, and general welfare of the people[.]" (quotation omitted)).

Some courts have taken a slightly different, but consistent, analytical path in rejecting COVID-related takings challenges, invoking the familiar *Lucas* and *Penn Central* frameworks and anchoring those regulatory-takings analyses in the same

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response to unexploded munitions discovered on the property because the abatement of the danger posed by the property was "an exercise of its police power that did not require just compensation"); *Hendler v United States*, 38 Fed Cl 611, 615 (1997) ("[B]ecause a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights.").

[21] The New Mexico Supreme Court also reviewed under *Lucas*, concluding that "the public nuisance exception to the categorical rule in *Lucas* would apply." *Id.* at *14.

core legal proposition discussed above: "Courts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking," *Blackburn v Dare Co*, 486 F Supp 3d 988, 999 (ED NC, 2020), and "[a]ctions like those taken through these orders, which are undertaken to address a global pandemic, do not constitute a regulatory taking," *Our Wicked Lady LLC v Cuomo*, 2021 WL 915033, at *6 (SD NY, March 9, 2021) (Defs' MCOA App'x, pp 118–119).[22]

As with these numerous decisions, all analytical paths here lead to the same outcome. As discussed below, the application of the *Lucas* and *Penn Central* regulatory-takings frameworks demonstrate that Plaintiffs' claims fail as a matter

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[22] See also, e.g., *Skatemore, Inc v Whitmer*, 2021 WL 3930808, *3-5 (WD Mich, Sept 2, 2021) (bowling establishments) (Defs' MCOA App'x, pp 122-124); *Mission Fitness Ctr, LLC v Newsom*, 2021 WL 1856552, *9 (CD Cal, May 10, 2021) (gyms) (Defs' MCOA App'x, p 132); *Amato v Elicker*, 534 F Supp 3d 196, 213 (D Conn, 2021) (restaurant); *Northland Baptist Church of St. Paul v Walz*, 530 F Supp 3d 790, 817 (D Minn 2021) (church); *Flint v Cty of Kauai*, 521 F Supp 3d 978, 993-994 (D Hawaii 2021) (rental property owners); *Daugherty Speedway, Inc v Freeland*, 520 F Supp 3d 1020, 1077 (ND Ind 2021) (racetrack owners); *Peinhopf v Guerrero,* 2021 WL 218721, *8 (D Guam, Jan 21, 2021) (business owners) (Defs' MCOA App'x, p 140); *Heights Apartments, LLC v Walz*, 510 F Supp 3d 789, 814 (D Minn 2020); *Oregon Rest & Lodging Ass'n v Brown*, ___ F Supp 3d ___, ___; 2020 WL 6905319, at *7 (D Oregon, Nov 24, 2020) (food and drinking establishments) (Defs' MCOA App'x, p 156); *AJE Enter LLC v Justice*, 2020 WL 6940381, *10 (ND WV, Oct 27, 2020) (bars and restaurants) (Defs' MCOA App'x, p 165); *Bimber's Delwood, Inc v James*, 496 F Supp 3d 760, 784–785 (WD NY, 2020) (various businesses); *Luke's Catering Serv, LLC v Cuomo*, 485 F Supp 3d 369, 386 (WD NY, 2020) (event and banquet centers); *Lebanon Valley Auto Racing Corp v Cuomo*, 478 F Supp 3d 389 (ND NY, 2020) (auto-racing); *Savage v Mills*, 478 F Supp 3d 16, 32 (D Me, 2020) (various businesses); *PCG-SP Venture I LLC v Newsom*, 2020 WL 4344631, at *10 (CD Cal, June 23, 2020) (hotel) (Defs' MCOA App'x, pp 173–174); *McCarthy v Cuomo*, 2020 WL 3286530, at *5 (ED NY, June 18, 2020) (restaurant and bar) (Defs' MCOA App'x, pp 181–182).

of law. But as ample jurisprudence provides, Plaintiffs' claims fail before even reaching those frameworks. The courts that have duly recognized this legal proposition have relied on the same basic universe of U.S. Supreme Court cases.

**Public Safety and Public Nuisance**

At the center of this jurisprudence is the principle from the U.S. Supreme Court securing the ability of the states to combat public nuisances and protect the public safety. See *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 492 n 22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."); *Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Plan Agency*, 535 US 302, 329 (2002) (recognizing that the government "might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations"), citing *First English Evangelical Lutheran Church v Los Angeles Co*, 482 US 304, 313 (1987), which in turn cited, among other cases, *Goldblatt v Hempstead*, 369 US 590 (1962) (upholding a safety ordinance). In this regard, a property owner's use of property is subject to the police power of the state to protect the community's health and safety:

> Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community[,] . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.
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> [*Keystone Bituminous Coal*, 480 US at 491 (internal quotes omitted), citing *Mugler v Kansas*, 123 US 623, 668–669 (1887).]

Accord *Mugler*, 123 US at 668–669 ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."); *Miller v Schoene*, 276 US 272, 280 (1928) (holding that the Takings Clause did not require the Commonwealth of Virginia to compensate the owners of cedar trees destroyed to prevent a disease from spreading to nearby apple orchards).

The Court of Appeals has agreed that there is no taking where the government acts to combat a public nuisance to protect the community's health and safety. See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272 (2008) ("[T]he nuisance exception to the prohibition of unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, the State has not taken anything when it asserts its power to enjoin a nuisance-like activity." (cleaned up)), citing *Keystone Bituminous Coal*, 480 US at 491 n 20, 492 n 22. In that circumstance, the court ruled that because the township "was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred." *Id.* at 272, citing *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 555 n 22 (2007). The same reasoning applies here.

The nuisance at issue in *Kircher* was water pollution, see *id.* at 255, but the case's controlling principle about the State's ability to combat "nuisance-like activity" applies with at least equal force to the danger of the spread of COVID-19.

At its core, a "condition that is so threatening as to constitute an impending danger to the public welfare is a nuisance." *Id.* at 276, citing 19 Michigan Civil Jurisprudence, Nuisances, § 1, pp 62–63. As noted in *Kircher*, "the State has not taken anything when it asserts its power to enjoin a nuisance-like activity." *Id.* at 272 (cleaned up). The restrictions at issue here plainly were an exercise of that power, put in place to protect the public from an imminent and severe threat to its health, safety, and welfare.

**War and the Doctrine of Necessity**

There is a second strain of U.S. Supreme Court precedent, consistent with law on abating public nuisances and similar harms, that confirms Plaintiffs' failure to bring a valid takings claim and obviates the need for any further analysis under *Lucas* or *Penn Central*. The law on the doctrine of "necessity," generally invoked during time of war, is rooted in the common law. As noted by the U.S. Supreme Court, "the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v Caltex*, 344 US 149, 154 (1952).

The Federal Circuit Court of Appeals has termed this principle the "doctrine of necessity," which requires an "actual emergency with immediate and impending danger." *TrinCo Inv Co v United States*, 722 F3d 1375, 1377 (CA Fed, 2013); *id.* ("The princip[le] 'otherwise' that we have in mind is litigation absolving the State . . . of liability for the destruction of 'real and personal property, in cases of actual

necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others."), citing *Lucas*, 505 US at 1029 n 16.

This principle was in play in *United States v Central Eureka Mining Co*, 357 US 155, 157 (1958), which involved the government's ordered closure of non-essential gold mines in an attempt to free up resources for different types of mining that supported the war effort. The government "did not take physical possession of the gold mines [and] did not require the mine owners to dispose of any of their machinery or equipment." *Id*. at 158. The closure order remained in effect for almost three years. *Id*. Some of the affected mines alleged that the closure order comprised a taking in violation of the Fifth Amendment. *Id*. at 162.

The U.S. Supreme Court disagreed. The Court noted that, ordinarily, a takings inquiry was "a question properly turning upon the particular circumstances of each case." *Id*. at 168, citing *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922). But that inquiry was inappropriate when the needs of the government—and the country's residents at large—were sufficiently dire to require the use of the police power:

> In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands. We do not find in the temporary restrictions here placed on the operation of gold mines a taking of private property that would justify a departure from the trend of the above decisions.
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> [*Id*. at 168–169 (citations omitted).]

That point applies here as well. As already noted, Michigan residents experienced death and harm from the COVID-19 pandemic on a devastating scale. And as was the case in *Eureka* (and in so many recent COVID cases across the country), a taking did not, as a matter of law, arise from the Governor's and DHHS Directors' orders placing limited, temporary restrictions on private businesses to save the lives of countless Michigan residents from an imminent, pervasive, and lethal threat.

For that reason, no further analysis is required. The prevention of the spread of disease rests at the heart of a state's police power. See, e.g., *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 390 (1923) (recognizing "the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, and will prevent the spread of this dread disease"). As the federal district court in Mississippi cogently explained in dismissing a takings claim from an athletic club there in May 2021, "[t]he COVID-19 pandemic presents a grave and deadly threat to the public," such that the government "was justified in its actions to stem the spread of the disease," leaving it "immune from [takings] liability for these specific actions." *Underwood*, 538 F Supp 3d at 680–681. The same is true here and forecloses Plaintiffs' takings claim.

As is clear from these settled lines of precedent—and the ample cases that have applied them, in the context of this pandemic and beyond—the Court of Claims was correct to dismiss Plaintiffs' takings claim as a matter of law, and the Court of Appeals was correct to affirm.

In resisting this conclusion, Plaintiffs argue that the lower courts improperly relied on a due-process analysis that has been "conclusively repudiated" by the U.S. Supreme Court in *Lingle v Chevron USA, Inc*, 544 US 528 (2005). (App for Lv, p 33.) But *Lingle* simply does not do the work Plaintiffs attempt to attribute to it, nor does it betray error below.

*Lingle* rejected the legal proposition "that government regulation of private property effects a taking if such regulation does not substantially advance legitimate state interests," and thus held that a plaintiff cannot sustain a takings claim on the basis of a challenge to a regulation's legitimacy or efficacy. 544 US at 531 (cleaned up). See *id.* at 542 (explaining a challenge to "whether a regulation is *effective* in achieving some legitimate public purpose . . . reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how any regulatory burden is *distributed* among property owners."). See also, e.g., *Colony Cove Props, LLC v City of Carson*, 888 F3d 445, 454 (CA 9, 2018) ("*Lingle* simply held that a plaintiff could not claim that a regulation constituted a taking merely because it did not substantially advance a legitimate state interest."); *Dorman v Twp of Clinton*, 269 Mich App 638, 646 n 23 (2006) ("The United States Supreme Court recently clarified in [*Lingle*] that the determination of whether a regulation fails to 'substantially advance legitimate state interests' has no part in the takings analysis. Accordingly, we need not consider plaintiff's challenge to the rezoning of his property on that ground.").

Thus, *Lingle* does make one thing clear: Plaintiffs' attempt to question the legitimacy or efficacy of Defendants' efforts in mitigating the spread of COVID-19 has no legal relevance to or place in their takings claim, as any such attempt is inherently compatible with the legal theory upon which such a takings claim for compensation is based.[23] *Id.* at 543 ("The [Takings] Clause expressly requires compensation where government takes private property *for public use*. It does not bar government from interfering with property rights, but rather requires compensation in the event of *otherwise proper interference* amounting to a taking." (quotation marks omitted)). *Lingle* does not, however, suggest, let alone hold, that every kind of government regulation is capable of giving rise to a compensable taking regardless of the nature or character of its public purpose, or that a plaintiff can now sustain a takings claim on grounds the law previously foreclosed.

Nor, for that matter, does *Lingle* purport to disrupt the settled proposition, and the long-established lines of precedent undergirding it, that one kind of regulation—an exercise of police power undertaken to protect public health and safety from an imminent and lethal threat—does not amount to a taking as a

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[23] The Court of Appeals recognized that Plaintiffs now concede this principle. (Slip op at 9 (noting Plaintiffs' concession that whether the EOs were arbitrary or invalid "is ultimately irrelevant to the regulatory taking analysis").) Nonetheless, Defendants note that the reasonableness of the mitigation measures at issue here has already been confirmed in the context of due process and equal protection challenges. See *Michigan Restaurant & Lodging Ass'n v Gordon*, No. 20-cv-1104 (WD Mich, Dec. 2, 2020) (Defs' MCOA App'x, pp 187–190); *Thunderbowl Entertainment v Gordon*, No. 20-000255-MZ (Mich Ct Claims Dec. 18, 2020) (Defs' MCOA App'x, pp 194–200).

matter of law. To the contrary, *Lingle* took pains to emphasize that its ruling did not "disturb any of [the Court's] prior holdings," *id.* at 545, and even specifically noted the continued role of "background principles of nuisance and property law" in limiting what regulations can constitute a compensable taking. *Id.* at 538 (reciting with approval its holding in *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), that "the government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property."); see also *Lucas*, 505 U.S. at 1029 & n 16 (confirming that, even when an owner has been deprived of all economically beneficial use of its land, a compensable taking does not arise from a "law or decree" that "duplicate[s] the result that could have been achieved in the courts . . . by the State under its . . . power to abate nuisances that affect the public generally" or "to forestall . . . grave threats to the lives . . . of others").

Simply put, neither *Lingle* nor any other authority provides Plaintiffs a viable path around the legal principles and authority recited above, be they those grounded in public safety and nuisance or those grounded in the doctrine of necessity. As numerous courts across the country have recognized, those principles—and the longstanding precedent animating them—remain fully intact and controlling, and they confirm the Court of Appeals' conclusion here. This Court should deny leave.

### B. There was no categorical taking in any event, as any action was temporary and did not completely divest Plaintiffs of the ability to operate their businesses.

As reflected in the fleet of decisions cited above,[24] the same conclusion holds even when Plaintiffs' claims are reviewed under the *Lucas* and *Penn Central* frameworks. Again, there is no claim regarding a physical taking, only that the executive and epidemic orders deprived Plaintiffs of some or all economic use of their property during the pendency of the orders. But there is no dispute that the orders were temporary in nature, which alone is dispositive of any categorical taking claim as a matter of law.

The U.S. Supreme Court has rejected the argument that "a temporary deprivation—no matter how brief—of all economically viable use . . . trigger[s] a per se rule that a taking has occurred." *Tahoe-Sierra*, 535 US at 330–331 (holding that 32-month moratorium on development is best analyzed under a non-categorical framework under *Penn Central*). An interest in real property has two dimensions—physical and temporal—and both "must be considered." *Id.* at 331–332. A temporary restriction on use does not take the entire property: "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* See also *Cummins*, 283 Mich App at 717 (discussing *Tahoe-Sierra* favorably); *K & K Constr, Inc v Dep't of Env'l Quality*, 267 Mich App 523, 536 n 17 (2005) (same).

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[24] See note 23, *supra*, and accompanying text.

For this reason alone, Plaintiffs have not alleged a legally cognizable claim of categorical regulatory taking. Defendants' orders imposed temporary regulations aimed at mitigating COVID-19 until the virus's spread was contained sufficiently to permit the regulations' removal. Defendants never moved to permanently close Plaintiffs' businesses, and they did not impose permanent regulations of any kind. The temporary nature of the limitation is enough in itself to defeat any categorical regulatory takings claim.

Moreover, Plaintiffs have not plausibly alleged that Defendants' orders completely diminished the value of the land. For starters, Plaintiffs' Complaint never alleges that they *own* any of the property in issue. To the contrary, the Complaint suggests that, at best, Plaintiffs are mere tenants. (See Compl ¶ 40 (alleging that "restaurants, bars, and banquet halls are specific-use properties," and the businesses that occupy them "are appraised based on their ability to pay rent, which, in turn, is based on their ability to generate income"), Appellants' MCOA App'x, p 28(a).) Consistent with this, the only "just compensation" specifically articulated in the Complaint comprises "business expenses and lost profits," as opposed to the value of any real or personal property. (*Id.* at 19 (request for relief), Appellants' MCOA App'x, p 35(a).) Thus, Plaintiffs failed to articulate a categorical regulatory takings claim.

Even if the crucial allegation of ownership is assumed *arguendo*, the same result holds. As noted above, throughout the pandemic, food service establishments were permitted to offer delivery and pickup service, and their ability to host

customers on premises, indoor or outdoor, varied as demands of the pandemic required.[25] In other words, Plaintiffs may have found themselves restricted to varying extents in their ability to engage in certain forms of business, but they remained free to make use of the land in economically beneficial ways. That point alone also defeats a categorical regulatory takings claim. See *Tahoe-Sierra*, 535 US at 330 (stating that "the categorical rule would not apply if the diminution in value were 95% instead of 100%," and "[a]nything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*"), quoting *Lucas*, 505 US at 1019–1020 & n 8. See also *Adams Outdoor Advert v City of E Lansing*, 463 Mich 17, 27 (2000) ("Because this provision does not deprive the lessors of 'all economically beneficial or productive use of land,' it would not effect a categorical taking of the lessors' interests."); *K & K Const*, 456 Mich at 587 ("While the commercial value of the land may have been reduced by the restrictions placed on it by the [Wetland Protect Act], it was not rendered worthless or economically idle.").

In short, as courts have uniformly recognized in evaluating this question in the COVID-19 context,[26] there is no legally viable basis to conclude that Defendants' orders permanently deprived Plaintiffs' property of all productive use.

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[25] See, e.g., notes 5–10, *supra*.

[26] See, e.g., *TJM 64*, 526 F Supp 3d at 337 (rejecting as legally insufficient restaurants' allegations "that the Closure Order took away all economically beneficial uses of their properties" given the plain terms of the order, which only limited the provision of "in-building services" while leaving "[o]ther business models" available); *Excel Fitness Fair Oaks*, 2021 WL 795670, *5 (ED Cal, March 2,

### C. There likewise was no non-categorical taking under *Penn Central*.

The same result is reached under a non-categorical takings analysis under *Penn Central*, which considers three factors: "[1] the economic impact of the regulation on the claimant"; "[2] the extent to which the regulation has interfered with distinct investment-backed expectations"; and "[3] the character of the governmental action." *Penn Central*, 438 US at 124. None of these factors, individually or collectively, suggests a taking occurred.

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2021) ("Given that the Supreme Court [in *Tahoe-Sierra*] did not find a 32-month moratorium to constitute a regulatory taking, Plaintiffs' allegations of a few months of gym closures followed by reopening with COVID-19-safety-related restrictions are clearly insufficient to establish a regulatory taking.") (Defs' MCOA App'x, pp 205–206); *Skatemore*, 2021 WL 3930808 at *4 (rejecting categorical regulatory takings claim in light of temporary nature of restriction) (Defs' MCOA App'x, pp 123–124); *Mission Fitness*, 2021 WL 1856552, at *9 ("Here, assuming plaintiffs have alleged a protected property interest, they have not alleged a complete loss of economic value. To the contrary, the Orders permit operating outdoors, among other things.") (Defs' MCOA App'x, p 132); *Case*, 2021 WL 2210589, at *23 (plaintiffs' "per se regulatory takings claim fails because the closure of their business did not permanently deprive their property of all value" given that the order at issue only required "a temporary closure of [their] business") (Defs' MCOA App'x, pp 106); *Northland Baptist Church*, 530 F Supp 3d at 815 ("Here, some E.Os. temporarily, but entirely, foreclosed some Business Plaintiffs from utilizing their properties as intended. But *Tahoe-Sierra* indicates that such actions do not constitute a categorical taking."); *TJM 64, Inc v Harris*, 475 F Supp 3d 828, 838 (WD Tenn, 2020) ("While it may not accord with Plaintiffs' pre-pandemic financial plans to operate their businesses in ways the Order allows, it does not follow that the Closure Order has necessarily stripped Plaintiffs' businesses of all their value."). See also the state cases reaching the same conclusion. *Wilson*, 489 P 3d at 925, 941 (noting *Tahoe-Sierra* and "the temporary nature of COVID-19-related use restrictions" in rejecting takings claim); *Friends of Danny DeVito*, 227 A3d at 895–896 (same).

### 1. The analysis of economic impact supports dismissal.

Plaintiffs' allegations regarding the economic impact of the challenged restrictions are sparse and conclusory, comprising only bald assertions of unspecified financial harm presumptively attributed to the restrictions alone, despite the plain presence of any number of other relevant factors (including each business's respective willingness and ability to adapt its business model to the scope of operations permitted under the orders, and the impact of the pandemic on customers' willingness to engage in certain activities regardless of the existence of restrictions). Some food service establishments added or expanded delivery and takeout options, and others chose not to do so.[27] And, even had indoor dining not been restricted, any notion that Plaintiffs' revenue streams would have been unaffected by consumers choosing to protect themselves by dining at home is speculative.

The restrictions at issue—put in place as the people came together in shared sacrifice to prevent COVID-19 from exponentially spreading through the population—may have negatively impacted Plaintiffs' business. But any such economic impact was blunted by their temporary nature and limited scope. And in any event, that Plaintiffs may have suffered significant financial losses as a result does not in itself give rise to a legally viable takings claim. See, e.g., *Tahoe-Sierra*, 535 US at 327; *K & K Const*, 456 Mich at 587.

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[27] See, e.g., Murphy, Monica, *Local restaurant doing well after adapting to the pandemic*, (Feb 2, 2021), https://www.wndu.com/2021/02/03/local-restaurant-doing-well-after-adapting-to-the-pandemic/

### 2. The consideration of any interference with investment-backed expectations supports dismissal.

The second *Penn Central* factor considers "the extent to which the regulation has interfered with distinct investment-backed expectations." *Murr v Wisconsin*, 137 S Ct 1933, 1943 (2017) (citation omitted). As with the first factor, Plaintiffs continue to allege nothing in particular with respect to their investment-backed expectations, and the temporary and limited nature of the regulation at issue belies any notion that their investment-backed expectations were unreasonably disrupted here. Plaintiffs' sparse and conclusory allegations on these points do not establish a cognizable claim that the regulation at issue amounted to a taking. A plaintiff must allege facts going to all of the elements of its claim; parroting the elements of the cause of action is not enough. See *Varela v Spanski*, 329 Mich App 58, 79 (2019) ("A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action."). See also *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 64 n 41 (2014).

Plaintiffs did not allege any facts to show that whatever expectations they may have had were both "reasonable" and "investment-backed." See, e.g., *Underwood*, 538 F Supp 3d at 680–681 ("'A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need.") (citation omitted). Plaintiffs fail to present any such expectation beyond their own unilateral conceptions about the speculative profits of their business when

compared to pre-pandemic circumstances.[28] Nor did they allege anything about "the extent to which" the alleged taking interfered with those expectations. *Murr*, 137 S Ct at 1943. As above, Plaintiffs have not alleged facts to show that this factor weighs in their favor.

### 3. The character of the government action supports dismissal.

Most important, and regardless of whatever weight is afforded the first two factors, the character of the government action decisively favors Defendants and is enough in itself to foreclose Plaintiffs' regulatory takings claim as a matter of law. This factor weighs "the character of the governmental action." *Penn Central*, 438 US at 124. See also *Tahoe-Sierra*, 535 US at 320 (highlighting "the importance of the public interest served by the regulation" as part of a non-categorical inquiry). There is no dispute that the challenged restrictions arose from a genuine emergency that has inflicted untold human and economic suffering on Michigan, and Defendants' orders were issued to protect Michigan residents from a highly

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[28] See, e.g., *Skatemore*, 2021 WL 3930808, at *4 ("Although Plaintiffs understandably expected to conduct business as usual when 2020 began, the pandemic forced everyone to adjust their expectations. Plaintiffs cannot plausibly contend that they expected to continue operating normally when doing so posed an obvious risk of spreading a contagious and dangerous virus.") (Defs' MCOA App'x, pp 124). See also, e.g., *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 405 (1994) (for purposes of the Takings Clause, there is no compensable "property right to potential or future profits"); *Long v Liquor Control Comm'n*, 322 Mich App 60, 70 (2017) (explaining that having a food service license does not create a compensable property interest in profitability or market share).

infectious and dangerous disease. As detailed above, such action lies at the heart of the State's traditional police power to protect the public health.

Correspondingly, and "[u]nsurprisingly, courts across the country agree that the final *Penn Central* factor, the character of the disputed government action during the COVID-19 pandemic, weighs heavily in Defendants' favor." *Daugherty Speedway*, 520 F Supp 3d at 1078 (collecting cases). See, e.g., *Amato*, 534 F Supp 3d at 204 ("The orders at issue here were a temporary exercise of the State's police power to protect the health and safety of the community, which weighs strongly against finding that they constituted a taking. Other courts have similarly concluded.") (citation omitted, collecting cases); *Blackburn*, 486 F Supp 3d at 999 ("Courts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking."); *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 147 (2014) ("[A] regulatory taking will not be found where a state tribunal reasonably concludes that the land-use limitation promotes the general welfare, even if it destroys or adversely affects recognized real property interests." (cleaned up).)

Even if merely the method of the challenged action, and not its character, were relevant, this factor nevertheless supports Defendants. The mitigation efforts took the form of a negative restriction, not some affirmative appropriation of Plaintiffs' property. And that restriction related to particular uses involving third parties; Plaintiffs' own access to real and personal property was unaffected. The restriction did not last as long as the almost three-year closure effected in *Eureka*,

357 US at 159, nor the 32-month delay for a permit in *Tahoe-Sierra*, 535 US at 306. And the restriction applied broadly and affected similarly situated property owners similarly; indeed, by their own allegations, Plaintiffs seek to sue on behalf of roughly 17,000 "similarly situated food-service establishment businesses throughout Michigan." (Appellants' MCOA App'x, p 32(a).) See, e.g., *Cummins*, 283 Mich App at 720 (concluding this *Penn Central* factor "weigh[ed] heavily" against finding a compensable taking because the challenged regulation applied "statewide" and "equally to all landowners with property similarly situated," thus leaving plaintiffs "both benefited and burdened like other similarly situated property owners"); *K & K Const, Inc,* 267 Mich App at 560 ("[R]egulation in and of itself does not constitute a taking if it applies to a widespread group of landowners."). See also *Penn Central*, 438 US at 124 (stating that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good"); *Lingle,* 544 US at 537 ("While scholars have offered various justifications for this [takings] regime, we have emphasized its role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"), quoting *Armstrong v United States*, 364 US 40, 49 (1960).

As *Penn Central* and its progeny reflect, a takings claim simply does not provide a viable vehicle for Plaintiffs to seek compensation from the government on behalf of an entire industry subject to the same statewide, temporary public-health

regulation.[29] Given the nature of the regulation at issue, Plaintiffs cannot sustain a non-categorical regulatory takings claim as a matter of law.

While Plaintiffs urge this Court to apply the *Penn Central* framework to their takings claim, they offer little to explain how it might save that claim from dismissal. Their core argument is that under *Penn Central*, discovery must occur to further develop the factual basis for their claim before a ruling on its merits can be had. (App for Lv, pp 26–27.) Not so. While a *Penn Central* analysis can involve ad hoc, case-specific inquiries, it does not provide the automatic ticket to discovery that Plaintiffs would like. A regulatory takings claim, like any other claim, most certainly can fail as a matter of law, and when it does, it must be dismissed. See, e.g., *Hotel & Motel Ass'n of Oakland v City of Oakland*, 344 F3d 959, 966 (CA 9, 2003) (stressing that "individualized scrutiny of such claims does not foreclose resolution on a motion to dismiss"). As always, a plaintiff must plead facts sufficient to show entitlement to relief. As detailed throughout this brief, Plaintiffs have failed to do so.

Accordingly, while there is no need for the *Lucas* and *Penn Central* frameworks here, their application only confirms the right outcome: This Court

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[29] In essence, Plaintiffs are attempting to use a putative takings class-action to force a legislative appropriation on behalf of the food-service industry in Michigan. However well-intentioned this goal may be, it is not one properly pursued through a lawsuit such as this, under *Penn Central* or otherwise. Cf, e.g., *Musselman v Governor*, 448 Mich 503, 521–522 (1995). This pandemic has been challenging for countless individuals and businesses, including food service establishments. But Plaintiffs' efforts should be directed toward the Legislature, not the courts.

should deny leave, leaving intact the Court of Appeals' conclusion that Count I was properly dismissed.

## III. Plaintiffs failed to plead their tort claims in avoidance of Defendants' absolute immunity, and otherwise failed to adequately plead those claims.

### A. Defendants have absolute immunity.

Plaintiffs advance two tort claims against Defendants as government officials acting in their official capacities. As such, Plaintiffs' claims are seeking damages against the State itself. *Mays v Snyder*, 323 Mich App 1, 88 (2018). All Defendants are high-ranking officials who have absolute immunity in this case. MCL 691.1407(5); *Petipren v Jaskowski*, 494 Mich 190, 218–219 (2013).

In light of the State's governmental immunity, Plaintiffs had a heightened pleading standard here, *Mack v City of Detroit*, 467 Mich 186, 193 (2002), which they failed to meet. In their Complaint, Plaintiffs neither acknowledged the Defendants' absolute immunity nor did they identify any rationale for it to be disregarded. They did not even plead facts sufficient to meet the basic pleading requirement for claims against lower-level officers and employees. Specifically, plaintiffs alleging tort claims against the State and its officials

> must plead facts in their complaint in avoidance of immunity, i.e., they must allege facts which would justify a finding that the alleged tort does not fall within the concept of sovereign or governmental immunity. This may be accomplished by stating a claim which fits within one of the statutory exceptions or pleading facts which demonstrate that the tort occurred during the exercise or discharge of a non-governmental or proprietary function.

> [*Id.* at 199, quoting *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 621, n 34 (1984).]

Plaintiffs did not plead any of the statutory exceptions to governmental immunity, nor do they allege Defendants were acting in a proprietary function. Instead, Plaintiffs assert Defendants are not entitled to immunity "due to the illegal nature of the acts and regulations[.]" (Compl ¶ 65, Appellants' MCOA App'x, p 33(a).) But this bald proposition alone—that the Defendants engaged in acts Plaintiffs believe were illegal—falls far short of the affirmative allegation they were required to make.

Neither surprising nor availing is Plaintiffs' attempt to avoid this result with reference to *In re Certified Questions*, 506 Mich 332 (2020). That ruling held that the statutory sources of authority the Governor had invoked to respond to the spread of COVID-19 were no longer available to her. It did not, as Plaintiffs suggest, purport to render the Governor's prior actions in response to the pandemic ultra vires.[30] And regardless, throughout the time that the Governor was issuing executive orders under her statutory emergency authority, so too was the Director of DHHS issuing epidemic orders under the separate authority of MCL 333.2253.

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[30] Setting aside whether *In re Certified Questions* was wrongly decided (as Defendants maintain it was), the ruling made clear that its only "consequence" was that "the executive orders issued by the Governor in response to the COVID-19 pandemic *now* lack any basis under Michigan law" and "the EPGA cannot *continue to* provide a basis for the Governor to exercise emergency powers." *Id.* at 338, 385 (emphasis added). It did not purport to invalidate the actions that the Governor took under the EPGA—and that any other governor before her took under that 75-year-old statute—prior to the ruling. Nor did the ruling cast doubt on the propriety of those actions, instead confirming "that there is one predominant and reasonable construction of the EPGA—the construction given to it by the Governor." *Id.* at 356.

These epidemic orders provided a parallel, but distinct and independently sufficient, basis for the restrictions at issue here. And in opining on the Governor's statutory authority, this Court did not hold, or even suggest, that DHHS's orders were in any way invalid, unauthorized, or improper. Accordingly, as the Court of Appeals correctly concluded, Defendants are immune from Plaintiffs' tort claims, and Plaintiffs have identified no viable basis, in *In re Certified Questions* or elsewhere, to disturb that conclusion.

### B. Plaintiffs did not otherwise adequately plead their tort claims.

Furthermore, even if Plaintiffs could somehow avoid Defendants' absolute immunity, their allegations still failed to state viable tort claims as a matter of law. Plaintiffs attempt to distract this Court from reaching this obvious conclusion by presenting an argument suggesting they pleaded a constitutional tort instead of the common law torts actually alleged in their Complaint. Within their own Complaint, Plaintiffs expressly cite case law articulating the pleading requirement for the two tort claims they advance: "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." (Appellants' MCOA App'x, p 33(a), quoting *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131 (2002), which quoted *Feldman v Green*, 138 Mich App 360, 378 (1984).)

Despite acknowledging this pleading requirement, Plaintiffs wholly fail to meet it. In particular, they never allege Defendants' actions were done for the "purpose" of interfering with their contracts and business relationships. Nor could they. Plaintiffs disagree with Defendants' efforts to mitigate the spread of COVID-19, and they believe Defendants are wrong about the underlying science. But whatever the actions' wisdom or consequence, there can be no dispute that Defendants' actions in this case were undertaken for the purpose of protecting Michiganders from the scourge of COVID-19. Plaintiffs have failed to allege any credible basis to conclude that the orders' purpose was to interfere with their contractual or business relationships, let alone in a per se unlawful or malicious manner.

This pandemic has been hard on everyone; businesses such as Plaintiffs' are certainly no exception. Defendants have worked diligently to meet the unprecedented challenges posed by COVID-19 and to protect our state's public health while preserving its economic well-being. Plaintiffs have made their objections to those efforts clear, as they are fully entitled to do. But the law, for its part, makes clear that suits such as this provide no vehicle to secure compensation for those grievances. For a number of reasons, Plaintiffs' takings and tort claims fail as a matter of law. This Court should deny leave to appeal the Court of Appeals' sound opinion below.

## CONCLUSION AND RELIEF REQUESTED

The right court reached the right result here. Plaintiffs have no jury trial right for any of the claims in their Complaint, and the Court of Claims properly exercised jurisdiction over them. A significant body of case law emphatically shows there simply was no taking here as a matter of law. And Plaintiffs did not properly plead tort claims, in avoidance of Defendants' absolute immunity or otherwise. The Court of Appeals duly recognized all this and properly disposed of Plaintiffs' appeal. Accordingly, Defendants respectfully request that this Honorable Court deny leave.

Respectfully submitted,

DANA NESSEL
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

*/s/ Darrin F. Fowler*
Darrin F. Fowler (P53464)
Daniel J. Ping (P81482)
Assistant Attorneys General
Corporate Oversight Division
Attorneys for Defendants-Appellees'
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
FowlerD1@michigan.gov
PingD@michigan.gov

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## WORD COUNT STATEMENT

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*/s/ Darron F. Fowler*
Darrin F. Fowler (P53464)
Daniel J. Ping (P81482)
Assistant Attorneys General
Corporate Oversight Division
Attorneys for Defendants-Appellees'
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
FowlerD1@michigan.gov
PingD@michigan.gov

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