STATE OF MICHIGAN
IN THE SUPREME COURT

MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., and MIRAGE CATERING, INC., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v

ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services, KRISTIN BELTZER, in her official capacity as Chair of the Michigan Liquor Control Commission, and GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,

Defendants-Appellees.

Supreme Court No. 165169

Court of Appeals No. 358755

Court of Claims No. 21-000126-MZ
HON. ELIZABETH L. GLEICHER

Macomb Co. Case No. 2021-001836-CZ
HON. JAMES M. BIERNAT, JR.

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

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

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

STATEMENT OF QUESTIONS PRESENTED

1. A plaintiff's claim against the State belongs in the Court of Claims unless it carries a jury-trial right. Here, the jury-trial right Plaintiffs invoke applies only to determinations of just compensation within formal exercises of eminent domain, not to an action initiated by a property owner claiming that government conduct effectively amounted to a taking. Should Plaintiffs' motion to transfer the case back to Macomb Circuit Court have been granted?

   The State of Michigan's answer: No.

   Plaintiffs' answer: Yes.

   Court of Claims' answer: No.

   Court of Appeals' answer: No.

2. A plaintiff cannot allege a taking if a government action seeks to abate a nuisance, or is necessary to mitigate an emergency, because no property right can supersede such an action. Here, Plaintiffs' claim is premised on an alleged property right to continue operating their businesses irrespective of the State's efforts to rein in an existential emergency. Can Plaintiffs plead a takings claim in this context?

   The State of Michigan's answer: No.

   Plaintiffs' answer: Yes.

   The Court of Appeals' answer: Did not answer.

   Court of Claims' answer: Did not answer.

3. A state action constitutes a noncategorical taking when it disproportionately affects the plaintiff. Here, Plaintiffs' properties were subject to restrictions that were applicable to all similarly situated places of public accommodation during the COVID-19 pandemic. Under the ad hoc, flexible takings inquiry guided by the *Penn Central* factors, were Plaintiffs' properties "taken" by the State's proportionate restriction on use?

The State of Michigan's answer:	No.
Plaintiffs' answer:	Yes.
The Court of Appeals' answer:	No.
Court of Claims' answer:	No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides:

> [N]or shall private property be taken for public use, without just compensation.

The Takings Clause of the Michigan Constitution, article 10, § 2, provides:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

Section 6419 of the Court of Claims Act, MCL 600.6419(1), provides:

> 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.

Section 6421 of the Court of Claims Act, MCL 600.6421, provides:

> (1) 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.
>
> (2) For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in section 6419(1) and arising out of the same transaction or series of transactions with a matter asserted for which a party has the right to a trial by jury under subsection (1), unless joined as provided in subsection (3), the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has been entered, and the matter asserted for which a party has the right to a trial by jury under subsection (1) shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ.
>
> (3) With the approval of all parties, any matter within the jurisdiction of the court of claims described in section 6419(1) may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state. A case in the court of claims that has been joined with the approval of all parties shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

Section 12 of the Uniform Condemnation Procedures Act, MCL 213.62, provides:

> (1) A plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules. The jury shall consist of 6 qualified electors . . . and shall be governed by court rules applicable to juries in civil cases in circuit court.
>
> (2) Unless there is good cause shown to the contrary, there shall be a separate trial as to just compensation with respect to each parcel.

Section 3 of the Condemnation by State Act, MCL 213.3, provides:

> When all the parties named in the petition have been summoned or notified, in the manner provided, and the time for their appearance shall have expired, the court shall hear any and all persons who shall have appeared and interposed objections to the petition or proceedings, and proceed to decide the questions raised, and may vacate the petition, or any part of the proceedings for cause, and may allow amendments of the petition, in form or substance, as the right of the matter shall demand. If any person having an interest in the land has been overlooked, or not summoned or notified, the court may continue the proceedings and cause such person to be served or notified. If the petition and proceedings are sustained, the court shall appoint 3 commissioners, residents and freeholders within the county, not interested or of kin to any of the persons interested in the land to ascertain and determine the necessity of the proposed public use, the necessity for using such property and the just compensation to be paid therefor by the state, which ought to be paid by the state to each of the owners and persons interested in the premises, as and for his, her or their just compensation for the land sought to be taken. Such commissioners before entering upon their duties as such shall take an oath in substantially the following form: "We do each of us solemnly swear that we will faithfully and justly determine the public necessity of the proposed use, the necessity of taking the property described in the petition filed in this cause and the amount of compensation which ought to be paid to each of the owners and persons interested in the premises described in said petition according to our best ability." They shall visit the land sought to be acquired, shall ascertain the separate interest of each person owning or interested in any part of the premises, and the description of his or her separate interest in the parcel; shall hear, in the presence and under direction of the court, evidence touching the matters they are to find, brought forward by any person having an interest, and shall find all necessary facts to possess

the court with the truth and right of the matter, but shall not be required to find what evidence was offered or given, and shall report to the court, in writing, their findings. Instead of commissioners, the court, with or without the request of any person interested in any portion of the premises described in the petition, may, and upon the request of any such person shall, order a venire to issue to the sheriff, to summon 12 jurors who shall be residents and freeholders of the county where the land is situated, to attend at a time to be named, before the court, to serve as a jury. Any person interested in any part of the premises may object for cause to any of the jurors, but there shall be no peremptory challenge allowed. In case any juror fails to appear, is excused, or set aside from the panel, the court may order the sheriff, or other proper officer in attendance, to summon forthwith the requisite number of talesmen to form the jury. The jury shall be sworn, as is required of commissioners, and they shall view the premises, hear evidence if offered, determine the necessity of the public use, the necessity for taking such property and the amount of compensation to be paid therefor and the same proceedings be had as near as may be, as hereinbefore required in reference to commissioners.

Section 5 of the State Agencies Act, MCL 213.25, provides:

The public corporation or state agency shall make and deliver to its attorney a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the corporation or state agency in the court having jurisdiction of the proceedings a petition signed by him in his official character and duly verified by him, to which petition a certified copy of the resolution of the corporation or state agency shall be annexed, which certified copy shall be prima facie evidence of the action taken by the corporation or state agency and of the passage of said resolution. The petition shall state among other things that it is made and filed as commencement of judicial proceedings by the corporation or state agency in pursuance of this act to acquire the right to take private property for the use or benefit of the public, without the consent of the owners, for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its power, designating the same, for a just compensation to be made. A description of the property to be taken shall be given, and also the names of the owners and others interested in the property so far as can be ascertained. The petition shall also state that the corporation or state agency has declared such improvement or purpose to be necessary, and that it deems it necessary to take the private property described for such improvement or purpose, for the use or benefit of the public. The petition shall ask

that a jury be summoned and impanelled to ascertain and determine whether it is necessary to make such public improvement or fulfill such purpose and whether it is necessary to take such property as it is proposed to do for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor. The petition may state any other pertinent matter or things, and may pray for any other or further relief to which the public corporation or state agency may be entitled within the objects of this act.

INTRODUCTION

One of government's core duties is to provide "security and protection" to the people. Const 1963, art 1, § 1. The orders challenged by Plaintiff food-service businesses were issued in accordance with that duty. The orders were designed to protect the lives of the people from a deadly pandemic and, relatedly, to mitigate the effects of the pandemic so that business as usual could resume. To address these historic challenges, Michigan's orders applied temporary limitations on public access to nearly all places of public accommodation, including the premises of food-service businesses like Plaintiffs'.

Plaintiffs first take issue with their case's transfer to the Court of Claims, arguing that statutory and constitutional jury-trial rights trigger a statutory exception to the Court of Claims' jurisdiction. This has no basis in law. The statutes Plaintiffs invoke now were never pleaded in their complaint, and in any event are inapplicable because (1) they apply exclusively to formal condemnation actions, not a lawsuit initiated by a property owner advancing a regulatory-takings claim; and (2) they apply only to just-compensation determinations in those condemnation actions, not liability determinations.

Separately, Plaintiffs allege that these orders effectuated a taking of their property by regulating them in a manner that was so disproportionate to what others experienced that principles of "justice and fairness" require the State (i.e., the taxpayers) to pay them for their lost revenues. Here too, their position fails.

All takings claims first require the plaintiff to establish the scope of the allegedly impaired property interest. No analysis can occur prior to this exercise.

Here, Plaintiffs say they had a property right to continue operating their businesses more fully than the orders allowed, but there exists no property interest that supersedes the State's need to mitigate an emergency like the COVID-19 pandemic. Simply put, a property owner's "bundle" of rights has never included a strand permitting the owner to continue operating irrespective of state action to abate a nuisance-like condition or avert an acute and imminent danger to others' health. Thus, in addressing these unique harms, the State cannot "take" a property interest, because that property interest never existed in the first place. Many courts nationwide have reached the same conclusion. No taking occurred. Regardless, even if one arrives at the next steps of a takings analysis, the same result applies.

Plaintiffs' claim asserts a "noncategorical" regulatory taking, which is analyzed under the *Penn Central* test. This ad hoc test is guided by three "particularly significant" factors, but its true north star is the proportionality of the burden imposed: If the plaintiff was not one of only "a few" entities on whom the weight of the regulation was "disproportionately concentrated," then justice and fairness do not demand just compensation. *Penn Central Transportation Co v City of New York*, 438 US 104, 123–124 (1978).

All three *Penn Central* factors demonstrate that no taking occurred. The *first* factor—the economic burden imposed by the regulation—reflects that the regulation imposed on all similar places of public accommodation a burden similar to Plaintiffs, and also that the losses alleged by Plaintiffs are not the sort that indicate a taking has occurred. The *second* factor—Plaintiffs' distinct investment-backed

expectations—addresses the State's response to the pandemic, not the predictability of the pandemic itself. Plaintiffs could not have held a reasonable expectation that the State would remain idle in the face of such a threat or that its business would somehow remain exempt from the limitations designed to safeguard the public health; to have done so would have been contrary to the expectations of the citizenry expressed in the Michigan Constitution and would have rendered our State a national outlier. Finally, the *third* factor—the character of the State's action—confirms that no taking occurred. The historic demands of the pandemic speak for themselves, and the nature of the threat addressed by the regulation is critical in a takings analysis. Moreover, it is relevant that the regulations were broadly applicable, reflected a reciprocity of advantage, and their temporary application limited only one form of use, i.e., physical access by the public for a certain commercial activity—not all use, not access by the owners, and, ultimately, not marketability of the property.

Thus, no matter the analytical path taken, the same result holds: Plaintiffs' claims fail as a matter of law because the challenged restrictions lie well outside the sort of state action that can beget a compensable taking. Plaintiffs aver that they must be permitted to offer evidence regarding their particular financial and business-related circumstances, but no such factual development is needed to reach this result here or could change it. The Takings Clause was not designed to put the State and its taxpayers to the choice of letting a deadly virus ravage it populace or incurring

devastating financial liability in its efforts to prevent it. This Court should deny leave or affirm.

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. Within months of its emergence, it was widely known and accepted that COVID-19 could (and did) cause severe illness and death. When COVID-19 hit the United States in early 2020, there was no immunity built up in the population, no available vaccine, and few treatments to combat the disease itself. It was highly contagious, spreading easily from person to person through coughing, sneezing, talking, and breathing. Given the virus's ease of transmission, novel nature, and potentially fatal consequences, the Centers for Disease Control and Prevention (CDC) have indicated that the best way to prevent illness is to avoid contact with others.[1]

On March 10, 2020, in anticipation of the pandemic spreading in Michigan, Governor Whitmer declared a state of emergency and, soon thereafter, 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

[1] (See Defs' MSD, pp 3–4 & n 3, citing CDC, *COVID-19 Frequently Asked Questions* https://www.cdc.gov/coronavirus/2019-ncov/faq.html (accessed August 13, 2020).)

establishments and other places of public accommodation.[2] 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 as pandemic conditions permitted.[3] 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 to protect the public health as the needs of the State required.[4] 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.[5]

Governor Whitmer continued issuing executive orders to combat the spread of COVID-19, reexamining the orders' mitigation measures to meet the ever-changing demands of the pandemic, until early October 2020, when this Court handed down its decision in *In re Certified Questions*, 506 Mich 332 (2020). Soon

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

[3] 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.

[4] All MDHHS emergency orders can be found at: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455- 533660--,00.html.

[5] 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. (See Defs' MCOA App'x, pp 5–11 (summarizing restrictions' basis in public health experts' risk analysis).)

thereafter, Michigan, much like the rest of the country, was on the precipice of a second wave of cases and deaths.[6] 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.[7] 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.[8] 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.[9] 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.[10] These updates were "designed to balance reopening while controlling the spread of COVID-19" and were based on improving

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[6] 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.

[7] 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.

[8] *Id.* § 3.

[9] 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

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

hospital capacity, overall case rates, and test positivity rates.[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 complaint in the Macomb County Circuit Court containing three counts: (1) regulatory taking, (2) tortious interference with contract, and (3) tortious interference with a business 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).) Plaintiffs filed a jury demand with their complaint. (*Id.* at 36(a)–37(a).) On June 15, 2021, Defendants filed a notice of

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[11] See *MDHHS: Updated MDHHS Orders Expand Restaurant Capacity, Increase Gathering and Capacity Limits, Allow for Expanded Visitation at Residential Care Facilities*, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98158-553395--,00.html.

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

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

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).)

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 it had jurisdiction over Plaintiffs' claims, 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. Relevant here, the Court of Appeals first 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 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.)

The Court of Appeals then also confirmed that no taking occurred under the noncategorical regulatory takings theory Plaintiffs advanced. Applying its decision in *Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238 (2022), the court recognized that the applicable balancing test articulated in *Penn Central*, 438 US at 104, was decided by the state's interest in exercising its police power to mitigate the effects of the pandemic. (Slip op at 8 (quoting *Gym 24/7*'s holding that "the [police-power] character of the Governor's actions strongly favors the state, or perhaps actually demands that we find no taking").)

C. Proceedings in this Court

Plaintiffs filed an application for leave to appeal on December 29, 2022, and Defendants responded in opposition on January 26, 2023. On May 31, 2023, this Court ordered oral argument on the application, and it further ordered the parties to file supplemental briefs addressing (1) whether the matter should have been transferred back to Macomb County and (2) the takings claim. 990 NW2d 259 (2023).

ARGUMENT

I. This matter was correctly transferred to the Court of Claims.

A. Standard of Review

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. Analysis

Plaintiffs allege that it was improper to transfer their case from the circuit court to the Court of Claims, arguing that they have both a constitutional and statutory right to have their takings claim heard by a jury in the circuit court, triggering an exception in the Court of Claims Act. But neither right exists, and the Court of Claims therefore had exclusive jurisdiction over Plaintiffs' regulatory-takings claim against the State.

As Plaintiffs' claim is against State officers in their official capacities, it is against the State itself, *Mays v Snyder*, 323 Mich App 1, 88 (2018), and thus falls 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)].

Plaintiffs concede that their case falls within the plain language of the Court of Claims Act's general jurisdictional statute if read in isolation. (See Pls' Supp Br, pp 7–8.) They point out, however, that the Act maintains jurisdiction in the circuit court to hear claims for which there was a jury trial right prior to the Act's effectiveness. That statute provides as follows:

> 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).][14]

Plaintiffs claim that the requisite jury-trial right "provided by law" exists in both statutes and the Michigan Constitution. Plaintiffs are wrong on both counts. The statutes Plaintiffs identify are absent from their complaint, and rightly so: They are inapplicable to regulatory-takings lawsuits initiated by property owners such as this one, instead pertaining to intentional exercises of eminent domain.

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[14] Briefly, Plaintiffs frame MCL 600.6421(1) as an affirmative grant of jurisdiction to the circuit court. (See Pls' Supp Br, pp 7–8 & n 54.) The statute does not support this interpretation. It simply clarifies that certain instances of preexisting jurisdiction in the circuit court are unaffected by the Court of Claims Act and uses the permissive "may" to explain when a jury-trial right can be heard in the circuit court. Regardless, the upshot is the same. Plaintiffs' claimed jury-trial right does not exist.

And even for the agency-initiated condemnation actions to which they do apply, they provide a jury right only as to the issue of just compensation—not the threshold liability issue of whether a taking occurred. As for Plaintiffs' claimed constitutional right, this Court has already correctly recognized that our Constitution plainly does not include it; there is no reason to revisit that settled precedent here.

1. There is no statutory right to a jury trial on Plaintiffs' takings claim.

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). (Pls' Supp Br, pp 7–8 & n 54.) Plaintiffs then point primarily to the Uniform Condemnation Procedures Act (UCPA) as establishing such a right. (*Id.* at 10–15.) "In cases where the UCPA does not address a particular issue," argue Plaintiffs, a jury-trial right is nevertheless established in the Condemnation by State Act (CSA), and the State Agencies Act (SAA). (*Id.* at 7.) None of these arguments withstands scrutiny.

a. The Uniform Condemnation Procedures Act does not afford a jury-trial right on Plaintiffs' claim.

The UCPA is intended to guide the hand of the State in its intentional and affirmative exercise of its freestanding power of eminent domain. See MCL 213.53(1) ("This Act . . . does not confer the power of eminent domain."). To that end, the UCPA establishes a right of action and procedures that apply (and make

sense) only in that limited context. Reading the entirety of the UCPA *in pari materia*, it is plain that the Legislature intended it to be essentially an instruction manual on how to conduct (or respond to) an intentional exercise of eminent domain; it does not govern an action, like this one, commenced by a property owner seeking to challenge State regulatory conduct as effectively amounting to a taking.

The UCPA describes its scope, in pertinent part, as follows:

> (1) This act provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. It does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised. All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act.
>
> (2) If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property. [MCL 213.52(1), (2).]

The UCPA's purpose and function is apparent from these provisions: to require the State to "commence a condemnation action" when it wants to "acquire[]" "property . . . through the exercise of its power of eminent domain," and to delineate "standards" for that process. Correspondingly, the Act prohibits the State from "intentionally" failing to follow these requirements when seeking to exercise its eminent-domain power, such that the affected property owner is forced "to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property." The Act does not purport to govern such "constructive" or "de facto" takings actions commenced by a property owner

(like Plaintiffs' here), or create any rights as to them.[15] Instead, it makes clear that such takings claims are, by nature and definition, fundamentally distinct from the type of "acquisition" or "taking" that is the subject of the Act. See MCL 213.51(b), (e) (providing separate and different definitions for " 'constructive' or 'de facto' taking" and " 'acquisition' or 'taking' ").

As one reviews the remainder of the UCPA, its inapplicability to actions such as Plaintiffs' crystallizes. See also MCL 213.75. Put simply, the UCPA is dominated by procedures governing formal condemnation proceedings, which are contemplated and identified as such prior to the actual transfer. See, e.g., MCL 213.54(3) (defining State's right of entry for pre-condemnation appraisals); MCL 213.55 (imposing various requirements on State prior to "initiating negotiations for the purchase of the property"); MCL 213.55(2) (authorizing State to obtain financial information for appraisal purposes; MCL 213.55(3)(a) (authorizing property owner to file claim, but only to raise "claims that the agency is taking property other than the property described in the good faith written offer or claims a right to compensation for damage caused by the taking, apart from the value of the property taken[.]").

If the owner denies entry for an appraisal or otherwise refuses to engage in negotiations with the State, the UCPA authorizes *the agency* to file a complaint in

[15] Furthermore, if Plaintiffs believed that the State had violated its duty not to intentionally make it necessary for them to file a takings action, it would be that violation—not the alleged taking—that would form the basis for that claim. No such claim was raised here; the Plaintiffs did not raise the UCPA in their amended complaint at all, let alone charge the State with violating it.

the circuit court. MCL 213.54(4); MCL 213.60. As a result, the provisions in the UCPA alluding to a pending action refers to such agency-filed complaints, or otherwise look forward to future completion of ordered eminent-domain proceedings. See, e.g., MCL 213.55(4) (listing contents of complaint); MCL 213.55(5) (establishing escrow requirement for appraised property value upon filing complaint); MCL 213.57 (vesting title to the property and right to receive just compensation on date complaint is filed); MCL 213.59 (granting authority to circuit court in which complaint was filed to fix time and terms for surrender of property).

At best, MCL 213.71 authorizes a "*defendant*" in an agency-initiated action (i.e., the property owner) to "assert *as a counterclaim*, any claim for damages based on conduct by an agency which constitutes a constructive or de facto taking of property." (Emphases added.) By referring to the claimant's status as "defendant" and its claim as a "counterclaim," this authorization operates only within the UCPA's eminent-domain context, and only after a complaint is filed.

The single case discussing MCL 213.71, *Department of Transportation v Dondero*, 171 Mich App 567 (1988), shows how this statute operates. *Dondero* involved a "statutory action brought by plaintiff Michigan Department of Transportation under the . . . UCPA." *Id.* at 568. There, the defendant property owner alleged that the agency had improperly delayed complying with the UCPA's acquisition procedures; according to the defendant, the condemnation's "impending" nature allegedly had rendered the property valueless for several years—effecting a constructive taking—before the agency got around to filing the complaint that

effectuated a formal condemnation. *Id.* at 568–569. In response to the defendant's demand for lost profits "during the pendency of the taking," *id.* at 569, the *Dondero* court held that, as far as the UCPA is concerned, the date of the taking fell on the date the agency filed its complaint, MCL 213.70. No pre-taking "pendency" was cognizable—especially given the defendant's decision to abandon her claim that the taking actually occurred at an earlier date. The *Dondero* court explained that, "[w]hen faced with events that occurred prior to the [agency's] suit which might constitute a constructive taking as of an earlier date, the property owner is free to pursue that theory as an alternative," but "a property owner cannot recover in a[ ] UCPA action for injuries allegedly incurred prior to the established date of taking." *Id.* at 571–572.

Dondero thus confirms the meaning of MCL 213.71 that is already apparent from the context of the UCPA: The Act at large exists to govern *only* formal condemnation proceedings, and MCL 213.71 simply provides a safety net for those instances where the formal condemnation proceeding might fall short of capturing the entirety of the property interests affected. It is easy to think of examples where such a safety net might come in handy in the correct context of formal condemnations;[16] the UCPA need not be grafted onto Plaintiffs' freestanding regulatory-takings action in order to give effect to this section.

[16] For instance, an agency might condemn a parcel without regard to the exclusive right of access it provided to another of the defendant's parcels. Or, as *Dondero* mused, that defendant could have contested the true date of the condemnation within the scope of the agency's UCPA action, had she not abandoned the claim. 171 Mich App at 571–572.

Having established that the UCPA applies exclusively to actions brought by an agency to effectuate its eminent-domain authority, that brings us to the UCPA's purported jury-trial right that Plaintiffs invoke. The lack of such a right is evident. MCL 213.62 states as follows:

> (1) A *plaintiff or defendant* may demand a trial by jury *as to the issue of just compensation* pursuant to applicable law and court rules. The jury shall consist of 6 qualified electors . . . and shall be governed by court rules applicable to juries in civil cases in circuit court.
>
> (2) Unless there is good cause shown to the contrary, there shall be a separate trial as to just compensation with respect to each parcel. [Emphases added.]

By its plain terms, the ability to "demand a trial by jury" granted by this provision extends only to "the issue of just compensation"; it does not purport to reach whether liability for such compensation has arisen in the first place—i.e., whether a compensable taking has occurred. This not only belies any notion that Plaintiffs could invoke this provision to demand a jury for their claim of takings liability, but further illustrates that the UCPA was not designed to cover owner-initiated takings actions such as Plaintiffs' at all, where proof of liability is typically a predominant concern. Rather, consistent with the foregoing, this limited jury-trial right exists only within the framework of the agency-brought "complaint" that pervades the UCPA, and the monikers of "plaintiff or defendant" in MCL 213.62 must be understood in that context as well.[17] Thus, reading this alleged right *in parti materia* with the remainder of the UCPA clarifies that the UCPA cannot apply here.

[17] On this point, Plaintiffs argue MCL 213.62(1)'s reference to "[a] plaintiff or defendant" should be read to apply "equally to plaintiffs in de facto takings cases and defendants in formal condemnation proceedings." (Pls' Supp Br, p 13.) Given

In a related vein, the UCPA does explicitly grant a property owner the right to contest the "necessity" and "public convenience" of a taking, but *only* by motion, and *only* prior to the taking. MCL 213.56. Such a challenge is, again, premised on an extant agency-filed complaint, and review is performed by the court—not a jury—and constitutes a final judgment. MCL 213.56(5). In addition to confirming that the UCPA pertains exclusively to intentional exercises of eminent domain, MCL 213.56 confirms the Legislature's intent to sever judicial determinations about the taking itself from jury determinations related to just compensation. See also MCL 213.56(6) ("[T]he order [on the motion contesting necessity] is not appealable as part of an appeal from a judgment as to just compensation.").

The Court of Appeals has confirmed that the UCPA has no application to owner-initiated takings claims such as Plaintiffs'. *Lim v Dep't of Transp*, 167 Mich App 751 (1988). *Lim* correctly held that "the Court of Claims is the exclusive forum to adjudicate such claims" and that the UCPA "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." *Id*. at 755. Plaintiffs ask this Court to overrule *Lim*, but there is no sound basis in the respective statutes to do so.

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the fact that the entirety of the UCPA contemplates an agency-filed complaint and uses "plaintiff" throughout to refer only to the agency condemnor, there is no textual basis to read "plaintiff" in this instance to potentially include a property-owner plaintiff advancing a freestanding action for a regulatory taking. Rather, the inclusion of "plaintiff" simply signals that, within the context of the UCPA-governed condemnation proceedings, the plaintiff agency shares a right to invoke a jury trial on compensation.

Plaintiffs argue that *Lim*'s holding is contrary to the plain language of the UCPA, stating that the Act never limits itself to agency-initiated eminent domain actions. (Pls' Supp Br, pp 14–15.) But for the reasons set forth above, the UCPA, read as a whole, plainly is limited to such actions. Plaintiffs fail to engage with the text that supposedly supports their argument.

Plaintiffs also allege that the Court of Claims Act has materially changed since *Lim* was decided. (*Id.* at 15.) The apparent thrust of this unelaborated argument is that, when *Lim* was decided, the Court of Claims was divested of jurisdiction only when a statute "*expressly* confer[red]" jurisdiction on the circuit court; now, all that is required is a claim "for which there is a right to a trial by jury as otherwise provided by law." MCL 600.6421(1). But there is nothing to support the notion that this change in phrasing compromises *Lim*'s conclusion or warrants a different one here. Plaintiffs have failed to establish a jury-trial right that is "provided by law," express or implied.

b. Neither the Condemnation by State Act nor the State Agencies Act establishes a right to a jury trial on Plaintiffs' claim.

As a backup, Plaintiffs also assert that a jury-trial right is established in the CSA and SAA. Whereas the UCPA governs the procedures surrounding exercise of eminent domain, see MCL 213.53(1), the CSA and SAA are eminent-domain

enabling statutes. Regardless, the same conclusion holds: These statutes apply only to eminent-domain actions.[18]

The CSA authorizes only affirmative eminent-domain proceedings, permitting a taking only after initiation of *in rem* proceedings in the circuit court. MCL 213.1. The circuit court has jurisdiction only over "such proceedings." *Id.* See also MCL 213.2 (permitting authorized persons to request Attorney General file petition to acquire property, requiring objectors to appear and show cause).

Proceedings to acquire property under the CSA trigger a hearing regarding the proposed exercise of eminent domain, at which "*the court* shall hear" objections and "proceed to decide the questions raised." MCL 213.3 (emphasis added). Only an advisory jury is contemplated by the statute.[19] Even setting aside the CSA's express and exclusive application to eminent-domain proceedings, it contains *no* jury-trial right—not even one limited to just compensation.

Likewise, the SAA is targeted toward eminent-domain actions that, unlike the instant case's allegations, result in an actual transfer of title. It opens by stating, "Any public corporation or state agency is authorized to take private

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[18] The CSA is housed in MCL 213.1 through MCL 213.4, and the SAA is housed in MCL 213.21 through MCL 213.24. Both appear in Chapter 213 of the Compiled Laws, entitled "Condemnation," along with the UCPA.

[19] The statute permits the circuit court to convene either a three-commissioner panel or, at its option, a 12-member jury, "to ascertain and determine the necessity of the proposed public use, the necessity for using such property and the just compensation to be paid therefor by the state"; but that determination is nonbinding and intended only "to possess the court with the truth and right of the matter." MCL 213.3. See also MCL 213.4 (permitting court to "set aside the report and finding").

property necessary for a public improvement or for the purposes of its incorporation or for public use *and to institute and prosecute proceedings for that purpose*." MCL 213.23(1) (emphasis added). See also MCL 213.24 (stating that "[p]roceedings may be commenced and prosecuted under this act" only upon a declaration of necessity and a resolution directing an attorney to institute circuit-court proceedings).

Regarding the SAA, Plaintiffs assert, without any analysis, that their jury-trial right appears at MCL 213.25. (Pls' Supp Br, p 16 n 97.) Such a right, if it exists, attaches only to a *State-filed* petition seeking approval of its exercise of eminent domain. MCL 213.25 ("The petition shall state among other things that it is made and filed as commencement of judicial proceedings by the corporation or state agency in pursuance of this act to acquire the right to take private property for the use or benefit of the public . . . . The petition shall ask that a jury be summoned[.]").[20] This parallels the UCPA's general presumption that an agency-initiated action is pending.

For these reasons, none of the statutes invoked by Plaintiffs—the UCPA, CSA, or SAA—can be read to apply to a regulatory-takings action initiated by a property owner such as Plaintiffs. And none of these statutes includes a jury trial right that plausibly could apply to such an action, either. Accordingly, the Court of

[20] Moreover, the Court of Appeals has concluded that the UCPA implicitly repealed MCL 213.25, principally due to irreconcilable inconsistencies presented by the jury question. *City of Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 36–38 (2004) ("MCL 213.56 of the UCPA provides that the issue of necessity is to be reviewed by the trial judge, not the jury as provided in MCL 213.25 of the [SAA]."); *id.* at 39 ("The issue must now be determined by the agency seeking to condemn and it may be reviewed only by the trial judge.").

Claims Act's exception for circuit-court jurisdiction did not apply, and transfer to the Court of Claims was appropriate.

2. There is no constitutional right to a jury trial on Plaintiffs' takings claim.

Unlike Plaintiffs' statutory claims, which do not appear in their complaint, their pleading does include a claim under Const 1963, art 10, § 2. But, when it comes to the purported jury-trial right, Plaintiffs' pleaded constitutional claim fares no better than the non-pleaded statutory ones. It has long been established that there is no constitutional right to a jury trial for a takings claim. *Hill v Michigan*, 382 Mich 398, 405–406 (1969) ("[N]either the Constitution of 1908 nor 1963 provides a constitutional right to a jury in a condemnation hearing[.]"). Plaintiffs admit to the effect of this settled precedent. (Pls' Supp Br, p 21 & n 119.)

Nevertheless, Plaintiffs maintain that this Court's precedent is incorrect. They harken back to the Magna Carta, touching briefly upon laws governing Michigan's "pre-state wilderness" along the way. (*Id.* at 19–21.) The crux of Plaintiffs' argument is that, given the purported pedigree of the jury trial right they propose, Michigan's *general* right to a jury trial, Const 1963, art 1, § 14, should be interpreted to extend to their claim by reference. But reaching so far into the past proves too much.

First of all, no right to a jury trial for condemnation proceedings existed at common law. On this point, the United States Supreme Court has stated:

> The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress

> contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain. [*United States v Reynolds*, 397 US 14, 18 (1970), quoting 5 J. Moore, Federal Practice 38.32(1), p 239 (2d ed 1969).]

Thus, the Michigan Constitution's preservation of the right to a jury trial does *not* refer back to some ancient, hallowed right to a jury trial for takings claims. Indeed, it is telling that Plaintiffs can muster no contextual examples of such a right, instead referring only to general, unelaborated principles regarding property rights.

Nor can Plaintiffs establish that a jury-trial right arose and continues to exist within the confines of Michigan jurisprudence that would place jurisdiction in the circuit court under the Court of Claims Act. The predecessor to Michigan's current constitution did establish a limited jury trial right regarding both "necessity" and just compensation, Const 1908, art 13, § 2; but (1) actions by the State, as opposed to its subdivisions, were exempted from the right, and, in any event, (2) Michigan's current constitution eliminated the right altogether.

Thus, even to the extent Plaintiffs are correct that some right to a jury trial existed in Michigan's distant, pre-statehood past, that right became circumscribed in 1908 in the context of a takings claim. First, the fact that a jury-trial right needed to be articulated in the context of condemnations confirms that the general preservation of the right to a jury trial did not include such a right. Second, with the exception of highway or road commissioners, the jury-trial right attached only to takings effected by political subdivisions. It expressly did not attach to takings effected by the State. *Fitzsimmons & Galvin v Rogers*, 243 Mich 649, 661 (1928)

("The present undertaking is a state project, and as such clearly falls within the exception found in the state Constitution as to the right of a jury trial.").

In Michigan's 1963 Constitution, the general preservation of the jury trial remains, Const 1963, art 1, § 14, but, as in the 1908 Constitution, takings are governed by their own provision, which now bears no reference even to a circumscribed jury right. Const 1963, art 10, § 2. Only the determination of just compensation is addressed, and that responsibility lies with "a court of record." *Id.*

In sum, whatever ancient, unspecified principle Plaintiffs invoke was replaced in the 1908 Constitution and further refined in the 1963 Constitution. The People decided not to maintain the limited, express jury trial right regarding takings claims set forth in the 1908 Constitution. This Court has noted, and given effect to, the People's decision to remove certain components of the 1908 Constitution's takings provisions when enacting the 1963 Constitution. E.g., *Co of Wayne v Hathcock*, 471 Mich 445, 464 (2004) ("[T]he 1908 Constitution . . . in contrast to the 1963 Constitution . . . expressly required any exercise of eminent domain to be 'necessary.'"). Accord *Hill*, 382 Mich at 406–407 (contrasting limited jury-trial right in Const 1908, art 13, § 2, with absence of any jury-trial right in Const 1963, art 10, § 2). Even if Plaintiffs could anchor their purported right in some jurisprudential history—which they have not and cannot—the link was severed by the People in 1963.

Finally, Plaintiffs argue that the constitutional phrase "[t]he right of trial by jury shall remain," Const 1963, art 1, § 14, suffices to constitutionalize any

statutory right to a jury trial that existed at the time of ratification. (Pls' Supp Br, p 22 & n 122, citing *Guardian Depositors Corp of Detroit v Darmstaetter*, 290 Mich 445, 451 (1939).) They assert that this applies to the SAA and CSA, in particular, to the exclusion of the UCPA. (*Id.*) For the reasons set forth above, however, the SAA and CSA do not apply to Plaintiffs' claims. Simply put, Plaintiffs' bid to avoid the Court of Claims' settled jurisdiction over its takings claim lacks any viable basis, constitutional or statutory, and the Court of Appeals correctly rejected it.

II. Whether examined on a threshold inquiry related to the public-health emergency they addressed or under *Penn Central*, the challenged orders did not comprise a compensable taking.

The Court of Appeals likewise was correct in rejecting Plaintiff's regulatory-takings claim on the merits, duly applying its own published decision in *Gym 24/7* to hold that the claim should be dismissed as a matter of law. Plaintiffs raise three interrelated challenges to the decision below. First, they allege that *Gym 24/7* was wrongly decided and therefore led to an unsound result in their own case. Second, and notwithstanding the correctness of the Court of Appeals' *Gym 24/7* opinion, Plaintiffs argue that their businesses pose distinguishable considerations regarding whether a taking occurred. Third, and closely related, Plaintiffs argue that any decision was premature because discovery is required to elicit the necessary inputs to the *Penn Central* test.

This Court is addressing the core issue of *Gym 24/7*'s correctness under that caption. Defendants incorporate those arguments here, but rephrase them below to account for Plaintiffs' particular arguments. In short, to the extent that Plaintiffs'

claims differ from those of the plaintiffs in *Gym 24/7*, they only cement the result. This is true because any distinguishable considerations merely confirm that the State's economy shared the burdens of the State's tailored effort to mitigate the COVID-19 pandemic. Even considering only places of public accommodation, which all bore similar burdens, or food-services businesses in particular, the result is the same: The orders did not impose upon Plaintiffs a burden so disproportionate that compensation is required. No discovery is required to reach this result, nor could any conceivable discovery change it.

A. Standard of Review

This Court reviews rulings on motions for summary disposition de novo. *Spiek v Michigan Dept of Transp*, 456 Mich 331, 337 (1998). Constitutional questions are likewise reviewed de novo. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 686 (2022).

B. Analysis

Whereas a *categorical* regulatory takings claim is premised upon a complete and permanent loss of all economically beneficial use of one's property, a *noncategorical* takings claim is available to determine whether fairness and justice require that some lesser degree of "taking" for public use occurred and demands compensation. Plaintiffs raise only a noncategorical claim.[21] This inquiry

[21] Although Plaintiffs' complaint contained unelaborated claims that the restrictions rendered their property valueless—an allegation necessary to support a "categorical" regulatory takings claim—they have long since abandoned such a

necessarily entails an ad hoc test, the contours of which were set forth for the first time in *Penn Central*, 438 US 104. *Penn Central* highlighted three factors, examined in full below, which combine with all other relevant considerations to help determine whether the regulation targeted the plaintiff disproportionately to the public at large (and which consider the reciprocal benefit the regulation was designed to confer to the public, including the plaintiff itself). Applied here, this test confirms that no compensable taking for public use occurred as a matter of law.

But first, this Court must determine whether Plaintiffs had a property right to operate their businesses irrespective of State efforts intended to protect the public from a dire threat to individuals' lives. Plaintiffs cannot establish such a property right. And since they cannot, and this is a threshold question, the Court need not even reach the *Penn Central* inquiry to conclude that Plaintiffs' claim was correctly dismissed as a matter of law.

1. The State's efforts to respond to the historic threat posed by the pandemic did not "take" property interests such that liability for just compensation could arise.

All takings claims, regardless of the theory under which they are pursued—physical or regulatory, categorical or noncategorical—require courts to engage in a threshold inquiry: whether the plaintiff actually possesses the property interest they allege was "taken," or if the alleged use was, instead, always subject to the

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claim by exclusively briefing the noncategorical takings issue. (See generally Pls' App for Lv.) This was true even before this Court's May 31, 2023, order circumscribed the inquiry to the *Penn Central* framework. (*Id.*)

challenged government regulation. See *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027 (1992) (describing this principle as a "logically antecedent inquiry"); *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 455 (2020) ("In order to assert a takings claim of this nature, a claimant must first establish a vested property right under state law." (citation omitted)); *Adams Outdoor Advertising v City of E Lansing*, 463 Mich 17, 24 (2000) ("[B]efore we apply these tests, there is a preliminary question: does the claimant possess the interest that he alleges is being taken by the regulation?"); *Murr v Wisconsin*, 582 U.S. 383, 407 (2017) (Roberts, CJ, dissenting) (stating that "[s]tep one" entails "identifying the property interest at stake"); *Yee v City of Escondido, Cal*, 503 US 519, 535 (1992) (stating that categorical and noncategorical takings are "not separate *claims*," but "are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking").

This well-established threshold limitation on takings claims is particularly salient when the government takes action intended to mitigate a "harmful or noxious use" of property, which might be analogous to a public nuisance, or an emergent threat to health posed by the property's use. *Lucas*, 505 US at 1022–1023; *id*. at 1020 n 9. See, e.g., *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2079 (2021); *Adams Outdoor Advertising*, 463 Mich at 24–25 (holding that, because "lessors never had an *absolute* right to display signs on the rooftops of their buildings," they "had no right to prevent the imposition of regulations" affecting rooftop signage, which "did not effect a taking"); *Ypsilanti Charter Twp v Kircher*,

281 Mich App 251, 272 (2008) ("[B]ecause 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 470, 492 n 22 (1987). Indeed, as the U.S. Supreme Court explained in *Lucas*, even a regulation that deprives land of all economically beneficial use, in perpetuity, still does not require compensation if "the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 US at 1027. See also *Murr*, 582 US at 394 ("The complete deprivation of use will not require compensation if the challenged limitations inhere in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." (cleaned up)).

In clarifying this rule, *Lucas* was careful to acknowledge its limits: a state could not simply invoke "police power" as magic words to rebut any and all claims of takings, irrespective of the kind of problem the state was acting to address. 505 US at 1024 (noting the potential ability to creatively reframe *any* alleged taking as "harm-preventing" and, therefore, immune from takings liability).[22] But *Lucas* did reaffirm that a state *can* act without providing compensation, if such action was

[22] This makes sense given how broadly the states' "police power" has been defined. See, e.g., *Eubank v City of Richmond*, 226 US 137, 142 (1912) (stating that the police power "extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." (citation omitted)).

part of the state's "power to abate nuisances that affect the public generally, or otherwise." *Id.* at 1029.

The most obvious and noncontroversial application of this principle applied to mitigations of "grave threats to the lives and property of others"—for example, state action "to prevent the spreading of a fire," *id.* at 1029 n 16 (cleaned up), or shutting down an otherwise-lawful nuclear power plant when it was discovered to sit astride an earthquake fault, *id.* at 1029. See also, e.g., *United States v Caltex*, 344 US 149, 154 (1952) ("[T]he common law ha[s] 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."); *Miller v Schoene*, 276 US 272, 280 (1928) (owners of trees destroyed to prevent a disease from spreading not entitled to compensation); *Bowditch v City of Boston*, 101 US 16, 18 (1879) ("At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.") The principle has also featured in government action taken to meet the citizenry's needs in times of war, which, notable, did not comprise a physical taking. See *United States v Central Eureka Mining Company*, 357 US 155, 168 (1958) (finding no taking implicated by a nearly-three-year-long government-ordered closure of non-essential gold mines to free up resources to support the war effort, as "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".)[23]

This power to address an "actual emergency with immediate and impending danger" without implicating takings liability has been described as the "doctrine of necessity." *TrinCo Inv Co v United States*, 722 F3d 1375, 1377 (CA Fed, 2013). And much like the need "to prevent the spreading of a fire," *Lucas*, 505 US at 1029 n 16, the need to prevent the spreading of a deadly virus—undisputedly "one of the most threatening public-health crises of modern times," *In re Certified Questions*, 506 Mich at 337—is an emergency tailor-made for it.

These principles are readily apparent in Michigan state law. The prevention of the spread of disease, in particular, has long rested at the heart of the State's police power, and an owner of property in fee simple has never had a right to operate a business on that property irrespective of the State's efforts to mitigate such spread. *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

[23] See also, e.g., *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 . . . 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) (holding that five-month closure of flea market to abate danger of unexploded munitions discovered on the property was not a taking); *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.").

will prevent the spread of this dread disease"). Long ago, this Court recognized that the State may protect its residents from harm and impose limitations on the use of property without subjecting itself to payment. See, e.g., *People v Eberle*, 167 Mich 477, 485 (1911) (affirming constitutionality of law prohibiting sale of alcohol, which rendered plaintiff's inventory valueless, citing law's purpose in addressing activities "injurious to the health, morals, or safety of the community") (quotation omitted), affirmed *Eberle v People*, 232 US 700 (1914). See also *Allen v City of Detroit*, 167 Mich 464, 474 (1911), quoting *Commonwealth v Alger*, 61 Mass 53, 85 (1851); *Ypsilanti Charter Twp*, 281 Mich App at 276 ("A condition that is so threatening as to constitute an impending danger to the public welfare is a nuisance"); Cooley, Constitutional Limitations, The Police Power of the States (7th ed), pp 882–883 ("And, generally, it may be said that each State has complete authority to provide for the abatement of nuisances, whether they exist by the fault of the individuals or not . . . .").

Based on these principles, the challenged pandemic-era restrictions on Plaintiffs' business use of their property did not effect a taking. This is true whether the restrictions are viewed as an effort to abate a nuisance or under the related doctrine of necessity. Indisputably, "[t]he purpose of the EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders," *Gym 24/7*, 341 Mich App at 268–269. The restrictions were implemented to protect the public from a grave and immediate threat to its health. This acute public interest in health and safety, and the manner used to effectuate that interest, rest

outside the scope of takings as a matter of law. As laid out in the State's Answer to Plaintiffs' Application, pandemic-related case law from courts across the country—state and federal—support this conclusion and the corresponding dismissal of Plaintiffs' claims. (See State's Ans to App, pp 19–21.)

In sum, there is no legal support for the claim that a temporary limitation on food service establishments, whose sole purpose is to control a deadly pandemic, can give rise to a compensable takings claim under our state or federal constitution. A state's decision regarding how to address a matter of necessity—as opposed to choosing between two "perfectly innocent and independently desirable" goals, *Lucas*, 505 US at 1025 (quotation omitted)—exists outside of the Takings Clause, which is not intended to impede the State's ability to exercise its duty to protect citizens from imminent threats to their health or safety. A contrary rule would hamstring the government in the exercise of one of its most essential functions, turning every emergency, life-saving effort into a crippling budgetary decision. Long-settled jurisprudence duly forecloses this outcome, and Plaintiffs' claims as a matter of law. As the Court of Appeals correctly recognized, no discovery is needed to reach this conclusion, nor could any discovery avoid it; dismissal is warranted.

2. *Penn Central*'s flexible, ad hoc test instructs that Plaintiffs' property was not, as a matter of law, "taken" by the challenged restrictions.

Even if this Court declines to decide this case on the foregoing basis, many of the same considerations are powerfully relevant to the ad hoc test for noncategorical regulatory takings summarized in *Penn Central*, as set forth below. The *Penn*

Central Court prescribed an ad hoc inquiry into proportionality, which is shepherded by three significant, but non-exhaustive, 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." [438 US at 124.]

As set forth below, these factors must be viewed through a common lens: the burdens and benefits the restrictions imposed on all entities they regulated. Correctly understood, the *Penn Central* test instructs that no taking occurred.

a. The *Penn Central* test is defined by its flexibility and is intended to determine when the effects of the State action are disproportionately concentrated on a few persons.

To begin, although the three familiar *Penn Central* factors have "particular significance," they represent not an exhaustive end in themselves, but a flexible means to evaluate the unified and determinative principle underlying them: that the Fifth Amendment was "designed to bar 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." *Id.* at 123–124 (emphasis added), quoting *Armstrong v United States*, 364 US 40, 49 (1960). See also *id.* (explaining that compensation required only when economic injury is *disproportionately concentrated on a few persons*" (emphasis added)), citing *Goldblatt v Hempstead*, 369 US 590, 594 (1962); *Palazzolo v Rhode Island*, 533 US 606, 617–618 (2001) (stating that the three *Penn*

Central factors "are informed by the purpose of the Takings Clause" articulated in *Armstrong*).

Plaintiffs would have this Court place a thumb on the scales of this flexible test. In its order granting argument on the application, this Court cited *Lingle v Chevron USA Inc*, 544 US 528, 538–539 (2005), which catalogued the factors as follows:

> Primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred. [Cleaned up.]

Plaintiffs seize upon *Lingle*'s statement that the first two *Penn Central* factors are "primary," (Pl's Supp Br, pp 24, 26, 28, 31, 36), perhaps perceiving that—if those factors are divorced from their context—elevating the first two factors in some unexplained manner will help their claim. For several reasons, however, *Lingle* cannot be read to elevate any particular factor or factors at the expense of *Penn Central*'s flexibility or the settled principles of takings jurisprudence that underlie it.

First, this statement was *obiter dictum*. *Lingle* expressly went no further than disavowing a separate, freestanding test for noncategorical takings—the so-called " 'substantially advances' formula." *Lingle*, 544 US at 545 ("emphasiz[ing]" that rejection of "substantially advances" formula did not "disturb any . . . prior

holdings").[24] Its summarization of the *Penn Central* factors, including its statement of primacy, cited only *Penn Central* itself, *id.* at 538–539, which reflects no particular preference among or between the factors, see *Penn Central*, 438 US at 124. See also *Reiter v Sonotone Corp*, 442 US 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.").

Indeed, the ostensible ranking of factors suggested by Plaintiffs cannot be found elsewhere in Supreme Court jurisprudence. And for good reason. There is no "set formula" for answering the overarching question regarding fairness, justice, and proportionality; rather, the answer "depends largely upon the particular circumstances in [the] case." *Penn Central*, 438 US at 123–124 (cleaned up). "[T]he answer to this question generally resists *per se* rules and rigid formulas," instead requiring a "flexible approach," in which "[t]he factors to consider are wide ranging"—all in service of a singular, "ultimate question." *Murr*, 582 US at 409 (Roberts, CJ, dissenting); *Tahoe-Sierra Pres Council Inc v Tahoe Reg'l Plan Agency*, 535 US 302, 326 n 23 (2002). In fact, "the type of taking alleged is . . . an often critical factor," and a taking is least likely to "'arise[] from some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Keystone Bituminous Coal*, 480 US at 489 n 18, quoting *Penn Central*, 438 US at 124. These high-level classifications occur at the outset of a court's inquiry, and

[24] Prior to its repudiation, the "substantially advances" formula permitted a plaintiff to maintain a takings claim by challenging whether a regulation substantially advanced a legitimate state interest. *Lingle*, 544 US at 531.

they are no less important than the manner in which a restriction might treat an individual plaintiff. See also *id.* at 489 ("Many cases before and since *Pennsylvania Coal* [*Co v Mahon,* 260 US 393 (1922),] have recognized that the nature of the State's action is critical in takings analysis.").

At best, *Lingle*'s statement that the first two factors are "primary" reflects only these factors' direct relationship to economic burden and the overarching "disproportionality" inquiry, the latter of which necessarily will require some consideration of the economic burdens contemplated by a restriction on use. After all, at its most basic level, the *Penn Central* test was "designed to bar 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," 438 US at 123–124, and that unified question often will require examining the factors that are tailored to those very burdens. But that does not give those factors any particular overriding *weight*, nor does it diminish the potential impact of *all* circumstances relevant to a particular case.

Thus, when working through each of the three *Penn Central* factors, one must revisit the singular question the factors are intended to answer: Did the challenged restrictions single out Plaintiffs to bear a disproportionate burden? As the Court of Appeals duly concluded, the answer here, as a matter of law, is no.

b. The Court of Appeals properly applied *Gym 24/7* to conclude that no taking occurred under *Penn Central*.

The nature of the COVID-19 pandemic—the fear and death it wrought, the shared sacrifice it demanded, and the total disruption it caused in *all* corners of civic life—did not disproportionally affect Plaintiffs. And neither did the statewide efforts to mitigate the pandemic. In *Gym 24/7*, on which the panel below principally relied, the Court of Appeals correctly concluded as much in applying *Penn Central*. If the *Gym 24/7* court erred at all, it did so by discussing two factors—economic burden and investment-backed expectations—in a relative vacuum, i.e., without explicitly placing them in the proper context of disproportionality. In fact, all three factors, and all other relevant considerations, show that no taking occurred as a matter of law.

To start, the nature of the emergency and the State's form of response instructs that the character of the State action was a profoundly significant factor in these circumstances. At issue is a tailored, temporary, negative restriction on use that was imposed statewide and was intended to protect the public health from a deadly pandemic that affected everyone, including Plaintiffs' employees and customers. And no business, Plaintiffs' included, had a distinct investment-backed expectation to continue operating free from such restrictions under those conditions. Although Plaintiffs doubtless were economically impacted by the restrictions, their plain terms make clear that the burden was not disproportionate, see, e.g., E.O. 2020-20, and Plaintiffs have not plausibly alleged any lasting economic impact to their property interests beyond the speculative revenues affected by all aspects of

the pandemic and the efforts to control the same. These considerations require no factual development, and, when they are considered together, they confirm that emergency orders' burdens were not "disproportionately concentrated on a few persons," regardless of whether the numerator is limited to Plaintiffs or expanded to include the putative class.

The Court of Appeals correctly reached this conclusion under *Penn Central*, and while the *Gym 24/7* analysis it relied on may have afforded more weight in Plaintiffs' favor on certain points than warranted, that did not undermine the ultimate integrity of its disposition: that Plaintiffs' claims should be dismissed as a matter of law.

i. Plaintiffs were not singled out by the orders, and, regardless, *Penn Central*'s economic-impact analysis affords little if any weight to Plaintiffs' alleged reduced revenues.

The first of the three *Penn Central* factors looks to the "economic impact of the regulation on the claimant." *Penn Central*, 438 US at 124. In *Gym 24/7*, the Court of Appeals held that this factor favored those plaintiffs. 341 Mich App at 268. Respectfully, however, in both that case and this one, this factor weighs against finding a taking when viewed properly through the lens of "fairness and justice" articulated in *Penn Central*. *Yee*, 503 US at 522–523, citing *Penn Central*, 438 US at 123–125. It is not the mere fact of a burden that is relevant; rather, it is that burden's proportionality.

Here, the alleged economic impact of the restrictions principally comprised revenue losses that might have followed from limiting public access. (E.g., Compl ¶ 37.) This impact is sparsely alleged, but it is plain from the orders' terms and settled caselaw that it does not support Plaintiffs' claim. Throughout the orders, restrictions on public access, and their corresponding economic impact, were imposed on all similar places of public accommodation. (See, e.g., E.O. 2020-20 (March 21, 2020).) Other places of public accommodation were burdened according to the risk they were assessed to present, as were other businesses and individuals more broadly. When the scope of the orders is properly considered, this factor weighs against a taking.

Michigan cases applying the *Penn Central* factors have used this same metric, i.e., whether the government unfairly "single[d] plaintiffs out to bear the burden for the public good" and have rejected claims where the action "is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *Cummins v Robinson Twp*, 283 Mich App 677, 720 (2009). See, e.g., *Adams Outdoor Advertising*, 463 Mich at 26 (billboard code); *Schmude Oil, Inc v Dep't of Env't Quality*, 306 Mich App 35, 53 (2014); *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 147 (2014) (rezoning); *Dorman v Twp of Clinton*, 269 Mich App 638, 647 (2006); *Michigan Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 407 (1994); *Cryderman v City of Birmingham*, 171 Mich App 15, 28 (1988); *Blue Water Isles Co v Dep't of Natural Resources*, 171 Mich App 526, 536 (1988). When a court reached the opposite

conclusion, it was because the State action effectively targeted a single business. See, e.g., *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 131 (2004) ("Essentially, the city wanted plaintiff's property without having to pay for it through the institution of formal condemnation proceedings").

In that vein, it is also relevant that the regulations were intended to preserve the lives of Plaintiffs' *own customer bases and staff*, among others, and, as an ancillary benefit, to hasten the return of normal market activity statewide—part of which depended on consumers' willingness to venture back into public. When a use restriction contemplates a "reciprocity of advantage" flowing back to the plaintiffs themselves, the economic impact is all the more proportionate. See *Tahoe-Sierra*, 535 US at 341 (identifying "reciprocity of advantage" of moratorium on development between plaintiffs and the community); *Keystone Bituminous Coal*, 480 US at 491 ("While each of us is burdened somewhat by such [use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others"). E.g., *Pennsylvania Coal*, 260 US at 415 (explaining that, under *Plymouth Coal Co v Pennsylvania*, 232 US 531 (1914), statute requiring coal mine to leave pillar of coal along border with a neighboring coal mine was not a taking because statute "secured an average reciprocity of advantage that has been recognized as a justification of various laws"). The gravity of the threat addressed by the restrictions is difficult to overstate, but suffice it to say they were intended to protect the very lives—and way of life—that supported businesses like Plaintiffs'.

Beyond conclusory allegations of harm, Plaintiffs' Complaint alleged no lasting economic impact on its real or personal property, or on their businesses as a going concern. A loss of profits, by itself, is at best "a slender reed upon which to rest a takings claim." *Andrus v Allard*, 444 US 51, 66 (1979). See *Tahoe-Sierra*, 535 US at 332; *United States v Petty Motor Co*, 327 US 372, 377–378 (1946) ("[E]vidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings" (citations omitted)); *College Sav Bank v Florida Prepaid Postsecondary Educ Expense Bd*, 527 US 666, 675 (1999); *Stand for Something Group Live, LLC v Abbott*, No. 13-21-00017-CV, 2022 WL 11485464, at *6 (Tex App, October 20, 2022), review den (June 23, 2023) ("We do not usually consider the loss of anticipated profits in analyzing [the first *Penn Central*] factor."). Even to the extent one has a property interest in speculative revenues, "[t]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus*, 444 US at 66. See *Penn Central*, 438 US at 130 (holding that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable").

Courts' unwillingness to give credence to speculative lost revenues is consistent with the proper focus on the *entire scope* of one's property interests in takings jurisprudence; in the appropriate proportionality inquiry, it is important to remember that Plaintiffs do not allege—nor could they, given the orders' plain

language—that the use restrictions at issue here purported to affect Plaintiffs' other, more concrete property interests.

Accordingly, any disruption to Plaintiffs' business operations attributable to the restrictions was, first and foremost, broadly proportionate to the burdens imposed on society as a whole. Like the pandemic itself, the State's response thereto was statewide and comprehensive; its burdens, and its intended benefits, were directed at everyone in Michigan, individuals and businesses alike. Even if this proportionality inquiry is narrowed to focus on only places of public accommodation, food-service businesses were not burdened disproportionately under the plain terms of the orders. The restrictions imposed a temporary disruption of commercial use, and as detailed above, that temporary disruption was itself partial in scope: throughout the duration of the restrictions, food-service businesses were permitted to offer delivery and pickup service; their ability to host customers on premises, indoor or outdoor, varied as demands of the pandemic required; and they were of course permitted to use their property for any other uses allowed under the orders. (E.g., E.O. 2020-20, § 1 (March 21, 2020).) At most, this disruption allegedly affected Plaintiffs' speculative revenues for a temporary period—but under the orders' plain terms, all similar places of public accommodation were affected similarly, and, notwithstanding, revenues are given

at most very little weight as a matter of law in the *Penn Central* analysis.[25] Viewed properly, this factor suggests that no taking occurred.

ii. Investors in Plaintiffs, or food-service businesses generally, had no reason to believe they would be immune from emergency measures to protect the public.

The second *Penn Central* factor instructs courts to consider "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 US at 126. "A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need." *Ruckelshaus v Monsanto Co*, 467 US 986, 1005 (1984) (cleaned up). A "key factor" in this inquiry is "notice of the applicable regulatory regime." *K & K Const, Inc v Dep't of Envtl Quality*, 267 Mich App 523, 555 (2005).

The "applicable" regulatory regime here must be viewed in the context of (i.e., as "applicable" to) the deadly COVID-19 pandemic. To understand how this factor works in that context, it helps to separate the pandemic *itself* from the State's *response thereto*. This factor examines only the latter. Although few people might have particularly anticipated the onset of the historic, globe-spanning COVID-19 pandemic, once that threat to public health emerged, no one could hold a reasonable, distinct expectation that the State would remain idle. E.g., *Underwood*,

[25] And all that is to say nothing of the fact that it would be impossible to disentangle the portion of revenues lost solely as a result of the restrictions from the portion lost as a result of consumers' own unwillingness to engage in business as usual. See *Underwood v City of Starkville, Mississippi*, 538 F Supp 3d 667, 680 (ND Miss 2021).

538 F Supp 3d at 680 (holding that plaintiff failed to support this factor by alluding exclusively to "pre-pandemic circumstances"). As a federal district court stated in rejecting the same basic claim against Governor Whitmer advanced by other places of public accommodation:

> 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. [*Skatemore, Inc v Whitmer*, 2021 WL 3930808, at *4 (WD Mich Sept 2, 2021) (emphasis added), aff'd 40 F 4th 727 (CA 6, 2022).]

Would Plaintiffs have been justified in making investments premised on the State remaining idle in the face of an existential, emergent threat to public health? As explained *supra*, the answer is no. See *Withey v Bloem*, 163 Mich 419, 423 (1910). The pervasive nature of similar state action across the country confirms that, starting within the context of a pandemic viral outbreak, a given business would not have been reasonable in making investments premised on the State failing to respond to the pandemic as it did. *Oregon Restaurant & Lodging Ass'n v Brown*, ___ F Supp 3d ___, No. 3:20-cv-02017-YY, 2020 WL 6905319, at *6 (D Oregon, Nov 24, 2020) ("There is no reasonable, investment-backed expectation that the state would not act in the face of a historic public health crisis."). See also *Keystone Bituminous Coal*, 480 US at 491 ("[A]ll 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."). Expecting the sort of immunity from lifesaving public-health measures, as Plaintiffs

imply they did, is inconsistent with the principles of justice, fairness, and proportionality that guide the *Penn Central* test. *Keystone Bituminous Coal*, 480 US at 491–492 ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship.").

To date, Plaintiffs have alleged nothing in particular—let alone "distinct"—with respect to their investment-backed expectations. Their failure is understandable when framed properly in terms of the pandemic. And, looking outward to the rest of Michigan's economy at the relevant time, Plaintiffs fail to allege the sort of "expectation" that is in any way unique. Furthermore, the temporary and limited nature of the restrictions at issue, along with the context from which they arose, further belies any notion that Plaintiffs' investment-backed expectations for their property were unreasonably disrupted. This factor too suggests no taking occurred.

iii. The character of the governmental action here confirms that there was no taking as a matter of law.

The third *Penn Central* factor weighs "the character of the governmental action." *Penn Central*, 438 US at 124. "[T]he nature of the State's action is *critical* in takings analysis." *Keystone Bituminous Coal*, 480 US at 488–490 (emphasis added) (collecting cases affirming the "important role" the nature of the government action plays in the analysis). See also *Tahoe-Sierra*, 535 US at 320 (highlighting "the importance of the public interest served by the regulation" as part of a

noncategorical inquiry); *Lucas*, 505 US at 1015 (confirming that noncategorical takings claims include analysis of "how weighty the public purpose is"). In *Gym 24/7*, the Court of Appeals correctly held that the background informing this factor was sufficiently weighty to compel dismissal, even after it found the other two factors weighed somewhat in the plaintiff's favor. *Gym 24/7*, 341 Mich App at 268–269.

The challenged orders were intended "to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders." *Id.* This proper purpose lies at the heart of the State's traditional police power to protect the public health. For this reason, "[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, Inc v Freeland*, 520 F Supp 3d 1070, 1078 (ND Ind, Feb 17, 2021) (collecting cases). (See also State's Ans to App, p 21–22 & n 22 (collecting cases)).

Pointing to *Lingle*, Plaintiffs suggests that the nature of the threat itself plays no role in this factor (or, by extension, the *Penn Central* inquiry at large). (Pls' Supp Br, p 34.) This interpretation of *Lingle* is well off the mark. As set forth above, *Lingle* explained that its holding was limited to a rejection of "a stand-alone regulatory takings test" that asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Lingle*, 544 US at 545; *id.* at 540, 542. A challenge to a regulation's efficacy or legitimacy invokes the Due Process Clause, not the Takings Clause, and thus a plaintiff cannot premise a takings claim

upon it. *Id*. at 540. Nothing about this clarification suggested that the nature of the purpose the regulation was designed to serve (regardless of how effectively it may have done so) was now irrelevant to a takings inquiry, contrary to the heaps of longstanding jurisprudence holding otherwise. E.g., *id*. at 545 (stressing that its ruling did not "disturb any of [the Court's] prior holdings").

Here, the *Penn Central* test's overarching focus on the proportionality of the burden not only permits, but in this context requires, consideration of the character of the orders vis-à-vis the threat they addressed. *Tahoe-Sierra*, 535 US at 326 n 23 ("The Takings Clause requires careful examination and weighing of all the relevant circumstances[.]"), quoting *Palazzolo*, 533 US at 636 (O'Conner, J, concurring). The U.S. Supreme Court has confirmed this following *Lingle*. *Murr*, 582 US at 405 (holding that third *Penn Central* factor weighed against a taking when the governmental action was "a land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land"). A contrary rule would put too much focus on "burden," which cannot be understood without the corresponding "benefit." In addition to the direct, immediate benefit of saving lives, the orders also were intended to lessen the pandemic's spread and duration so as to bring consumers back to the very market in which Plaintiffs operate.

Plaintiffs would define this factor as a mere restatement of the *Penn Central* inquiry's overarching focus on proportionality, claiming that it "does not contemplate the purpose behind the government's action," but instead asks only whether the

action "singles plaintiffs out to bear the burden for the public good." (Pls' Supp Br, p 28, quoting *K & K Constr*, 267 Mich App at 559.[26]) Given that this same question underlies and informs all of the *Penn Central* factors, it is unclear what meaning would be left of this factor under this interpretation. But even if *distribution* of the burden is the third factor's only input, it still weighs heavily against finding a taking. The Governor's and Director's orders placed similar burdens on similar places of public accommodation, and significant burdens on all places of public accommodation—and indeed, on all businesses and individuals statewide—for the intended benefit of all.[27] In fact, the statewide nature of the public-health threat is *crucial* to evaluating Plaintiffs' claim that they bore a disproportionate burden. See *Penn Central*, 438 US at 133–135.

The idea that Plaintiffs—or food-service businesses generally—bore a disproportionate burden therefore does not withstand scrutiny. The purpose of the orders was to stem the tide of COVID's spread to everyone's benefit. In so doing, a burden befell economic actors such as Plaintiffs. But the nature and magnitude of the corresponding statewide benefit intended by the orders is very relevant. Cf. *id.* at

[26] The very case Plaintiffs cite for this proposition in fact gave heavy weight to the significance of the interests addressed by the regulation at issue. *K & K Constr*, 267 Mich App at 559 (applying observation that similar regulations "indisputably serve an important public purpose" in context of third *Penn Central* factor), quoting *Brace v United States,* 48 Fed Cl 272, 279 (2000).

[27] Even within the very narrow context of food-service businesses, it would be incomplete to circumscribe the "burden" to the business alone. A consumer's access to prepared food is not always a luxury or an indulgence.

135 (noting relevance of fact that challenged law's benefit inured to public generally, rather than serving "some strictly governmental purpose").

Notably, by styling this lawsuit as a class action, Plaintiffs bring the orders' statewide scope to the fore, effectively acknowledging that they were not "unfairly singled out to bear a burden that should be borne by the public as a whole." *Yee*, 503 US at 522–523. *Thousands* of businesses were treated identically to Plaintiffs. And that is to say nothing of the countless other businesses and individuals that were required to bear their own heavy burdens in this society-wide effort.

Attempts to define an accurate (if legally improper) "class" of entities burdened by the State's COVID-19 emergency orders will thus encompass more and more businesses and other entities, until one reaches the correct conclusion that the entire territory was affected. Class actions and takings claims already are like oil and water; but a class action whose theory could be extended statewide is even less cognizable as a takings claim. The character of the order that included Plaintiffs and the putative class members was therefore not disproportionate. See also *Blackburn v Dare Co*, 58 F4th 807, 814–815 (2023) (noting putative class action's incompatibility with a showing of disproportionate burden).

All other considerations informing the "character" of the orders weighs against finding a taking, too. The orders were temporary in nature, both by their plain terms and their actual operation, and their negative restrictions were calculated to mitigate the spread of a deadly pandemic. And, again, similar restrictions were in place all across the State and, indeed, the country. *McKinley v Grisham*, No. CV 20-01331

JHR/JFR, 2022 WL 2048593, at *7 (DNM, June 7, 2022) ("Rather than affirmative exploitation, physical invasion or permanent appropriation of plaintiffs' assets, the public health orders were negative limitations setting occupancy limits, etc.; their negative character also weighs in favor of the Defendants.").

Finally, the orders' emergency character instructs that they should not be considered a taking, insofar as a contrary holding would put the State to the choice of either letting a deadly virus ravage its populace, on the one hand, or go bankrupt in its efforts to mitigate the same, on the other. Never before has the law imagined that the State would be obligated to pay just compensation to temporarily regulate property in an emergency to protect the public health. That rule would be untenable. See *Respublica v Sparhawk*, 1 US 357, 361–362 (1788) ("If the Appellant is entitled to relief, ... every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified. What nation could sustain the enormous load of debt which so ruinous a doctrine would create!"); *Tahoe-Sierra*, 535 US at 340 (disavowing a "perverse system of incentives" that acknowledge "well-reasoned decisions" facilitated by permitting delay "while, at the same time, holding that those planners must compensate landowners for the delay").

For these reasons, the character of the challenged COVID-19 regulations proves that neither Plaintiffs' properties, nor their revenues, were taken for public use. To make their case for disproportionality, Plaintiffs' complaint cherry-picks regulations that affected the class of businesses to which it belongs—but even these

particular regulations that applied to the putative class applied to thousands of other businesses to a proportional extent. The historic threat—and the historic response that threat required—was felt by individuals and businesses of all stripes nationwide. As a matter of law, no noncategorical taking occurred under *Penn Central*.

3. Further factual development could not change that Plaintiffs' claim fails as a matter of law under *Penn Central*.

A principal theme in Plaintiffs' argument posits that the Court of Appeals, in both *Gym 24/7* and the instant case, failed to consider the pertinent facts, whether those facts related to the orders, fitness centers, food-service businesses, or places of public accommodation generally. These attacks on the Court of Appeals' decisions collapse into a claim that discovery is needed to explore facts such as "whether the Plaintiffs lost employees, customers, or goodwill"; "what distinct investment-backed expectations were held by . . . food-service establishments"; Plaintiffs' "operating costs and overhead," "number and type of employees," "[e]quipment and supplies," and so on. (Pls' Supp Br, p 27.) Plaintiffs say that courts cannot engage in a *Penn Central* inquiry without such information.

This argument is founded on a misunderstanding of the nature of the *Penn Central* test, the COVID-19 pandemic and the statewide orders it prompted, and litigation generally. Just as every lawsuit contains a factual component, it is true that an ad hoc, fact-based inquiry such as the *Penn Central* test must be answered with facts; but that does not mean that articulating a fact question makes that

question relevant to the ultimate issue or forecloses judgment as a matter of law. Judgment on the pleadings is routine—and desirable—when the allegations in the complaint cannot support a viable claim for relief. *Spiek*, 456 Mich at 337. Takings claims, including those advanced under *Penn Central*, are no exception.[28] Numerous courts nationwide have recognized as much in the context of this pandemic, routinely dismissing takings challenges to COVID-19 business restrictions as a matter of law.[29] Such is the case here too—twice over, in fact.

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[28] E.g., *74 Pinehurst LLC v New York*, 59 F4th 557 (CA 2, 2023); *Britton v Keller*, 851 F. App'x 821, 825 (CA 10, 2021) ("Ms. Britton argues the district court erred in performing a *Penn Central* analysis on a motion to dismiss. In her view, because the *Penn Central* analysis is fact specific, a district court must wait for the factual development that occurs in discovery before undertaking it. Ms. Britton is incorrect."), citing *Taylor v United States*, 959 F3d 1081, 1087 (Fed Cir 2020) (concluding, in reviewing a motion to dismiss a takings claim, that "the [plaintiffs'] regulatory-taking claim cannot pass muster under [the *Penn Central*] standards, even without further factual inquiry"); *Britton*, 851 F. App'x at 827 n 4 (collecting cases); *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"); *Rogin v Bensalem Twp*, 616 F2d 680 (CA 3, 1980).

[29] For federal examples, see, e.g., *Abshire v Newsom*, 2023 WL 3243999 (CA 9, May 4, 2023) (Mem); *Nowlin v Pritzker*, 34 F 4th 629 (CA 7, 2022); *Bojicic v DeWine*, 2022 WL 3585636 (CA 6, Aug 22, 2022); *Best Supplement Guide, LLC v Newsom*, 2022 WL 2703404 (CA 9, July 12, 2022) (Mem); *Everest Foods Inc v Cuomo*, 585 F Supp 3d 425 (SDNY 2022); *Tuck's Rest & Bar v Newsom*, 2022 WL 5063861 (ED Cal Oct 4, 2022); *Tatoma, Inc v Newsom*, 2022 WL 686965 (SD Cal Mar 8, 2022); *TJM 64, Inc v Harris*, 526 F Supp 3d 331 (WD Tenn 2021); *Madsen v City of Lincoln*, 574 F Supp 3d 683 (D Neb 2021); *Underwood*, 538 F Supp 3d 667; *Culinary Studios, Inc v Newsom*, 517 F Supp 3d 1042 (ED Cal 2021); *Metroflex Oceanside LLC v Newsom*, 532 F Supp 3d 976 (SD Cal 2021); *Mission Fitness Ctr, LLC v Newsom*, 2021 WL 1856552 (CD Cal, May 10, 2021); *Amato v Elicker*, 534 F Supp 3d 196, 212–214 (D Conn, April 15, 2021); *Northland Baptist Church of St. Paul v Walz*, 530 F Supp 3d 790 (D Minn, March 30, 2021), aff'd sub nom *Glow In One Mini Golf, LLC v Walz*, 37 F 4th 1365 (CA 8, 2022); *Daugherty Speedway*, 520 F Supp 3d 1070; *Peinhopf v Guerrero*, 2021 WL 2417150 (D Guam, June 14, 2021); *Our Wicked Lady LLC v Cuomo*, 2021 WL 2413347 (SDNY, June 11, 2021); *Lebanon Valley Auto Racing*

First, there is the legal principle that state regulatory action intended to abate a nuisance on a plaintiff's property or avert acute and imminent danger—here, the spread of a deadly global pandemic—cannot comprise a taking. This conclusion would hold true even if the alleged "taking" was categorical, i.e., permanent and total. E.g., *Lucas*, 505 US at 1029 ("Nor [is compensation owing to] the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault"). Plaintiffs' is a noncategorical claim, and no discovery regarding Plaintiffs' workforce, investments, goodwill, or overhead can avoid the same conclusion; even if the effect on Plaintiffs' businesses is assumed to be both permanent and total, Plaintiffs would still not be able to state a compensable takings claim as a matter of law.

Notwithstanding that threshold principle, the ad hoc *Penn Central* inquiry can and must be resolved on the pleadings here, too. That is because, in working through that inquiry here, a finding of no takings liability as a matter of law flows inexorably from the purpose and design of the challenged statewide orders, which are apparent from the orders' plain terms. Further exploration of Plaintiffs' respective individualized experiences under the orders would not change that

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Corp v Cuomo, 478 F Supp 3d 389 (ND NY, 2020). For state examples, see, e.g., *Galovelho LLC v Abbott*, 2023 WL 5542621 (Tex App Aug 29, 2023); *640 Tenth, LP v Newsom*, 78 Cal App 5th 840 (2022); *Orlando Bar Grp, LLC v DeSantis*, 339 So 3d 487 (Fla Dist Ct App, 2022); *Stand for Something Grp Live, LLC v Abbott*, 2022 WL 11485464 (Tex App Oct 20, 2022); *JWC Fitness, LLC v Murphy*, 469 NJ Super 414 (2021). But see *City Bar, Inc. v Edwards*, 349 So 3d 22, 33 (La App 1 Cir Aug 30, 2022).

outcome or render their claims any more legally viable. E.g., *Penn Central*, 438 US 137 (rejecting property owner's untenable, "exaggerate[d]" claim regarding what the challenged law plainly did not prohibit); *Adams Outdoor Advertising*, 463 Mich at 24–25 (applying *Penn Central* test to grant summary disposition based in part on simple observation that "any economic effect would be limited because the rooftop is only a small portion of the lessors' property," without discussing particulars of plaintiff's finances); *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 47 (1985) (evaluating economic-impact factor by reference to law's characterization, design, and purpose vis-à-vis plaintiffs).

Even Plaintiffs do not dispute that the third factor—the character of the disputed orders—can be examined on the pleadings. (See Pls' Supp Br, p 30.) And as courts have overwhelmingly recognized, that character weighs, at the least, very heavily against the existence of takings liability here. But the same is true of the first and second factors, i.e., the orders' economic impact and effect on investment-backed expectations; their proper consideration likewise shows that Plaintiffs have failed to state a claim as a matter of law, and no further factual development could change that.

As discussed, Plaintiffs' alleged economic harm, to the extent it can be discerned from their sparse allegations, is at best scarcely cognizable under *Penn Central*. And by their plain terms, the restrictions were imposed on a temporary and statewide basis, with the same type of restrictions imposed on other similar places of public accommodation (along with broadly similar burdens on other

businesses and individuals throughout the State as well). These facts are enough in themselves to make clear that the economic impact at issue does not support a finding of takings liability under *Penn Central*, regardless of the specific extent of losses that Plaintiffs might eventually be able to show. E.g., *Penn Central*, 438 US at 133–135 ("It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others. . . . Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*."). Likewise, Plaintiffs' alleged "expectation"—that the State would remain idle in the face of a grave threat such as COVID-19—is not, as a matter of law, the sort that would suggest a taking had occurred; whether a given business invested $1,000 or $100,000 is of no moment to that conclusion.

None of the fact questions pressed by Plaintiffs particular to their businesses could render their claims viable under a proper application of *Penn Central* to this case, which is dominated by the distributed, statewide burden demanded by the historic threat posed by COVID-19 and the corresponding reciprocity of advantage it was designed to afford Michiganders at large—Plaintiffs included.[30] The

[30] Federal courts confronting this issue have held that a *Penn Central* analysis does not necessarily require discovery. E.g., *74 Pinehurst LLC v New York*, 59 F4th 557 (CA 2, 2023); *Britton v Keller*, 851 F. App'x 821, 825 (CA 10, 2021) ("Ms. Britton argues the district court erred in performing a *Penn Central* analysis on a motion to dismiss. In her view, because the *Penn Central* analysis is fact specific, a district

business-specific factfinding Plaintiffs urge cannot overcome this or cure the fatal legal deficiencies of their claims—nor, for that matter, is it even compatible with Plaintiffs' own class-action framing of those claims.

Simply put, to determine whether a compensable taking occurred under a noncategorical regulatory takings theory, *Penn Central* instructs this Court to evaluate whether the plaintiff was unfairly singled out to bear the burden of a policy that was enacted for the benefit of everyone in the State, such that the taxpayers should be called upon to shoulder that burden as a matter of justice and fairness. *Yee*, 503 US at 522–523. In this case, that answer is no, and it is readily apparent from the pleadings; "no factual development" would or could change it. *Spiek*, 456 Mich App at 337. No further discovery is required, and this issue was suitable for the Court of Appeals' review and dismissal as a matter of law. This Court should deny leave or affirm.

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court must wait for the factual development that occurs in discovery before undertaking it. Ms. Britton is incorrect."), citing *Taylor v United States*, 959 F3d 1081, 1087 (Fed Cir, 2020) (concluding, in reviewing a motion to dismiss a takings claim, that "the [plaintiffs'] regulatory-taking claim cannot pass muster under [the *Penn Central*] standards, even without further factual inquiry"); *Britton*, 851 F. App'x at 827 n 4; *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"); *Rogin v Bensalem Twp*, 616 F2d 680 (CA 3, 1980).

CONCLUSION AND RELIEF REQUESTED

This Court should either deny leave to appeal or affirm the decision below.

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WORD COUNT STATEMENT

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