STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Hood, Jansen, and K.F. Kelly

MOUNT CLEMENS RECREATIONAL BOWL, INC, a Michigan profit corporation, KMI, INC, a Michigan profit corporation, and MIRAGE CATERING, INC, a Michigan profit corporation, 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, PATRICK GAGLIARDI, in his official capacity as Chair of the Michigan Liquor Control Commission, and GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, Defendant/Appellee.	Supreme Court Case No. 165169 Court of Appeals Case No. 358755 Court of Claims No. 21-001836-CZ

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SUPPLEMENTAL BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGE AND MICHIGAN TOWNSHIPS ASSOCIATION

Dated: November 1, 2023

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STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Municipal League ("MML") is a nonprofit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Defense Fund. MML operates the Legal Defense Fund through a board of directors that is broadly representative of its members. The purpose of the Fund is to represent the member cities and villages in litigation of statewide significance.

The Michigan Townships Association ("MTA") is a Michigan nonprofit corporation whose membership consists of more than 1,200 townships within the State of Michigan, joined together for the purpose of providing education and exchanging information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government. The MTA has participated as *amicus curiae* in numerous state and federal cases presenting issues of statewide significance to Michigan townships.

This case presents questions of utmost importance to the function of local governments. Local governments sometimes impose regulations that temporarily alter the value of a particular land use without divesting the owner of a vested property interest. The law does not recognize those actions as takings that require the payment of just compensation. This Court should reject the invitation to change that law, where doing so would upend long accepted and authorized governmental action necessary to protect the public health, safety, and welfare.

In accordance with MCR 7.312(H)(5), no counsel for a party to this appeal authored this brief in whole or in part. No counsel or party to this appeal, nor any other person other than the *amici curiae*, their members, or their counsel, made a monetary contribution towards the preparation of this brief.

ARGUMENT

I. The public nuisance "exception" to takings jurisprudence has been long recognized in state and federal common law, and it is vital to daily local governance.

In Michigan, government is instituted for the equal benefit, security, and protection of the people. Const 1963, art 1 §1. Of course, sometimes the government's efforts to provide for the "security and protection" of the people is limited by the rights of individuals. Relevant in this case, when a governmental actor takes private property for public use, the property owner is entitled to just compensation. US Const Am 5; Const 1963, art 10, §2. Countless courts over the centuries have examined the intersection of the police power and the takings clauses, and the law has come to a relatively stable and clear balance. What Plaintiffs ask this Court to do in this case has the potential to greatly upset that balance, and at the same time, to drastically alter the function and feasibility of local governance in modern life.

A. Local governments impact the day-to-day value of particular land uses in the ordinary course of modern life.

Governments must sometimes take actions that impact the value of a particular land use. Local water departments temporarily close roads and may limit access to businesses to fix a broken water main.[1] Local health departments inspect restaurants for health code compliance[2] and put in place regulations to prevent the spread of disease, which can have the effect of closing child care

[1] Moore, *Water Main Break Closes Lake Michigan Dr. at Covell Ave.*, Wood TV 8 (January 13, 2023) https://www.woodtv.com/news/grand-rapids/water-main-break-closes-lake-michigan-dr-at-covell-ave/ (accessed October 24, 2023).

[2] O'Brien, *County Shuts Down Downtown Restaurant*, Crain's Grand Rapids Business (April 25, 2016) <https://www.crainsgrandrapids.com/news/county-shuts-down-downtown-restaurant/> (accessed October 24, 2023).

centers.[3] Local law enforcement agencies close roads, block traffic, order evacuations, and even commandeer spaces when responding to emergencies.[4] These and like events occur in places across Michigan in the normal course of life. They are often essential to protecting the public, health, safety, and welfare.

They are not, however, takings that require just compensation. A determination to the contrary would fundamentally alter the delicate balance between private property rights and the police powers granted to local governments. Yet under Plaintiffs' theory in this case, these essential actions violate the federal and state constitutions unless the property owner is paid just compensation. Plaintiffs argue that the temporary closure of their businesses during the height of the COVID-19 pandemic was a taking for which just compensation must be paid. By extension, Plaintiffs argue that all temporary closures or restrictions are a compensable taking. This theory seriously threatens the function of local governments and is unsupported in our caselaw.

B. Determination of the vested property interest is a threshold question of state law.

Not every regulatory action is a taking. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co v Mahon*, 260 US 393, 413; 43 S Ct 158; 67 L ED 322 (1922). And what constitutes a property owner's "bundle of sticks" is a matter of state law and expectations

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[3] Spruill and Clark, *Some Michigan Daycares Closing Due to Coronavirus Concerns*, WDIV 4 (March 18, 2020) https://www.clickondetroit.com/news/local/2020/03/18/some-michigan-daycares-closing-due-to-coronavirus-concerns/ (accessed October 24, 2023).

[4] Holloway, *Suspect in Custody After Overnight Shelter-In-Place*, WLNS 6 (September 2, 2023) https://www.wlns.com/news/eaton-county-overnight-shelter-in-place-lifted/ (accessed October 24, 2023).

of society: "[a]s long recognized some values are enjoyed under an implied limitation and must yield to the police power." *Id.*

As both this Court and the Supreme Court of the United States have explained, the threshold inquiry in the takings context is a determination of the vested property interest. *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 455; 952 NW2d 434 (2020) ("In order to assert a takings claim . . .a claimant must first establish a vested property interest."). A vested property interest is "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v General Motors Corp*, 323 US 373, 378; 65 S Ct 357; 89 L ED 311 (1945). "Property interests. . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v Monsanto Co*, 467 US 986, 1001; 104 S Ct 2862; 81 L ED 815 (1984) (cleaned up).

C. Where the police power and the Takings Clause intersect, even the prohibition of lawful uses does not constitute a taking.

Over a century ago, the Supreme Court of the United States held that the Takings Clause must sometimes yield to the police power of local governments. *Hadacheck v Sebastian*, 239 US 394, 409-411; 36 S Ct 143; 60 L Ed 348 (1915). Comparing Los Angeles' closure of a brickyard to the previous closure of a livery by Little Rock, the Supreme Court stated that, "[t]here was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brickyard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities,-that is, the effect upon the health and comfort of the community." *Id.* at 410-411.

The Supreme Court has also held that a "temporary restriction that merely causes a diminution in value" is not a taking. *Tahoe-Sierra Pres Council Inc v Tahoe Reg'l Plan Agency*, 535 US 302, 332; 122 S Ct 1465; 152 L Ed 517 (2002). "Logically," the Court explained, "a fee

simple estate cannot be rendered valueless by a temporary restriction on economic use, because the property will recover value as soon the prohibition is lifted." *Id*. Specifically rejecting the idea that temporary delays in the ability to use land for a specific economically valuable purpose constitutes a taking, the Supreme Court explained that finding that a taking occurred in such a circumstance "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *Id*. at 335. Everyday government actions like "prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee" would be fundamentally affected if temporary restrictions on land use were determined to be takings. *Id*. Analysis of whether a regulation constitutes a temporary taking, the Supreme Court explained, "requires careful examination and weighing of all the relevant circumstances." *Id*., quoting *Palazzolo v Rhode Island*, 533 US 606, 636; 121 S Ct 2448; 150 L ED 592 (2001) (O'Connor, J., *concurring*). The Supreme Court has rejected "any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather remain disproportionately concentrated on a few persons." *Id*. at 336 (cleaned up).

This Court has long recognized the Legislature's authority to grant governmental units the power to institute temporary, emergency regulations. In *People ex rel. Hill v Bd of Ed of City of Lansing*, 224 Mich 388; 195 NW 95 (1923), this Court recognized that local governments, in the exercise of the police power and in the interest of the public health may enact laws, rules, and regulations to prevent the spread of disease (in that case, smallpox), citing *Mathews v Kalamazoo Bd of Ed*, 127 Mich 530; 86 NW 1036 (1901), and *Jacobsen v Massachusetts*, 197 US 11; 25 S Ct 358, 49 L ED 643 (1905). In *People ex rel. Hill*, the Court examined the then-existing laws granting the City of Lansing and local boards of health to deal with infectious disease to determine

the relevant regulation's soundness in law, but it did not conduct a takings analysis. 224 Mich at 394-395.

In addition to the orders challenged by Plaintiffs in this case, many other orders were made during the COVID-19 pandemic, pursuant to authority granted to local governments by the Legislature that, under Plaintiffs' theory, constituted compensable takings. Today, many laws enacted by the Legislature authorize local action to combat emergencies. Those laws must be liberally construed in favor of counties, townships, cities, and villages. Const 1963, art 7 §2. A finding that the exercise of these grants of authority constitutes a taking whenever they temporarily alter the value of a particular land use would fundamentally alter the exercise of long-accepted police power actions. See *Tahoe-Sierra*, 535 US at 334-335.

D. Many laws grant police power authority to local governments in Michigan that may from time to time temporarily affect the value of particular land uses.

The Michigan Compiled Laws contains hundreds of grants of various police power authorities granted to various forms of municipal government. When governments exercise these powers, the government action may have temporary impacts on private properties. For example, when a municipal authority performs work to maintain water mains and fittings, businesses in the vicinity of that work may be less accessible while the work is being performed. Below is merely a sampling of the laws authorizing local governments to take action to protect the health and safety of the public that have temporary impacts on a land use.

Townships	• MCL 41.181 (regulation of public health, safety, and general welfare of persons and property, including, among other things, traffic, sidewalk maintenance and repairs, licensing of businesses and public amusements) • MCL 41.340 (maintenance and use of mains and fittings of a water supply district) • MCL 41.16 (control and regulation of use of the streets, alleys, bridges, and public places of the township and the space above and beneath them)

Charter Townships	• MCL 42.1 (providing all the powers granted to townships) • MCL 42.17 (regulation of the conduct of business and construction of buildings, to the same extent available to cities)
Villages	• MCL 67.1 (abatement of nuisances, preservation of the public health and general welfare, and to ensure good government) • MCL 67.22 (regulation of public streets, laying and repairing of sewers, drains, tunnels, gas pipes, water pipes) • MCL 67.23 (regulation of public highways, streets, avenues, and alleys; regulation of traffic, storage of materials for sale, signs, sports, amusements, gatherings, nuisances, etc.) • MCL 71.1 *et seq*. (operation, construction, and maintenance of water works)
Cities	• MCL 117. 3 (charters must provide for the public peace and health and for the safety of person and property) • MCL 117.4b (providing sewers and water works) • MCL 117.4f (providing water, light, heat, power, transportation, sewage disposal, sewers, and plants) • MCL 117.4h (providing streets, alleys, public ways, water courses, parking availability, and docking of watercraft)

When local governments exercise the powers authorized by these statutes, temporary reduction of access and, unfortunately, sometimes inaccessibility to, businesses occur. Following a major motor vehicle accident, law enforcement may temporarily close the road in front of a particular business on which the accident occurred to protect the public from debris or to allow emergency medical personnel the space and time they need to save lives. When a water main breaks, it takes some amount of time to repair. During that time, businesses like restaurants and car washes may not be able to fully function, or possibly not function at all. In the winter months, a municipality may be forced to close long stretches of certain roads following a blizzard or an ice storm because of a lack of resources to adequately make the road safe or because of continuing hazardous weather conditions. Businesses, and even homes, along those roads are physically inaccessible in these situations. These are just a few scenarios that are inevitable pieces of modern life in our state that involve valid exercises of the police power but do not, and should not, give

rise to takings claims—even when they temporarily impact the value of a particular land use. "[A] fee simple estate cannot be rendered valueless by a temporary restriction on economic use, because the property will recover value as soon the prohibition is lifted." *Tahoe-Sierra*, 535 US at 332.

A review of existing caselaw citing these statutes reveals only a handful of alleged takings claims, and Amici did not locate any successful takings claims in those cases (or even claims that survived until discovery). The most detailed opinion arose from *Lakeside Resort, LLC v Crystal Twp*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 324799). That case involved a township's requirement that an existing nonconforming parcel be divided and that the "new" parcel be connected to the public sewer before the property could be sold. The Court of Appeals ultimately rejected the plaintiff's takings claim, noting this Court's decree that "to demonstrate that a township ordinance was confiscatory or served to wrongfully take property, the property owner must prove that application of the ordinance precluded the use of the property for any purpose to which it was reasonably adaptable." *Id*. at 21, *citing Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976).

In Plaintiff's case, the restriction was temporary, and it did not permanently preclude use of the property for any purpose for which was reasonably adaptable. The value of the property recovered after the restriction was lifted.

E. As a matter of Michigan law, no taking occurred.

Again, determining the vested property interest at stake is a threshold inquiry in takings jurisprudence. *Rafaeli*, 505 Mich 429 (2020). As discussed above, as a matter of state law, local governments have wide ranging authority to take actions that temporarily impact the value of a land use. Among dozens of statutory grants of authority, villages may install, upgrade, or repair water and sewer systems. MCL 67.22. Townships, among other things, may regulate traffic and the provision of water and sewer systems. MCL 41.181. These actions are necessities of modern

life that do not invoke the takings clauses, even when they have temporary impacts on the value of a land use.

Amici acknowledge this Court's recent jurisprudence holding that Michigan's Takings Clause provides greater protections than its federal counterpart. *Rafaeli*, 505 Mich 429 (2020). But unlike in *Rafaeli*, here, Michigan statutory and common law favor the State. See *id*. at 456-473. Plaintiffs do not present a history of Michigan common law that illuminates further protection for property owners to be compensated for government actions that protect health and safety or abate nuisances than what occurs in the federal system. Additionally, Amici note that the "additional protection" afforded by this Court in *Rafaeli* has since been similarly recognized by federal courts. See *Tyler v Hennepin Co*, 598 US 631; 143 S Ct 1369; 215 L Ed 2d 564 (2023).

As the State aptly points out in its supplemental brief, it does not appear that any court has found that COVID-19 related regulations constituted a taking, while a multitude have found the opposite (Defendant's Supplemental Brief, 16-18). Plaintiffs offer no persuasive theory of Michigan law to convince this Court to not follow *Tahoe-Sierra*. Because Plaintiffs have not proven that its "bundle" does not include a "stick" that provides freedom from temporary regulations that affect the value of a business short-term, no taking occurred. See *Rafaeli*; 505 Mich at 429. This Court should join the multitude of other courts that have found similarly.

Amici also maintain that this Court should not reject *Tahoe-Sierra* as a matter of state constitutional interpretation, as others have suggested. Much of *Tahoe-Sierra*'s reasoning is consistent with longstanding Michigan law and reality on the ground. *Tahoe-Sierra* arose in the context of a moratorium on a particular land use, and the Court found that the moratorium did not constitute a taking. 535 US at 306. The Court aptly explained that moratoria "are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy" and that planners consider moratoria an "essential tool of successful

development." *Id*. at 337-338. Members of the MTA and MML here in Michigan have long utilized this tool, adopting temporary moratoria as amendments to zoning ordinances. The impact of losing this tool would have tremendous impact on the normal course of modern local government in Michigan. And rejecting *Tahoe-Sierra* would mean that this Court would need to decide the availability of moratoria, and countless other planning and zoning tools, to local governments in the face of takings claims like those present in that case.

F. If plaintiffs' theory is correct, local governments would face immense numbers of takings cases.

If Plaintiffs prevail in this case, local governments will face increased litigation arising from the most commonplace of municipal activities. Imagine that a local law enforcement agency orders an evacuation or a shelter in place in response to a mass shooting. Residents are stuck in their homes, and business are shuttered—perhaps for a few hours, or maybe for a few days.[5] The local fitness center will be empty of patrons, and local restaurants cannot serve food and beverage. Under plaintiffs' theory, each business in the relevant geographic area that suffered a temporary loss of business would have a meritorious takings claim, and the local agency or relevant jurisdiction would be required to justly compensate them. This would create a chilling effect on effective government responses to short-term emergencies and potentially expose municipalities to large amounts of costly litigation. This Court should reject this proposed alternative reality.

[5] Sharp, Whittle, Ramer, & Smith, *Maine Officials Lift Shelter-In-Place Order As Search For Mass Shooting Suspect Continues*, PBS Newshour, <https://www.pbs.org/newshour/nation/maine-officials-lift-shelter-in-place-order-as-search-for-mass-shooting-suspect-continues> (accessed October 30, 2023).

II. The difference between analyzing this case under the police power exception and under *Penn Central* has tremendous consequences for local governments.

Plaintiffs maintain that the Court of Appeals erred when it decided as a matter of law that the *Penn Central* factors favor the State in this case.[6] According to Plaintiffs, the economic impact of a regulation, including interference with distinct investment-back expectations and the economic impact on Plaintiffs' businesses, is a factual question that requires evidentiary development. If their presentation on this point is correct, then it is of utmost importance to local governments that this Court determine that no taking occurred under the nuisance exception and not remand this case to the Court of Claims.

As discussed above, if the nuisance exception does not apply, then local governments could face an unyielding barrage of litigation arising from everyday government activities designed to protect and promote the health and safety of the public. There would likely be many more than just a handful of cases citing both to the Takings Clauses and the statutes cited in the table above. But even more, the claims in those cases, inevitably similar to the ones currently before the Court, will survive summary disposition under MCR 2.116(C)(8) and proceed to discovery. The cost to produce evidence and expert materials and testimony on the temporary impact on property valuations on every affected business of every road closure, health quarantine, and law enforcement extended curfew would be astronomical and would have a chilling effect on local

[6] Under *Penn Central*, 438 US 104, 124; 98 S Ct 2646; 57 L ED 631 (1978), courts analyze claims of noncategorical regulatory takings under a three-factor test: (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 government action.

government's willingness to take actions that may result in litigation, endangering the public health and safety and fundamentally altering the role and function of local government in modern life.

CONCLUSION

This Court should deny leave to appeal or otherwise determine that Plaintiffs failed to plead a takings claim upon which relief may be granted.

Respectfully submitted,

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Dated: November 1, 2023

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WORD COUNT CERTIFICATION

This brief contains 3588 words, in compliance with MCR 7.212 (B).

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