State of Michigan
In the Supreme Court

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,

Defendants-Appellees.

Supreme Court No.:

Court of Appeals No.: 358755

Court of Claims No.: 2021-000126-MZ
Hon. Elizabeth L. Gleicher

Circuit Court Case No.: 2021-001836-CZ
Hon. James M. Beirnat, Jr.

Plaintiffs-Appellants' Application for Leave to Appeal

**** * * ORAL ARGUMENT REQUESTED * * ****

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Statement of Jurisdiction

This Court may exercise jurisdiction over this matter under MCR 7.303(B)(1) and MCR 7.305. The Court of Appeals opinion resolving this appeal was issued on November 17, 2022. This Application for Leave is timely filed on December 29, 2022, which is 42 days after November 17, 2022.

Statement Regarding Date and Nature of the Order Appealed From

Appellant seeks leave to appeal the November 17, 2022, opinion of the Court of Appeals affirming the September 14, 2021, order of the Court of Claims granting of summary disposition of Appellants' claims.

Allegations of Error

The Court of Appeals erred when it affirmed the Court of Claims' denial of Appellants' motion to transfer because Appellant has a jury-trial right under the UCPA. The UCPA must provide just-compensation procedure in regulatory-taking cases because the Michigan Constitution requires that just-compensation procedure be set by statute, and the plain language of the UCPA indicates that it applies to exercises of eminent domain and provides procedures for the provision of just compensation. Because the UCPA provides a jury-trial right against the state, the Court of Claims should have granted Appellants' motion to transfer.

The Court of Appeals erred when it affirmed the Court of Claims' summary disposition of Appellants' regulatory-taking claim under MCR 2.116(C)(8) for several reasons. First, Appellant properly pleaded a regulatory-taking cause of action. Second, neither the Court of Appeals nor the Court of Claims applied the *Penn Central* test, as is required. Third, the Court of Appeals decided Appellants' regulatory-taking claim despite the fact that no factual development has occurred. Fourth, Appellant was not given an opportunity to amend its complaint despite the fact that summary disposition was granted under MCR 2.116(C)(8). Fifth, the Court of Appeals relied on the recent *Gym 24/7 Fitness* opinion, which contains several critical errors of law.

The Court of Appeals erred when it affirmed the Court of Claims' summary disposition of Appellants' tort claims under MCR 2.116(C)(7) because Appellants pleaded in avoidance of governmental immunity. Appellants alleged that the governmental action at issue was both illegal under *In re Certified Questions* and unconstitutional. For this reason, the governmental actions at issue were not authorized and not protected by governmental immunity.

Relief Sought

Appellant seeks the following relief under MCR 7.305(H). Appellant asks this Court to:

- issue an order reversing the Court of Appeals, reversing the Court of Claims' denial of Appellants' motion to transfer, and reversing the Court of Claims' grant of summary disposition of Appellants' claims; or, in the alternative,

- grant Appellants' application for leave to appeal.

Grounds for Granting Leave to Appeal under MCR 7.305(B)

This appeal arises from a regulatory takings and tort case brought by food service establishments based on the state's COVID-19 response. This appeal presents a jurisdictional issue, regulatory-taking issues, and a governmental-immunity issue. All of these Covid-related issues are of significant public interest, and the case is one against the state. On that ground alone, this Court may grant leave to appeal in this case. Additional grounds for granting leave to appeal are discussed below.

The jurisdictional issue. The jurisdictional issue in this appeal concerns whether a plaintiff in a regulatory-takings case has a jury-trial right against the state. The Court of Claims and Court of Appeals held that no statute governing just-compensation procedure applies to regulatory takings cases. But Michigan's Takings Clause requires that just-compensation procedure be established by statute, and any taking by the state is per se unconstitutional in the absence of such a statute. For this reason, under the holdings of the Court of Claims and Court of Appeals, all regulatory takings—past, present, and future—would be per se unconstitutional. Granting leave to appeal would permit this Court to correct this error. Appellants also argue that a constitutional jury-trial right against the state should be recognized in regulatory-takings cases.

Grounds: The jurisdictional issue raises a significant constitutional question. Thus, this issue involves a legal principle of major significance to the state's jurisprudence. The decision of the Court of Appeals on this issue is also clearly erroneous, as explained below, and will cause material injustice to Appellants and others similarly situated.

The regulatory-taking issues. Several regulatory-taking issues are presented. These issues include whether a regulatory taking claim can be decided without ever applying the Penn Central test and without any factual development. A great deal of caselaw indicates that the answer

to these questions is no, yet the Court of Appeals reached a contrary result in this case. This appeal also raises the issue of whether a broad, harm-prevention exception to general regulatory-taking principles exists. There is a great deal of conflicting caselaw on this issue, and this Court's intervention is required. This appeal also implicates the proper analysis under the character-of-the-government-action prong of the Penn Central test

Grounds: The decision of the Court of Appeals in this case conflicts with past decisions of this Court and the Court of Appeals holding that application of the *Penn Central* test and ad hoc, factual inquiry is required to determine whether a regulatory-taking has occurred. The issues presented involve legal principles of major significance to the state's jurisprudence. Lastly, the decision of the Court of Appeals on these issues are also clearly erroneous, as explained below, and will cause material injustice to Appellants and others similarly situated.

The immunity issue. The immunity issue concerns whether Appellants successfully pleaded in avoidance of governmental immunity by alleging that the Governor's orders under the EMA and EPGA were ultra vires and that the state's actions worked an unconstitutional taking without just compensation.

Grounds: The governmental-immunity issue involves a legal principle of major significance to the state's jurisprudence. The decision of the Court of Appeals on this issue conflicts with this Court's decision in *In re Certified Questions* and with prior decision of this Court and the Court of Appeals on pleading in avoidance of governmental immunity. Lastly, the decision of the Court of Appeals on this issue is also clearly erroneous, as explained below, and will cause material injustice to Appellants and others similarly situated.

Standard of Review

Appellants seek leave to appeal the order of the Court of Claims denying Appellants' emergency motion to transfer this case back to the Macomb County Circuit Court. "A challenge to the jurisdiction of the Court of Claims requires interpretation of the Court of Claims Act, MCL 600.6401 *et seq*., which presents a statutory question that is reviewed de novo."[1] "Issues of statutory interpretation are questions of law that are reviewed de novo."[2] Appellate courts review questions of constitutional law de novo.[3]

Appellants seek leave to appeal the trial court's grant of summary disposition in Appellees' favor. This Court reviews a grant of summary disposition de novo.[4] Appellate courts review questions of constitutional law de novo.[5] Whether a regulatory taking has occurred is a question of law that this Court review de novo.[6]

[1] *Doe v Dept of Transp*, 324 Mich App 226, 231; 919 NW2d 670 (2018).
[2] *Id*.
[3] *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019).
[4] *Mays v Snyder*, 323 Mich App 1, 24; 916 NW2d 227 (2018); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).
[5] *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019).
[6] *Schmude Oil, Inc v Dept of Envtl Quality*, 306 Mich App 35, 50; 856 NW2d 84 (2014).

Statement of Questions Presented

I. Michigan's Constitution requires that the procedure for determining just compensation in takings cases be established by statute. Michigan does not have a just-compensation procedural statute specific to regulatory takings cases, but the Uniform Condemnation Procedures Act governs just-compensation procedure for all exercises of eminent domain by state agencies. Does the UCPA govern just-compensation procedure in regulatory takings cases?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

The trial court failed to answer this question.

II. Michigan's Constitution requires that the procedure for determining just compensation in takings cases be established by statute. Michigan does not have a just-compensation procedural statute specific to regulatory takings cases, but the enabling statutes conferring the power of eminent domain on the state and its agencies contain procedural components relevant to just compensation. Do these enabling statutes govern just-compensation procedure in regulatory takings cases?

The Appellant answers, "Yes."

The Court of Appeals failed to answer this question.

The trial court failed to answer this question.

III. At the time of Michigan's first Constitution, a Michigan citizen could not be deprived of property without a jury trial. Though the wording has slightly changed over time, all iterations of Michigan's Constitution have stated that the right to a jury trial shall remain. Is there a constitutional jury-trial right in takings cases?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

The trial court answered, "No."

IV. To properly plead a regulatory claim, a plaintiff must allege that a governmental regulation went too far and constitutes a taking. Appellants alleged that the Executive Orders at issue in this case went too far and constitute a taking because they completely shut down Appellants' businesses, costing Appellants millions of dollars. Did Appellants properly plead a regulatory-taking claim?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

The trial court answered, "No."

V. To determine whether a non-categorical regulatory taking has occurred, it is necessary to apply the *Penn Central* test on a case-by case basis. Neither the Court of Appeals nor the trial court ever applied the *Penn Central* test in this case. Did the Court of Appeal err when it determined that, contrary to Appellant's allegations, no non-categorical regulatory taking occurred in this case?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

VI. To determine whether a non-categorical regulatory taking has occurred, a court must engage in ad hoc, factual inquiries into all relevant circumstances. Absolutely no factual development has taken place in this case. Did the Court of Appeal err when it determined that, contrary to Appellant's allegations, no non-categorical regulatory taking occurred in this case?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

VII. The purpose behind a governmental regulation is not relevant to whether a taking has occurred. The Court of Appeals relied on *Gym 24/7 Fitness*'s holding that the purpose of the Executive Orders to stop the spread of Covid-19 was compelling evidence that no regulatory taking occurred. Was the Court of Appeals decision based on an error of law in *Gym 24/7 Fitness*?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

VIII. The United States Supreme Court has clarified that there is not a broad harm-prevention exception to general takings principles. The Court of Appeals relied on *Gym 24/7 Fitness*'s holding that there may be a broad harm-prevention exception to general takings principles in holding that no regulatory taking occurred. Was the Court of Appeals decision based on an error of law in *Gym 24/7 Fitness*?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

IX. The character-of-the-government-action prong of the *Penn Central* test asks whether regulation at issue singles out the plaintiff or burdens and benefits all property relatively equally. *Gym 24/7 Fitness*, on which the Court of Appeals in this case relied, held that the character-of-the-government-action prong analyzed the government's purpose in acting. Was the Court of Appeals decision based on an error of law in *Gym 24/7 Fitness*?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

X. Government officials who act without authority or violate the Michigan Constitution are not entitled to governmental immunity. Appellant's complaint alleged that Appellees acted without authority under the EPGA and EMA and committed an unconstitutional taking without just compensation. Did Appellant plead in avoidance of governmental immunity?

The Appellant answers, "Yes."

The Court of Appeals answered, "No."

The trial court answered, "No."

Statement of Facts

Plaintiffs-Appellants are restaurants, bars, and banquet hall businesses operating within the State of Michigan and represent a putative class of similarly situated businesses.[1] Defendant-Appellee Elizabeth Hertel is the Director of the Michigan Department of Health and Human Services.[2] Defendant-Appellee Patrick Gagliardi is the Chair of the Michigan Liquor Control Commission.[3] Defendant-Appellee Gretchen Whitmer is the Governor of the State of Michigan.[4] Appellants sued all Appellees in their official capacities.[5]

i. Background

Beginning in March of 2020, Appellees issued and enforced several orders ostensibly related to the COVID-19 pandemic.[6] No sound science or hard data meaningfully linked Appellants' businesses to the spread of COVID-19.[7] In fact, relevant data suggested that no such link existed.[8] Despite this, Appellees' orders both directly and indirectly targeted restaurants, bars, and banquet hall businesses and halted or significantly curtailed operation of Appellants' businesses and use of Appellants' property.[9]

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[1] Complaint, Plaintiff-Appellants' Appx. 3, at 20(a).
[2] *Id*. at 18(a).
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] See *id*. at 20(a)–27(a).
[7] *Id*. at 29(a)–30(a).
[8] *Id*. at 30(a).
[9] See *id*.

On March 16, 2020, Appellee Whitmer issued Executive Order 2020-9.[10] This order arbitrarily singled out restaurants, bars, and banquet hall facilities for total closure, including closure to any and all "ingress, egress, use, and occupancy by members of the public."[11]

On March 23, 2020, Appellee Whitmer issued Executive Order 2020-21.[12] This order forced all "non-essential" businesses to close.[13] Restaurants, bars, and banquet hall facilities were deemed to be "non-essential" under the order.[14] This order was extended several times and remained in force through June 8, 2020.[15] Even after the forced closure of restaurants, bars, and banquet hall facilities ended on June 8, 2020, restaurants, bars, and banquet hall facilities remained subject to pervasive, strangling regulations issued by the state.[16]

On April 13, 2020, Appellee Whitmer issued Executive Order 2020-43.[17] This order arbitrarily singled out restaurants, bars, and banquet hall facilities for total closure, including closure to any and all "ingress, egress, use, and occupancy by members of the public."[18] This order was extended and remained in effect until May 29, 2020.[19]

On October 2, 2020, the Michigan Supreme Court ruled that all of Appellee Whitmer's executive orders that had forced restaurants, bars, and banquet hall facilities to close were ultra vires and unconstitutional.[20] Appellants' complaint alleged that, following this ruling, Appellee

[10] *Id*. at 20(a).
[11] *Id*. at 20(a)–21(a).
[12] *Id*. at 21(a).
[13] *Id*.
[14] *Id*.
[15] *Id*. at 21(a)–22(a).
[16] *Id*. at 22(a).
[17] *Id*. at 21(a).
[18] *Id*. at 21(a)–22(a).
[19] *Id*. at 22(a).
[20] *Id*. 22(a)–23(a).

Whitmer conspired with the Director of the Michigan Department of Health and Human Services to circumvent the Court's opinion.[21] On this basis, Appellants' complaint suggested that subsequent actions taken by the Director of the Michigan Department of Health and Human Services and the Chair of the Liquor Control Commission were also ultra vires and unconstitutional.[22]

On October 5, 2020, and again on October 9, 2020, the Director of the Michigan Department of Health and Human Services issued orders that arbitrarily singled out restaurants, bars, and banquet hall facilities for smothering restrictions, including mandating that the businesses host no more than 50% of their regular capacity.[23]

On November 15, 2020, the Director of the Michigan Department of Health and Human Services issued an order that arbitrarily singled out restaurants, bars, and banquet hall centers for closure of all indoor dining operations.[24] A series of orders extended this indoor-dining ban through January 31, 2021.[25] On January 22, 2021, the Director of the Michigan Department of Health and Human Services issued an order that placed suffocating restrictions on indoor dining beginning February 1, 2021.[26] These restrictions included capping indoor dining capacity at 25%.[27] When Appellants attempted to install and operate open-air tents, heaters, and other apparatus to facilitate safe, outdoor dining during the winter, Appellee Gagliardi and the Michigan Liquor

[21] *Id*. at 23(a).
[22] See *id*. at 32(a), 24(a).
[23] *Id*. at 23(a)–24(a).
[24] *Id*. at 24(a)
[25] *Id*. at 24(a)–25(a).
[26] *Id*. at 25(a)–26(a).
[27] *Id*.

Control Commission threatened to fine or shut down Appellants or revoke Appellants' liquor licenses.[28]

Appellants have been severely affected by the above-listed orders.[29] As a result of these orders, Appellants have lost millions of dollars.[30] These orders have caused Appellants to suffer astronomical lost profits.[31] These orders rendered Appellants' property valueless.[32] These orders have instigated breaches of contracts held between the Appellants and third-party vendors.[33] These orders have induced breaches and terminations of relationships and business expectancies between Appellants and their vendors.[34] Despite the devastating effects of these orders, Appellees have not provided Appellants with any compensation whatsoever.[35]

ii. Procedural History

On May 25, 2021, Appellants sued Appellees in the Macomb County Circuit Court.[36] Appellants' complaint alleged three causes of action: (1) a regulatory taking in violation of Michigan's Constitution, (2) tortious interference with a contract, and (3) tortious interference with a business expectancy.[37] Appellants timely filed a jury demand.[38]

On March 4, 2021, Appellees filed a Notice of Transfer in the Macomb County Circuit Court stating that Appellants' lawsuit was being transferred to the Court of Claims effective

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[28] *Id*. at 27(a)–28(a).
[29] *Id*. 28(a)–29(a).
[30] *Id*. at 24(a).
[31] *Id*. at 28(a).
[32] *Id*.
[33] *Id*. at 34(a).
[34] *Id*.
[35] *Id*. at 29(a).
[36] *Id*. at 17(a), 35(a).
[37] *Id*. at 32(a)–34(a).
[38] See Jury Demand, Plaintiff-Appellants' Appx. 4, at 36(a).

immediately.[39] In response, on July 16, 2021, Appellants filed an emergency motion to transfer the case back to the Macomb County Circuit Court.[40] On July 9, 2021, Appellees filed a motion for summary disposition under MCR 2.116(C)(8).[41]

On September 14, 2021, the Court of Claims issued an opinion and order granting Appellees' motion for summary disposition and denying Appellants' motion to transfer.[42] In deciding Appellees' challenge to the sufficiency of Appellants' pleadings, the Court of Claims did not take Appellants' facts, which alleged that Appellants' property lacked any meaningful connection to the spread of COVID-19, as true and in the light most favorable to Appellants. Instead, the Court of Claims seemed to accept Appellees' version of the facts. Applying inapposite due process principles, the Court of Claims held that the purpose of the Appellees' actions was "to stop the spread of COVID-19" and that therefore they "advanced legitimate state interests flowing from traditional police powers and did not result in a taking under the Michigan Constitution."[43]

On November 17, 2022, the Court of Appeals affirmed the Court of Claims in a published opinion.[44] The Court of Appeals held that Appellants did not have a jury-trial right under the UCPA, State Agencies Act, or the Condemnation by State Act because those statutes "speak to the acquisition of property by the state," and the state "did not acquire [Appellants]' property."[45] The

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[39] Notice of Transfer, Plaintiff-Appellants' Appx. 5, at 38(a).
[40] See Court of Claims Register of Actions, Case No. 21-000126-MZ, Plaintiff-Appellants' Appx. 2, at 16(a).
[41] *Id*. at 15(a).
[42] May 25, 2021, Opinion and Order of the Court of Claims granting Defendants' 03/15/2021 Motion for Summary Disposition, Plaintiff-Appellants' Appx. 1, at 4(a).
[43] *Id*. at 11(a).
[44] *Mount Clemens Recreational Bowl, Inc. v. Director of Department of Health and Human Services*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 358755).
[45] *Id*. at ____; slip op at 5.

Court of Appeals held that *Lim v Mich. Dep't of Transp*., 167 Mich App 751, 753, 423 N.W.2d 343 (1988) was still good law and retained precedential effect.[46]

The Court of Appeals held that Appellants had failed to plead a regulatory taking claim on which relief could be granted, relying almost exclusively on the Court of Appeals' recent *Gym 24/7 Fitness*[47] Opinion.[48] The Court of Appeals held that "*Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan," and "*Gym 24/7 Fitness* is not distinguishable from the present case."[49]

The Court of Appeals held that summary disposition of Appellants' tort claims was proper because Appellants had failed to plead in avoidance of governmental immunity.[50] Despite the fact that Appellants alleged that Appellees were not acting within the scope of their authority (ultra vires conduct) because the acts and regulations at issue were illegal and unconstitutional, the Court of Appeals held that Appellees were "clearly acting, at the very least, under implied authority, even if the Supreme Court later ruled against that authority."[51] The Court of Appeals did not address Appellants' argument that Appellants had pleaded in avoidance of governmental immunity by alleging that the Appellees' conduct at issue was unconstitutional.

Appellants now seek leave to appeal in this Court. In the alternative, Appellants ask this Court to issue an order reversing the Court of Appeals and reversing the September 14, 2021, order of the Court of Claims.

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[46] *Id*. at ____; slip op at 6.
[47] *Gym 24/7 Fitness, LLC v State*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 355148).
[48] *Mount Clemens Recreational Bowl*, ___ Mich App at ____; slip op at 10.
[49] *Id*. at ____; slip op at 10.
[50] *Id*. at ____; slip op at 11.
[51] *Id*. at ____; slip op at 11.

Argument

I. The Court of Appeals erred when it affirmed the Court of Claims' denial of Appellants' motion to transfer this case back to the Macomb County Circuit Court because Appellants have a right to a jury trial.

This case should never have been litigated in the Court of Claims because this case belongs in the Macomb County Circuit Court, where it was originally filed. Under the Court of Claims Act, the circuit court has jurisdiction over claims against the state for which there is a jury-trial right. Michigan's Takings Clause requires that just-compensation procedure be set by statute, and all such statutes provide a jury-trial right on just compensation. Further, while courts have yet to do so, a constitutional jury-trial right in takings cases should be recognized as a check against the power of the state. For these reasons, Appellants respectfully request that this Honorable Court reverse the Court of Appeals and Court of Claims and remand this case back to the Court of Claims with instructions to transfer this case to the Macomb County Circuit Court.

A. The Court of Claims Act grants the circuit court jurisdiction over cases in which there is a jury-trial right against the state.

The Court of Claims generally has exclusive jurisdiction over claims "against the state or any of its departments or officers."[52] Cases in the Court of Claims are "heard by the judge without a jury."[53] If a party has the right to a jury trial against the state, however, the Court of Claims Act grants the circuit court jurisdiction to hear and determine the action:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury . . . . Nothing in this chapter deprives the circuit . . . 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 . . . . 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 . . . court in the appropriate venue.[54]

[52] MCL 600.6419(1)(a).
[53] MCL 600.6443.
[54] MCL 600.6421(1).

Accordingly, where a litigant has a jury trial right against the state, the Court of Claims Act grants the circuit court jurisdiction over the matter.

B. Michigan's Constitution requires that the Legislature establish just-compensation procedure by statute.

Though eminent domain is a sovereign *power*, "[t]he *exercise* of such power is a matter entirely under the control of the Legislature, subject to such restrictions as are found in the Constitution."[55] "The necessity, the occasion, time, and manner of its exercise are wholly legislative questions," except as limited by the Constitution.[56]

Michigan's Constitution requires that the state pay just compensation when it exercises the power of eminent domain.[57] The Takings Clause also requires that just compensation be made "in a manner prescribed by law."[58] This means that the Legislature must establish by statute "how and in what manner [just compensation] shall be made or secured."[59] Stated another way, the Takings Clause requires that the Legislature establish just-compensation procedure by statute.

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[55] *Loomis v Hartz*, 165 Mich 662, 665; 131 NW 85 (1911); *Fitzsimmons & Galvin v Rogers*, 243 Mich 649, 656; 220 NW 881 (1928) (exercise of eminent domain limited by "constitutional and statutory provisions").

[56] *Loomis*, 165 Mich at 665.

[57] Const 1963, art 10, § 2. See also *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 129; 680 NW2d 485, 494 (2004); *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 452; 952 NW2d 434 (2020) ("The remedy for a taking of private property is just compensation . . . .").

[58] Const 1963, art 10, § 2.

[59] *Petition of Michigan State Hwy Comm, Canton Tp, Wayne Co*, 383 Mich 709, 715; 178 NW2d 923 (1970). See also *Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 30; 687 NW2d 319 (2004) (holding that "the 1963 Constitution requires . . . that just compensation be made or secured in a manner defined by the Legislature.").

This is consistent with the history of eminent domain in this state. See *Grand Rapids v Perkins*, 78 Mich 93, 96; 43 NW 1037 (1889) (holding that "the plain intent of the constitution [is] that legislature shall fix the mode to be pursued by the jury in determining the just compensation"); *Fletcher v Kalkaska Circuit Judge*, 81 Mich 186, 195; 45 NW 641 (1890) (holding that the legislature "may fix some basis for the determination of the question of just compensation"); *Lohrstorfer v Lohrstorfer*, 140 Mich 551, 560; 104 NW 142 (1905) (holding that "the Legislature

It is per se unconstitutional for the state to take property in the absence of a just-compensation procedural statute.[60] In *People v Kimble*, the Michigan Supreme Court considered whether a road had been unconstitutionally laid out.[61] The Takings Clause of the then-new 1850 Michigan Constitution required that either three commissioners or a jury of twelve freeholders determine the issues of necessity and just compensation in takings cases "as shall be prescribed by law."[62] An 1846 statute authorized highway construction on petition of two freeholders in any township; an 1848 amendment upped the petition requirement to ten freeholders.[63] Laws in force when the 1850 Constitution was adopted retained effect unless repugnant to the 1850 Constitution.[64] An 1851 statute covering state and territorial roads stated that "any person feeling himself aggrieved by the laying out, etc., of any road or roads, may have his damages appraised, and obtain the same in the same manner and under the same restrictions made and provided relative to township roads."[65] However, no such just-compensation procedural statute for township roads had been passed after the 1850 Constitution.[66]

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has the power to prescribe the mode in which such compensation shall be ascertained and determined in a fair and just manner"); *Loomis*, 165 Mich at 665 (holding that "[t]he exercise of [eminent domain in this state] is a matter entirely under the control of the Legislature, subject to such restrictions as are found in the Constitution"). This consistency is critical because "the whole of art 10, § 2 has a technical meaning that must be discerned by examining the 'purpose and history' of the power of eminent domain." *Co of Wayne v Hathcock*, 471 Mich 445, 471; 684 NW2d 765 (2004).

[60] *People v Kimball*, 4 Mich 95, 97–98 (1856) (holding that because "no law ha[d] been passed in relation to laying out township roads since the adoption of the constitution," "the supposed highway in question was illegally laid out . . .").

[61] See *id*. at 98.

[62] *Id*. at 96.

[63] *Id*.

[64] *Id*.

[65] *Id*. at 97.

[66] *Id*.

The Supreme Court held that the road at issue was unconstitutionally laid out.[67] The Court first held that taking a citizen's property to construct a road was surely an exercise of eminent domain subject to the Takings Clause.[68] Accordingly, the Court held that the 1850 Constitution had clearly intended "to change the mode of laying out highways, and to commit the charge of this matter . . . to the supervisors of each organized county, **under such restrictions and limitations as shall be prescribed by law**."[69] Thus, the 1846 and 1848 laws allowing two or ten freeholders to simply petition for a road were repugnant to the 1850 Constitution and void.[70] Because those laws did not retain effect, and no just-compensation procedural statute for township roads had been enacted after the 1850 Constitution, no restrictions and limitations on the exercise of eminent domain had been "prescribed by law" as required by the Takings Clause.[71] For this reason, the Court held that the road at issue was unconstitutionally laid out.[72]

C. The UCPA establishes just-compensation procedure in eminent domain cases.

If unambiguous, a statute speaks for itself and must be "enforced as written;" "further judicial construction is [neither] required [n]or permitted."[73] Courts must "construe statutes to avoid unconstitutionality, if possible, by a reasonable construction of the statutory language."[74] "A statute must also be construed to avoid absurd or unreasonable results."[75]

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[67] *Id*. at 98.
[68] *Id*. at 96.
[69] *Id*. at 97.
[70] *Id*.
[71] *Id*. at 98.
[72] *Id*.
[73] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).
[74] *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 275; 731 NW2d 41 (2007).
[75] *People v Cousins*, 196 Mich App 715, 716–17; 493 NW2d 512 (1992).

The Uniform Condemnation Procedures Act (UCPA), MCL 213.51, *et seq*. was enacted to create a uniform system of procedures to be used in all eminent domain actions.[76] As required by the Michigan Constitution,[77] the UCPA title section describes the object of the UCPA, stating that it provides procedures not just for formal condemnation actions, not just for the acquisition of property, but also for the general exercise of eminent domain:

> AN ACT to provide procedures for the condemnation, acquisition, * * * *or exercise of eminent domain* of real or personal property by public agencies or private agencies; to provide for an agency's entry upon land for certain purposes; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts.[78]

The UCPA applies to the exercise of eminent domain by the state, the office of the Governor, the Michigan Liquor Control Commission, and the Department of Health and Human Services.[79]

Moreover, *in addition to* providing standards for the acquisition of property and formal condemnation actions, the Act provides standards for the determination of just compensation:

> This act provides standards for the acquisition of property by an agency, the conduct of condemnation actions, * * * *and the determination of just compensation*.[80]

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[76] *State Hwy Com'n v Biltmore Inv Co, Inc*, 156 Mich App 768, 775; 401 NW2d 922, 925 (1986).
[77] Const 1963, art 4, § 24.
[78] 1980 PA 87, title (emphasis added).
[79] According the UCPA's title, it provides procedures for the exercise of eminent domain by *agencies*. The term "agency" is defined under the Act as "a public agency or private agency." MCL 213.51(c). The term "public agency" is defined as "a governmental unit, officer, or subdivision authorized by law to condemn property." MCL 213.51(j). The state is authorized by law to condemn property. MCL 213.1. The Office of the Governor is authorized by law to condemn property. See MCL 213.23(1) (authorizing state agencies to condemn property); MCL 213.21 (defining "state agency" to include "the office of governor or a division thereof"). The Michigan Liquor Control Commission is authorized by law to condemn property. See MCL 213.23(1) (authorizing state agencies to condemn property); MCL 213.21 (defining "state agency" to include "commissions and agencies of the state given by law the management and control of public business and property"). The Department of Health and Human Services is authorized by law to condemn property. See MCL 213.23(1) (authorizing state agencies to condemn property); MCL 213.21 (defining "state agency" to include "agencies of the state given by law the management and control of public business and property").
[80] MCL 213.52(1) (emphasis added).

The UCPA also acknowledges "constructive or de facto takings."[81] The UCPA defines a constructive or de facto taking as "conduct, other than regularly established judicial proceedings, sufficient to constitute a taking of property within the meaning of section 2 of article X of the state constitution of 1963."[82] The UCPA prohibits the state from intentionally forcing a property owner to commence an action to prove that a constructive or de facto taking has occurred.[83]

The UCPA creates a statutory jury-trial right in eminent domain cases on the issue of just compensation.[84] Section 62, titled "Just compensation; trial by jury," states as follows:

> 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 selected pursuant to chapter 13 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.1301 to 600.1376 of the Michigan Compiled Laws, and shall be governed by court rules applicable to juries in civil cases in circuit court.[85]

As the first line quoted above states, the UCPA's jury-trial right applies equally to plaintiffs in de facto takings cases and defendants in formal condemnation proceedings.[86]

[81] See MCL 213.52(2).
[82] MCL 213.51(e).
[83] MCL 213.52(2).
[84] MCL 213.62(1).
[85] *Id*.
[86] *Id*.

D. To satisfy the constitutional requirement that just-compensation procedure be established by statute, the UCPA must apply in regulatory takings cases on the issue of just-compensation procedure.

Many states have procedural statutes for inverse condemnation actions.[87] Michigan does not. Some have statutes specifically geared toward regulatory taking actions.[88] Michigan does not. To satisfy the constitutional requirement that just-compensation procedure be established by statute, the UCPA must apply in regulatory takings cases.

In this case, the UCPA must apply to provide the constitutionally required just-compensation procedure. The UCPA extends to all exercises of eminent domain. The UCPA states in its title that it applies not only to the condemnation of property, not only to the acquisition of property, but to *all* exercises of eminent domain by public agencies. The plain language of the UCPA states that it provides procedures not only for condemnation actions, not only for the acquisition of property, but for the determination of just compensation in *all* eminent domain cases.

The UCPA embraces de facto taking actions and recognizes that there will be occasions where a property owner, as opposed to the state, will have to initiate an eminent domain action. It is not wrongful for a property owner to initiate an eminent domain action; on the contrary, under the UCPA, it is wrongful for the *state* to intentionally cause a property owner to have to do so.[89]

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[87] See, e.g., *Rummage v State ex rel Dept of Transp,* 849 P2d 1109, 1112 (Okla Civ App, 1993) (Because statute contained language extending rules to inverse condemnation actions, "the procedures for an inverse condemnation action [are] the same as those for eminent domain condemnation in accordance with 66 O.S.1991 §§ 51 et seq."); NM Stat Ann 42A-l-29 (West); Wis Stat Ann 32.10 (West).

[88] Ellickson, *Takings Legislation: A Comment,* 20 Harv JL & Pub Pol 'y 75 (1996) (noting that by 1995, several states had enacted statutes requiring analysis of a legislative action's takings implications, while some states had also enacted regulatory taking compensation statutes).

[89] MCL 213.52(2) ("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.").

The UCPA provides an absolute and unqualified jury-trial right, and there is no indication in the UCPA that a property owner should lose its right to a jury trial on the issue of just compensation where the government wrongfully forces the property owner to initiate eminent domain proceedings. Further, the UCPA states that its jury-trial right may be invoked by a plaintiff *or* defendant,[90] holding the door open for the jury-trial right to apply equally to plaintiffs in de facto taking cases and defendants in direct condemnation cases.

In *Lim v Michigan Dept of Transp*,[91] the Court of Appeals held that "[t]he UCPA has no application to inverse condemnation actions initiated by aggrieved property owners" because "the UCPA only governs actions initiated *by an agency* to acquire property . . . ."[92] This holding is inconsistent with the plain language of the UCPA, which states that it provides standards for the determination of just compensation in all eminent domain cases.[93] The *Lim* Court gave this issue minimal analysis at best. Upon closer inspection, at least with respect to just compensation, there is no principled reason to hold that the UCPA should not apply to regulatory takings cases. On the contrary, as examined above, there are compelling reasons to hold that the UCPA does apply in regulatory takings cases. This Court should hold that *Lim* was wrongly decided.

Accordingly, in order to satisfy the constitutional requirement that just-compensation procedure be established by the legislature, this Court should hold that the UCPA provides just-compensation procedure in regulatory takings cases.

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[90] MCL 213.62(1).
[91] *Lim v Michigan Dept of Transp*, 167 Mich App 751; 423 NW2d 343 (1988).
[92] *Id.* at 755.
[93] See 1980 PA 87, title; MCL 213.52(1).

E. Additional statutory sources of just-compensation procedure include the State Agencies Act and the Condemnation by State Act.

There are other Michigan statutes from which just-compensation procedure could be derived in regulatory-taking cases. At least one state (Colorado) that lacks a specific inverse condemnation statute applies formal-condemnation procedural statutes to inverse-condemnation actions.[94] Colorado does this because both formal and inverse condemnation proceedings are based on its takings clause.[95] This is not unprecedented in Michigan, either. In the context of a mandamus action, this Court has looked to formal condemnation statutes to determine whether an inverse-condemnation plaintiff was entitled to a jury trial against the state.[96]

The Acquisition of Property by State Agencies and Public Corporations Act (State Agencies Act or SAA)[97] and the Condemnation by State Act (CSA)[98] are two eminent domain enabling statutes enacted in 1911.[99] These enabling acts conferred the power of eminent domain on the Governor and state agencies, commissions, and departments.[100] These acts also contained procedural components that established a right to a jury trial on the issue of just compensation.[101]

In this case, the only statutes under which the state could have instituted formal proceedings to condemn Appellants' property were the CSA and SAA. These enabling statutes give the state and its agencies the ability to condemn property, and they both provide an absolute statutory right

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[94] See *Stuart v Colorado Eastern R Co*, 61 Colo 58; 156 P 152 (1916) ("Since it is based on the 'takings' clause of our constitution, [an inverse condemnation action] is to be tried as if it were an eminent domain proceeding."). Colorado has a separate regulatory taking statute. See Colo Rev Stat Ann 29-20-201 (West).
[95] *Stuart*, 61 Colo 58.
[96] See *Hill v State*, 382 Mich 398, 406; 170 NW2d 18 (1969).
[97] MCL 213.21, *et seq*.
[98] MCL 213.1, *et seq*.
[99] See MCL 213.23; MCL 213.1; *KTS Indus*, 263 Mich App at 38.
[100] See MCL 213.1; MCL 213.23.
[101] MCL 213.3; MCL 213.25.

to a jury trial on the issue of just compensation. Accordingly, every statute that could conceivably govern the exercise of eminent domain by the state and its agencies, commissions, and departments in this case provides an absolute right to a jury trial on the issue of just compensation. For this reason, if this Court were to look to the relevant enabling statutes to satisfy the constitutional requirement that just-compensation procedure be set by statute, the result is the same as that under the UCPA: regulatory-taking plaintiffs have a jury-trial right against the state.

F. Under the Court of Claims Act, the circuit court has jurisdiction over Appellants' regulatory claim because the UCPA, CSA, and SAA all provide for a jury-trial right against the state.

The Court of Claims Act expressly confers jurisdiction on the circuit court to hear any claim for which a party has a right to a jury trial. As examined above, it is constitutionally required that just-compensation procedure be set by statute, and all relevant statutes—the UCPA, CSA, and SAA—provide for a jury-trial right against the state. These statutes must apply in this case to satisfy the constitutional requirement that just-compensation procedure be set by statute. Accordingly, Appellants have a jury-trial right against the state, and the Macomb County Circuit Court, where this case was originally filed, has jurisdiction over this matter.

Any construction of the UCPA, CSA, and SAA that leads to their non-application to de facto taking cases produces unconstitutional, absurd, and unreasonable results. Other than the UCPA and Michigan's direct condemnation statutes, no other Michigan statutes provide any standard for the determination of just compensation as required by the Constitution. If these statutes do not apply to provide the constitutionally required just-compensation standard in de facto taking cases, then *all* de facto takings would be unconstitutional takings without the just compensation required by Michigan's Constitution. Thus, a finding of non-application of the UCPA and direct condemnation statutes to de facto taking actions produces unconstitutional

results. This would also produce absurd and unreasonable results, as it would mean that every past de facto taking by the government was unconstitutional, as well.

Second, a finding of non-application of the UCPA and direct condemnation statutes to de facto taking actions would allow the state to benefit from wrongful action while penalizing innocent property owners. The legislature, though enactment of the UCPA, and through the statutory history of the UCPA, CSA, and State Agencies Act, has clearly established its intent to provide a jury-trial right against the state in all eminent domain cases. The legislature has also made it unlawful for the state to intentionally require a property owner to initiate de facto taking proceedings. It defies logic to believe that the legislature intended to allow the state to nullify the UCPA's jury-trial right by wrongfully failing to institute condemnation proceedings. This is an absurd, unreasonable result.

For these reasons, this Court should find that Appellants have a statutory jury-trial right. Accordingly, this Court should reverse the Court of Claims and transfer this case back to the Macomb County Circuit Court.

G. Michigan should recognize a constitutional jury-trial right in regulatory takings cases against the state.

"The right to a trial by a jury is one of the lodestar concepts of Anglo–American jurisprudence and has historical roots that grow as deep as the Magna Carta of 1215."[102] Indeed, the Magna Carta declared that a person could not be disseised of property "unless by the lawful judgment of his peers."[103] This right was initially granted in order to "check the power of the monarch."[104] Following the American Revolution, "the right to a jury trial became not a check

[102] *People v Antkoviak*, 242 Mich App 424, 441; 619 NW2d 18 (2000).
[103] *Id*.
[104] *Id*.

against the power of the English throne, but a check against the power of the state."[105] Similarly, the takings clause was "adopted for the protection of and security to the rights of the individual as against the government . . . ."[106]

Fifty years before Michigan became a state, the wilderness area that would become Michigan was governed by the Northwest Ordinance of 1787, which stated that inhabitants of the area could not be deprived of property without a jury trial.[107] In 1835, before Michigan became a state, Michigan enacted its first Constitution, which stated that the "right of trial by jury shall remain inviolate."[108] Michigan's Constitution of 1850 provided that the "right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law."[109] This language has remained largely unchanged ever since.[110]

The phrase "the right of trial by jury shall remain" "is a technical legal phrase with the meaning those understanding the jurisprudence of this state would give it."[111] This Court "must look for the meaning of "the right of trial by jury" before 1963, as understood by those learned in the law at the time."[112] This means that the right to a jury trial is "preserved in all cases where it existed prior to adoption of the Constitution . . . ."[113] And "at the time of the drafting and ratification of the 1963 Constitution, those sophisticated in the law understood, and thus the instrument

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[105] *Id*. at 442.
[106] *Rafaeli*, 505 Mich at 481.
[107] *Antkoviak*, 242 Mich App at 443–44.
[108] Const 1835, art 1, § 9.
[109] Const 1850, art 6, § 27.
[110] See Const 1908, art 2, § 13; Const 1963, art 1, § 14.
[111] *Phillips v Mirac, Inc*, 470 Mich 415, 425; 685 NW2d 174 (2004).
[112] *Id*.
[113] *Madugula*, 496 Mich at 704–05.

adopted, that the right of trial by jury encompassed a jury that could find facts, *including the amount of damages*."[114] To the extent the Constitution grants a jury-trial right in takings cases, the legislature cannot grant the state sovereign jury-trial immunity in such cases.[115]

The Michigan Court of Appeals has expressed "doubt [as to] whether there even was a right of trial by jury in [takings cases] at common law which could 'remain' when the constitution of 1835 and succeeding constitutions were adopted."[116] Further, this Court has held that "neither the Constitution of 1908 nor 1963 [specifically] provides a constitutional right to a jury in a condemnation hearing . . . ."[117] But, as stated above, the very purpose undergirding both the takings clause *and* the right to a jury trial—to provide a check against the state's power—compels a conclusion that the right to a jury trial should be afforded in takings cases against the state. Even before Michigan was a state, when the area was a mere wilderness governed by the Northwest Ordinance of 1787, its inhabitants could not be deprived of their property without a jury trial. Every iteration of Michigan's Constitution has provided that the right to a trial by jury shall remain. For these reasons, the takings clause and its protections against unbridled state power should be given full vitality and coupled with the constitutional right to a jury trial. Accordingly, this Court should reverse the Court of Claims and transfer this case back to the Macomb County Circuit Court.

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[114] *Phillips*, 470 Mich at 427–28 (emphasis added).
[115] See *Buckeye Union Fire Ins Co v State*, 383 Mich 630, 641; 178 NW2d 476 (1970) (holding that "the legislature does not have an unlimited discretion in shaping the pattern of the State's immunity" because, in doing so, the legislature remains bound by "applicable and overriding provisions of the State Constitution"); *People v Bigge*, 288 Mich 417, 424; 285 NW 5 (1939) (holding that "nothing is better settled on the authorities than that the legislature cannot take away a single one of the substantial and beneficial incidents of the right of trial by jury as it existed and was adopted by the Constitution").
[116] *Chamberlin v Detroit Edison Co*, 14 Mich App 565, 572; 165 NW2d 845 (1968).
[117] *Hill*, 382 Mich at 406.

II. The Court of Appeals erred when it affirmed the Court of Claims' summary disposition of Appellants' regulatory taking claim under MCR 2.116(C)(8) because Appellants have properly pleaded a regulatory taking claim.

In this case, the Court of Appeals committed clear error when it affirmed the grant of summary disposition under MCR 2.116(C)(8) on Appellants' regulatory taking claim. This motion challenged whether Appellants had properly pleaded a regulatory taking claim. Review of Appellants' complaint reveals that they have done so. For this reason, this Court should reverse the Court of Claims' summary disposition of Appellants' regulatory taking claim under MCR 2.116(C)(8).

A. Rule of Decision under MCR 2.116(C)(8)

"A motion [for summary disposition] under MCR 2.116(C)(8) tests the legal sufficiency of the complaint" and is properly granted where "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'"[118] In deciding a motion under subsection (C)(8), courts may only consider the pleadings.[119] "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[120]

B. A properly pleaded regulatory-taking claim must allege that a governmental regulation has so overburdened the property at issue that it has gone too far and constitutes a taking.

"[G]overnmental regulations that overburden a property may . . . constitute a compensable taking."[121] A regulation constitutes a taking if the regulation "goes too far."[122] Other than two

[118] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).
[119] *Id.* at 119–20; MCR 2.116(G)(5).
[120] *Maiden*, 461 Mich at 119.
[121] *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010).
[122] *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).

narrow categorical rules[123] not applicable in this case, however, there is no "set formula" for when a regulation goes too far.[124] A regulatory taking need not be permanent in order to be compensable.[125]

C. Summary disposition of Appellants' regulatory taking claim under MCR 2.116(C)(8) was wrongly granted because Appellants have properly pleaded a regulatory-taking claim.

In this case, Appellants properly pleaded a regulatory-taking claim on which relief can be granted. In Appellants' complaint, Appellants alleged that the Appellees had taken Appellants' "real and personal property by way of regulations imposed upon them."[126] Indeed, Appellants' complaint alleges that Appellants have been overburdened by regulations to the point that they were completely prohibited from operating their businesses or using their property for a significant period of time.[127] Appellants' complaint alleges that these regulations cost the Appellants millions of dollars.[128] Appellants' complaint further alleges that Appellants have not received any amount of compensation from the Appellees in light of these devastating regulations.[129] Thus, accepting Appellants' facts as true and construing them in the light most favorable to Appellants, Appellants have alleged all elements necessary to state a regulatory taking claim.

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[123] A regulation is a taking per se if it results in a permanent physical invasion of private property or the owner is deprived of *all* economically beneficial use of his land. *Dorman v Twp of Clinton*, 269 Mich App 638, 646; 714 NW2d 350 (2006).
[124] *Tahoe-Sierra Pres Council, Inc v Tahoe Regl Planning Agency*, 535 US 302, 326; 122 S Ct 1465; 152 L Ed 2d 517 (2002).
[125] See *id.* at 342; *Cummins v Robinson Twp*, 283 Mich App 677, 719; 770 NW2d 421 (2009).
[126] Complaint, Plaintiff-Appellants' Appx. 3, at 32(a).
[127] *Id*. at 20(a)–28(a).
[128] *Id*. at 24(a).
[129] *Id*. at 29(a)–30(a).

Further, Appellants' complaint alleged that there was no link between the spread of COVID-19 and Appellants' businesses.[130] Appellants' complaint also alleged that the Appellees' actions were illegal and outside of the scope of their governmental authority.[131] Thus, accepting Appellants' facts as true and construing them in the light most favorable to Appellants, Appellants' property was not harmful to the public and did not constitute a common-law nuisance or a "noxious use."

Therefore, accepting Appellants' facts as true and construing them in the light most favorable to Appellants, it is indisputable that Appellants could prevail on a regulatory taking claim with further factual development. For this reason, the Court of Appeals committed clear error when it affirmed the grant of summary disposition under MCR 2.116(C)(8).

III. The Court of Appeals erred when it held that a non-categorical regulatory taking did not occur in this case despite the fact that neither the Court of Appeals nor the Court of Claims ever applied the *Penn Central* test.

To determine whether a non-categorical regulatory taking has occurred, it is necessary to apply the test established in *Penn Central*.[132] The Court of Appeals, citing *Gym 24/7 Fitness*, acknowledged that this was true.[133] Despite this, the Court of Appeals never applied the *Penn Central* test in this case. Moreover, the trial court did not apply the *Penn Central* test, either.

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[130] Appellees' complaint alleged that the "connective studies employed by Defendants are erroneous, [and] the correlative effect between restaurant closures and declining infection numbers is tenuous." *Id*. at 29(a)–30(a). Appellants' complaint alleged that the Appellees' actions in this matter were unsupported by science and hard data. *Id*. Appellants' complaint alleged that the science offered by the Appellees in support of the orders was "woefully lacking." *Id*. at 29(a). Appellants' complaint alleged that the "Defendants' rhetoric claiming that dining capacity restrictions and other regulations kept infections low and helped save lives is false." *Id*. at 30(a). Appellants alleged that one study showed that less than 2% of all COVID-19 cases originate from bars and restaurants. *Id*.

[131] *Id*. at 22(a)–23(a), 30(a)–32(a).

[132] *Penn Cent Transp Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

[133] *Mount Clemens Recreational Bowl*, ___ Mich App at ____; slip op at 7–8.

Instead, the Court of Appeals simply held that a non-categorical regulatory taking did not occur in this case because "*Gym 24/7 Fitness* is not distinguishable from the present case."[134] This was clear error because all non-categorical regulatory taking cases must be decided on a case-by-case basis, and in all such cases, the *Penn Central* test must be applied to determine whether a non-categorical regulatory taking has occurred.

A. Factual inquiry under the *Penn Central* factors determines whether a non-categorical regulatory taking has occurred.

While "all taking cases require a case-specific inquiry,"[135] this is especially true for regulatory takings cases. Indeed, "a more fact specific inquiry" is "the default rule" in regulatory taking cases.[136] Whether a regulatory taking has occurred involves "essentially ad hoc, factual inquiries."[137] These inquiries are "designed to allow careful examination and weighing of all the relevant circumstances."[138] The United States Supreme Court[139] "resist[s] the temptation to adopt per se rules in [its] cases involving partial regulatory takings, preferring to examine a number of factors rather than a simple mathematically precise formula."[140] "[B]ecause **Takings Clause questions** are questions of degree they **cannot be disposed of by general propositions**."[141]

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[134] *Id.* at ____; slip op at 10.
[135] *K & K Const, Inc v Dept of Nat. Res*, 456 Mich 570, 576; 575 NW2d 531 (1998).
[136] *Tahoe-Sierra*, 535 US at 332.
[137] *Id*. at 326.
[138] *Id*. at 322 (quotation marks omitted).
[139] The federal and Michigan Takings Clauses are generally viewed as co-extensive, though the Michigan Supreme Court has occasionally held that the Michigan Takings Clause provides "broader protection" than its federal counterpart. *AFT Michigan v State of Michigan*, 497 Mich 197, 217; 866 NW2d 782 (2015).
[140] *Tahoe-Sierra*, 535 US at 326 (quotation marks omitted).
[141] *BCBSM v Milliken*, 422 Mich 1, 109; 367 NW2d 1 (1985) (quotation marks omitted) (emphasis added).

When a temporary regulatory taking is alleged, the court must analyze the claim under a test established by the United States Supreme Court in *Penn Central*.[142] Under the *Penn Central* analysis, the court must balance three factors:

(1) the economic effect of the regulation on the property,

(2) the extent by which the regulation has interfered with distinct, investment-backed expectations, and

(3) the character of the government's action.[143]

"*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[144]

B. The Court of Appeals held that no non-categorical regulatory taking occurred despite the fact that the *Penn Central* test has never been applied in this case.

In this case, neither the Court of Appeals nor the Court of Claims ever applied the *Penn Central* test. Neither the Court of Appeals nor the Court of Claims ever engaged in ad hoc, factual inquiry in this case. Instead, contrary to established caselaw cited above, both the Court of Appeals and the Court of Claims disposed of this case on general propositions. The Court of Appeals held that because there was no taking in *Gym 24/7 Fitness*, the same result must obtain here. But even *Gym 24/7 Fitness* applied the *Penn Central* test (albeit prematurely and incorrectly). No Michigan caselaw supports the Court of Appeals' manner of deciding the takings claim in this case. There is no exception: the *Penn Central* test must be applied in all non-categorical regulatory taking cases.

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[142] *Tahoe-Sierra*, 535 US at 342. See also *Cummins*, 283 Mich App at 719.
[143] *Lingle v Chevron USA Inc*, 544 US 528, 529; 125 S Ct 2074; 161 L Ed 2d 876 (2005).
[144] *Palazzolo v Rhode Island*, 533 US 606, 634; 121 S Ct 2448; 150 L Ed 2d 592 (2001) (O'Connor, J., concurring).

The facts of each and every non-categorical regulatory taking case must be closely examined. As Appellant's counsel argued in the Court of Appeals, food service establishments are different businesses than gyms. The Executive Orders affected food service establishments differently than they affected gyms. These businesses have different operating costs and overhead. The manner in which gyms take in revenue (often monthly membership dues) differs from the manner in which food service establishments take in revenue. Appellants deserve their own day in court, and they deserve to be able to offer evidence relevant to the *Penn Central* factors as those factors apply *to them*. It was clear error to deny Appellants this opportunity, and it was clear error to decide a non-categorical regulatory takings case on general propositions. For these reasons, the Court of Appeals must be reversed.

IV. The Court of Appeals erred when it decided whether a non-categorical regulatory taking had occurred in this case despite the fact that no factual development has taken place.

As explained above, it was error for the Court of Appeals to reject Appellants' non-categorical regulatory taking claim without ever applying the *Penn Central* test. But beyond this error, it is too early to decide whether a non-categorical regulatory taking has occurred in this case because no factual development has taken place. On information and belief, no Michigan appellate court has ever condoned application of the *Penn Central* factors when deciding a pre-answer motion for summary disposition under MCR 2.116(C)(8) alone. To do so would be error because ad hoc, factual inquiries are not possible before there has been factual development of the record.

"[A]ll taking cases require a case-specific inquiry,"[145] but this is especially true for regulatory takings cases.[146] Whether a regulatory taking has occurred involves "essentially ad hoc,

[145] *K & K Const*, 456 Mich at 576.
[146] *Tahoe-Sierra*, 535 US at 332.

factual inquiries."[147] "[B]ecause Takings Clause questions are questions of degree they cannot be disposed of by general propositions."[148] Accordingly, the *Penn Central* analysis requires a thoroughly developed factual record.[149] For this reason, *Penn Central* analysis is premature when deciding a pre-answer motion to dismiss.[150] An attempt to interject a *Penn Central* analysis into consideration of a pre-answer motion to dismiss merely "mudd[ies] the issue" of whether a regulatory-taking claim has been properly pleaded.[151]

In this case, application of the *Penn Central* factors would be premature at this time. The Court of Claims considered and granted a pre-answer motion for summary disposition under MCR 2.116(C)(8). There has been no development of the factual record and no discovery. No documentary evidence has been entered into the record, as there would have been if a (C)(10) summary disposition motion had been filed. Any attempt to inject a *Penn Central* analysis into the litigation at this time would simply muddy the waters. While the *Penn Central* factors are relevant in determining whether a regulatory taking has **occurred**, they do not assist this Court in determining whether a regulatory taking has been properly **pleaded**.[152]

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[147] *Id*. at 326.
[148] *BCBSM*, 422 Mich at 109 (quotation marks omitted).
[149] *Carpenter v United States*, 69 Fed Cl 718, 731 (2006).
[150] *Aviation & Gen Ins Co, Ltd v United States*, 121 Fed Cl 357, 366 (2015); *Alimanestianu v United States*, 124 Fed Cl 126, 133 (2015); *Fredericks v United States*, 125 Fed Cl 404, 421 (2016) ("While the *Penn Central* factors may ultimately be relevant in deciding whether a taking has occurred, they do not assist the court in deciding whether plaintiffs have stated a plausible taking claim.") (cleaned up); *Aureus Asset Managers, Ltd v United States*, 121 Fed Cl 206, 213 (2015).
[151] *Alimanestianu*, 124 Fed Cl at 133 ("Defendant attempts to muddy the issue by injecting a regulatory taking analysis into what should be an assessment of Plaintiffs' pleading—a Rule 12(b)(6) inquiry into whether Plaintiffs have stated a plausible claim for a Fifth Amendment taking.").
[152] See *Fredericks*, 125 Fed Cl at 421.

Likewise, analysis of collateral matters, such as nuisance or necessity (which Appellees argued below), is likewise premature. Establishing a nuisance in fact requires proof of both the act and its consequences.[153] "[W]hether an allegedly injurious condition constitutes a nuisance in fact is a question of fact."[154] Similarly, whether the actual emergency and imminent danger required to support a public necessity defense are questions of fact.[155] The issue before this Court is the sufficiency of Appellants' pleadings, and Appellants have adequately pleaded a regulatory taking. The allegations in Appellants' complaint do not permit a finding that Appellants' food-service operations constituted a nuisance in fact.[156] The allegations in Appellants' complaint do not permit a finding that any actual emergency or imminent danger existed to support a necessity defense. There has been no discovery in this matter. The factual record is bare. Thus, if Appellees wish to assert a nuisance-abatement defense or a necessity, it must do so after further factual development of the record, and application of any so-called nuisance or necessity exception cannot be a valid basis for granting summary disposition under MCR 2.116(C)(8).

Therefore, the Court of Appeals erred when it decided whether a non-categorical regulatory taking occurred in this case.

V. The Court of Appeals erred when it relied on the *Gym 24/7 Fitness* opinion because the *Gym 24/7 Fitness* opinion was based on clear errors of law.

The Court of Appeals relied almost exclusively on the Court of Appeals' recent decision in *Gym 24/7 Fitness* for its analysis of Appellants' regulatory taking claim. But the Court of

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[153] *Id*.
[154] *Ypsilanti Charter Tp v Kircher*, 281 Mich App 251, 269; 761 NW2d 761 (2008).
[155] *TrinCo Inv Co v United States*, 722 F3d 1375, 1379 (Fed Cir, 2013).
[156] It cannot legitimately be argued that restaurants, bars, and banquet centers constitute nuisances per se.

Appeals' reliance on *Gym 24/7 Fitness* was misplaced because the outcome in *Gym 24/7 Fitness* was based on several critical errors of law. For this reason, this Court should reverse the Court of Appeals and overrule *Gym 24/7 Fitness*.

A. The Court of Appeals erred when it relied on Gym 24/7 Fitness because the government's purpose in acting is not relevant to whether a taking has occurred.

The *Gym 24/7* Opinion held that, even though the first two *Penn Central* factors weighed in favor of a taking, there was no taking as a matter of law because "the aim of the EOs was to stop the spread of COVID-19 . . . ."[157] This was clear error because the government's purpose in acting is simply not relevant to whether a taking has occurred.

Regulatory takings tests seek to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[158] For this reason, regulatory takings "tests focus[ ] directly upon the severity of the burden that government imposes upon private property rights."[159] Critically,

> [a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.[160]

Thus, an inquiry that focuses on the government's purpose in acting is "an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in our takings jurisprudence."[161]

In this case, whether the Executive Orders were issued to stop the spread of Covid-19 reveals nothing about the burdens imposed on the gyms in *Gym 24/7 Fitness* or how that burden

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[157] *Gym 24/7 Fitness, LLC v State*, ___ Mich App at ___; slip op at 17.
[158] *Lingle*, 544 US at 539.
[159] *Id.*
[160] *Id*. at 543.
[161] *Id*. at 540.

was distributed. For this reason, whether the Executive Orders were issued to stop the spread of Covid-19 is a due process inquiry that has no proper place in modern takings jurisprudence. For this reason, the *Gym 24/7 Fitness* opinion's focus on the purpose of the Executive Orders was clear error.

B. The Court of Appeals erred when it relied on *Gym 24/7 Fitness* because there is not a broad, harm-prevention exception to general regulatory takings principles.

Prior to 2005, due process principles were often intermingled into regulatory takings cases.[162] This happened primarily because the United States Supreme Court's older land-use cases were analyzed under the Due Process Clause;[163] regulatory-taking cases such as *Penn Central* and *Agins v City of Tiburon*[164] used regrettably imprecise language;[165] and when the modern regulatory

[162] Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v Chevron and the Separation of Takings and Substantive Due Process*, 69 Alb L Rev 343 (2006) ("some of the inconsistency is due to the improper melding of the takings and substantive due process analyses"); Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 Harv Envtl L Rev 371, 372–73 (2006) (the Court engaged in a "a "historic intermingling of concepts of substantive due process and takings"); Kent, *Construing the Canon: An exegesis of Regulatory Takings Jurisprudence After Lingle v Chevron*, 16 NYU Envtl LJ 63–64 (2008) ("Almost from the beginning of its tangled affair with regulatory takings, the Supreme Court conflated the distinction between two constitutional inquiries: when a land use regulation offended notions of due process and when the same regulation resulted in property takings.").

[163] See, e.g., *Lingle's Legacy*, 30 Harv Envtl L Rev at 374 (noting that while the Court's early land-use cases involved claims that property had been effectively taken by regulation, these claims "were framed under the Due Process Clause of the Fourteenth Amendment, alleging that the imposition of regulations that severely diminished the value of private property violated due process unless accompanied by compensation").

[164] *Agins v City of Tiburon*, 447 US 255, 260; 100 S Ct 2138; 65 L Ed 2d 106 (1980).

[165] *Lingle*, 544 US at 542; Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 Minn L Rev 826, 855–56 (2006) ("Prior to *Penn Central*, courts did not borrow freely from Takings Clause precedents to resolve Fourteenth Amendment due process-based claims, or vice versa.").

taking cause of action developed, it was unclear it was cognizable under the Due Process Clause or the Takings Clause.[166]

Examples of the Court's older land-use cases include *Mugler v Kansas*,[167] *Miller v Schoene*,[168] and *Goldblatt v Town of Hempstead, N Y*.[169] Though later cited in some regulatory takings cases, each of these cases were due process cases—these were *not* takings cases.[170] In fact, *Mugler* was decided at a time when it was considered settled law that the Takings Clause did not apply to the states.[171]

The intermingling of due process principles into takings cases led to one of the most challenging debates in regulatory taking jurisprudence: whether there exists a broad "harm

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[166] *Lingle*, 544 US at 541–42 (noting that "when *Agins* was decided, there had been some history of referring to deprivations of property without due process of law as 'takings,' . . . and the Court had yet to clarify whether 'regulatory takings' claims were properly cognizable under the Takings Clause or the Due Process Clause").

[167] *Mugler v Kansas*, 123 US 623; 8 S Ct 273; 31 L Ed 205 (1887).

[168] *Miller v Schoene*, 276 US 272, 277; 48 S Ct 246; 72 L Ed 568 (1928).

[169] *Goldblatt v Town of Hempstead, N Y*, 369 US 590; 82 S Ct 987, 988; 8 L Ed 2d 130 (1962).

[170] *Mugler*, 123 US at 669 (holding that that a police power regulation is not unconstitutional "unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law"); *Miller*, 276 US at 277 (landowners mounted a due process challenge to a Virginia statute under which they were ordered to cut down ornamental red cedar trees growing on their property); *Goldblatt*, 369 US at 590 (landowner challenged an ordinance prohibiting the landowner from continuing sand and gravel mining on his property as unconstitutional under the Due Process Clause of the Fourteenth Amendment).

[171] See *Barron v City of Baltimore*, 32 US 243, 250–51; 8 L Ed 672 (1833) ("[T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."); *Davidson v City of New Orleans*, 96 US 97, 105; 24 L Ed 616 (1877) (rejecting the argument that the Takings Clause applies to the states through the Fourteenth Amendment). The Takings Clause would not be made applicable to the states through the Fourteenth Amendment until a decade after *Mugler* was decided. See *Chicago, B & QR Co v Chicago*, 166 US 226, 239; 17 S Ct 581, 585; 41 L Ed 979 (1897); *Dolan v City of Tigard*, 512 US 374, 383; 114 S Ct 2309; 129 L Ed 2d 304 (1994) (citing *Chicago, B & QR Co* for the proposition that the Fifth Amendment's Takings Clause is applicable to the states via the Fourteenth Amendment).

prevention" exception to general regulatory taking principles.[172] This so-called exception arises from the due-process opinion in *Mugler*, where it was held that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[173] Again, this was a due-process case decided before the Takings Clause was even applicable to the states, before regulatory takings were recognized as a viable cause of action, and before modern regulatory takings jurisprudence had developed. *Mugler* and other early, due-process based land-use cases would be cited by later cases such as *Keystone Bituminous Coal Ass'n v DeBenedictis*[174] in support of the existence of a broad, harm-prevention exception to takings principles. [175]

Five years after *Keystone*, in *Lucas v SC Coastal Council*,[176] "the Court returned to the question of whether its older due process cases establish a broad exemption from takings liability for government action taken to protect the public from harm, *with dramatically different results*."[177] Justice Scalia, writing for the *Lucas* majority, tightly cabined the so-called harm-

[172] *Lingle's Legacy*, 30 Harv Envtl L Rev at 378 ("The significance of the Court's early land use cases, and the relationship between the concepts of substantive due process and takings doctrine they embody, has . . . been at the center of [one] of the most difficult doctrinal debates in the Court's evolving understanding of the premises of regulatory takings doctrine: . . . whether there is a broad exception to takings liability for government regulation intended to protect the public from harm.").
[173] *Mugler*, 123 US at 668–69.
[174] *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 488; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
[175] *Id*.
[176] *Lucas v SC Coastal Council*, 505 US 1003, 1014; 112 S Ct 2886; 120 L Ed 2d 798 (1992).
[177] *Lingle's Legacy*, 30 Harv Envtl L Rev at 385 (emphasis added).

prevention exception to situations "where the use would be illegal under established principles of state property or nuisance law."[178]

Lucas put to bed any notion that the Court's early, due-process-based land-use cases that focused on the government's purpose in acting have a place modern regulatory takings jurisprudence. *Lucas* "untethered regulatory takings from any balancing between private and public interests . . . ."[179] Justice Scalia viewed the Court's early, due-process-based land-use cases "as reflecting only the police power predicate for government action to affect private property at all."[180] Justice Scalia held that, for this reason, the harm-prevention exception suggested in the Court's early cases was simply not relevant in distinguishing between compensable a regulatory taking and non-compensable police-power regulation:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; *it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation*.[181]

Further, and most critically, *Lucas* held that the harm-prevention model from earlier cases and the "substantially advances" model from *Agins* were one and the same:

> "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ."

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[178] *Id*.
[179] Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 Envtl L 307, 336 (2019).
[180] *Lingle's Legacy*, 30 Harv Envtl L Rev at 385.
[181] *Lucas*, 505 US at 1026 (emphasis added).

In the nearly 30 years since *Lucas*, the Court has not authoritatively cited *Keystone*, *Mugler*, or any other early, due-process-based land-use case in support of the current existence of a harm-prevention exception to regulatory-taking principles.

Finally, in 2005, the Court conclusively repudiated the Court's history of intermingling due process principles with regulatory taking principles in *Lingle v Chevron*, announcing that due process inquires have no proper place in the Court's modern regulatory taking jurisprudence.[182] "*Lingle* effectively severs the last links between the Court's old cases reviewing the constitutionality of land use regulations under due process and modern regulatory takings doctrine."[183] And in doing so, to the extent that any such questions remained after *Lucas*, *Lingle* also "brought to a close the Court's prolonged period of uncertainty and conflict regarding the proper meaning of its early land use decisions for modern takings jurisprudence."[184]

Lingle "explicit[ly] recogni[zed] the fundamental difference in nature and purpose of the judicial inquiry under due process from that under the Takings Clause, draw[ing] a sharp line between due process precedents and modern takings doctrine."[185] Unlike due-process inquiries, regulatory-taking inquiries "focus[ ] directly upon the severity of the burden that government

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[182] *Lingle*, 544 US at 540 (holding that the "substantially advances" test minted in *Agins* was "an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." See also *Requiem for Regulatory Takings*, 49 Envtl L at 343 ("The Court's unanimous rejection of the *Agins* "substantially advances" formula purported to establish a bright line, once again, between regulatory takings and due process."); Eagle, *Penn Central and its Reluctant Muftis*, 66 Baylor L Rev 1, 33 (2014) (noting that "the Supreme Court separated substantive due process and takings doctrine in *Lingle*").

[183] *Lingle's Legacy*, 30 Harv Envtl L Rev at 401; *At Last, Some Clarity*, 69 Alb L Rev at 350 ("As the Court recognized in *Lingle*, it is now clear that many prior cases were not concerned with the regulatory takings issue as currently conceived.").

[184] *Lingle's Legacy*, 30 Harv Envtl L Rev at 397.

[185] *Id*. at 401. See also *At Last, Some Clarity*, 69 Alb L Rev at 350 ("Simply put, the takings analysis asks whether the government act has taken property, while the substantive due process analysis asks whether the government act is within the scope of the government's power.").

imposes upon private property rights."[186] "[R]egulatory takings doctrine focuses on whether state action *that is legitimate* may nonetheless impose unfair economic burdens on particular property owners, warranting payment of just compensation."[187] The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[188]

Under the taking analysis, the government's purpose in acting is simply not at issue.[189] *Lingle* recognized that "whether the government is acting for a really important reason as opposed to a really silly reason[ ]is a substantive due process question, not a takings question . . . ."[190] Under *Lingle*, the *Penn Central* inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[191] The *Penn Central* inquiry only evaluates the character of the government's action to determine "whether the governmental regulation singles plaintiffs out to bear the burden for the public good" or whether the regulation "burdens and benefits all citizens relatively equally."[192] The focus remains on the property.[193]

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[186] *Lingle*, 544 US at 539.
[187] *Lingle's Legacy*, 30 Harv Envtl L Rev at 377 (emphasis added).
[188] *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304, 314; 107 SCt 2378; 96 LEd2d 250 (1987).
[189] *Requiem for Regulatory Takings*, 49 Envtl L at 343 (After *Lingle*, "regulatory takings has become solely about impact on the private property owner without any reference to the importance of the state's interest."); *At Last, Some Clarity*, 69 Alb L Rev at 354 ("As *Lingle* explained, the focus of the takings analysis is on whether the government act takes property, not on whether the government has a good or bad reason for its action.").
[190] *At Last, Some Clarity*, 69 Alb L Rev at 354–55. See also *Lingle*, 544 US at 542 (holding that a means-end test that focuses on the government's purpose in acting "not a valid method of discerning whether private property has been 'taken' . . . .").
[191] *Lingle*, 544 US at 540.
[192] *K & K Const*, 267 Mich App at 559.
[193] *Reluctant Muftis*, 66 Baylor L Rev at 28 ("In *Lingle*'s summary of the Penn Central doctrine, 'economic impact and the degree to which it interferes with legitimate property interests. seem to trump all.").

To the extent it retained any relevance to regulatory taking jurisprudence after *Lucas*, *Lingle* effectively clarified that *Keystone*'s focus on the government's purpose has no place in modern regulatory taking cases.[194] In the 16 years since *Lingle*, the Court has not authoritatively cited *Keystone*, *Mugler*, or any other early, due-process-based land-use case in support of the current existence of a harm-prevention exception to regulatory-taking principles.

In this case, the *Gym 24/7 Fitness* court committed clear error when it held that there may be a broad, harm-prevention exception to general regulatory-taking principles. The harm-prevention inquiry is a due process inquiry, which focuses on the government's purpose and the means selected to achieve that purpose. *Lingle* clarified that, in determining whether a taking has occurred, the focus must be on the burden imposed on the property—***not*** on the government's purpose in acting.

Like the substantially advances test rejected in *Lingle*, the so-called harm-prevention exception "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[195] Likewise, just like the abrogated substantially-advances test, the harm-prevention exception does not "provide any information about how any regulatory burden is distributed among property owners."[196] Thus, the harm-prevention inquiry fails to provide any insight into whether a regulation constitutes a taking. Thus, the harm-prevention inquiry is undoubtedly not a takings inquiry and has no proper place in this regulatory taking case.

For these reasons, the *Gym 24/7 Fitness* court erred when it held that there may be a broad, harm-prevention exception to general regulatory taking principles.

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[194] *At Last, Some Clarity*, 69 Alb L Rev at 355.
[195] *Lingle*, 544 US at 542.
[196] *Id*.

C. The Court of Appeals erred when it relied on *Gym 24/7 Fitness* because *Gym 24/7 Fitness* misapplied the character-of-the-government-action prong of the *Penn Central* test.

While no single prong of the Penn Central test is dispositive,[197] the economic-burden factor and investment-backed-expectation prongs are of primary importance.[198] The "character of the government action" prong does not contemplate the purpose behind the government's action. Instead, it essentially asks "whether the governmental regulation singles plaintiffs out to bear the burden for the public good" or whether the regulation "burdens and benefits all citizens relatively equally."[199] This factor requires the court to place the challenged regulatory action along a spectrum.[200] On one end of the spectrum are regulations that produce a physical taking.[201] This end of the spectrum weighs in favor of a taking.[202] On the other end of the spectrum are "far-reaching, ubiquitous governmental regulation that provides all property owners with an 'average reciprocity of advantage.'"[203] This end of the spectrum weighs against a taking.[204]

In this case, the Court of Appeals erred in relying on the *Gym 24/7 Fitness* opinion because the *Gym 24/7 Fitness* opinion incorrectly applied the character-of-the-government-action prong of the *Penn Central* test. Instead of analyzing how the burden imposed by the Executive Orders was distributed, the *Gym 24/7 Fitness* opinion analyzed the purpose of the Executive Orders, finding this purpose to be "compelling." Underscoring the prejudicial and significant nature of this error, the *Gym 24/7 Fitness* opinion actually held that the other two prongs of the *Penn Central*

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[197] *K & K Const*, 267 Mich App at 553. See also *Keystone*, 480 US at 485.
[198] *Lingle*, 544 US at 538.
[199] *K & K Const*, 267 Mich App at 559.
[200] *Id*. at 558.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*.

analysis—which are the "primary" factors for consideration—weighed in favor of a taking. Accordingly, the *Gym 24/7 Fitness* opinion was based on clear errors of law, and the Court of Appeals in this case erred when it relied on *Gym 24/7 Fitness*.

VI. The Court of Appeals erred when it affirmed summary disposition of Appellants' tort claims under MCR 2.116(C)(7) because Appellants properly pleaded in avoidance of governmental immunity.

In this case, the trial court erroneously granted summary disposition of Appellants' tort claims because Appellants properly pleaded in avoidance of governmental immunity. Appellants pleaded that Appellees underlying conduct was ultra vires and unconstitutional, and, for this reason, governmental immunity does not apply. For this reason, this Court should reverse the Court of Claims' grant of summary disposition of Appellants' tort claims.

A. Rule of Decision under MCR 2.116(C)(7)

The Court of Claims granted summary disposition of Appellants' tort claims "on immunity grounds." MCR 2.116(C)(7) allows summary disposition where a claim is barred by immunity.[205] Parties are permitted, but not required, to support or oppose a motion under subrule (C)(7) with admissible documentary evidence.[206] When considering a decision under subrule (C)(7), this Court must take all well-pleaded factual allegations as true and view them in the light most favorable to the plaintiff unless they are contradicted by other evidence.[207] Dismissal under subrule (C)(7) is appropriate where no material facts are in dispute, or no reasonable minds could differ as to the legal effect of the facts, and a claim is barred as a matter of law.[208]

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[205] MCR 2.116(C)(7).
[206] *Maiden*, 461 Mich at 118.
[207] *Mays v Snyder*, 323 Mich App 1, 25; 916 NW2d 227 (2018).
[208] *Id.*

B. Governmental agencies whose tortious conduct was unconstitutional or ultra vires do not receive the protection of governmental immunity.

The Governmental Tort Liability Act states that, generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[209] Further, "a party suing a unit of government must plead in avoidance of governmental immunity."[210]

But government officials who act without authority are not entitled to governmental immunity because they are not engaged in the exercise of a governmental function:

> When a governmental agency engages in mandated or authorized activities, it is immune from tort liability . . . . Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function. The agency is therefore liable for any injuries or damages incurred as a result of its tortious conduct.[211]

The Michigan Supreme Court has held that Appellee Whitmer was not required by or authorized "under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020."[212] And the Supreme Court further held that Appellee Whitmer was not required by or authorized under the EPGA to take any action because "the EPGA is unconstitutional in its entirety."[213] "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed."[214] "[A]n unconstitutional statute is

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[209] MCL 691.1407(1).
[210] *Mack v City of Detroit*, 467 Mich 186, 212; 649 NW2d 47 (2002).
[211] *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998) (quotations and citations omitted).
[212] *In re Certified Questions*, 506 Mich 332, 338, 345–47; 958 NW2d 1 (2020).
[213] *Id*. at 338, 374.
[214] *Campbell v City of Detroit*, 51 Mich App 34, 37; 214 NW2d 337 (1973) (quotations and citations omitted).

void from the date of its passage."[215] Governmental immunity is not available where it is alleged that the governmental action at issue violated the Michigan Constitution.[216]

C. Appellants pleaded in avoidance of governmental immunity by alleging that the governmental actions at issue were ultra vires and violated the Michigan Constitution.

In this case, Appellants' complaint alleged that the Appellees' actions were ultra vires because they were not mandated or authorized by law. Further, Appellants' complaint alleged that the governmental action at issue violated Appellants' constitutional rights. For both of these reasons, Appellees are not entitled to governmental immunity for their tortious acts. Because these arguments were pleaded in Appellants' complaint, Appellants pleaded in avoidance of governmental immunity, and summary disposition under MCR 2.116(C)(7) is inappropriate.

Ultra Vires Action. Appellants successfully pleaded in avoidance of governmental immunity because Appellants' complaint alleged that Appellee Whitmer's tortious conduct was ultra vires. Appellants' complaint alleged that the Michigan Supreme Court has held that all of Appellee Whitmer's Executive Orders at issue in this case were unconstitutional and beyond the scope of Appellee Whitmer's authority. Because Appellee Whitmer's Executive Orders were unconstitutional and beyond the scope of Appellee Whitmer's authority, Appellee Whitmer's issuance of those opinions was ultra vires. Ultra vires actions by governmental agencies are not protected by governmental immunity. For this reason, Appellants' complaint adequately pleaded in avoidance of governmental immunity with respect to Appellee Whitmer's conduct.

[215] *Horrigan v Klock*, 27 Mich App 107, 108; 183 NW2d 386 (1970).
[216] *Burdette v State*, 166 Mich App 406, 408–09; 421 NW2d 185 (1988) (A "[state] defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution.").

Further, Appellants' complaint further alleged that Appellee Whitmer conspired with Appellees Hertel and Gagliardi to circumvent the Michigan Supreme Court's decision in *In re Certified Questions* that invalidated her Executive Orders. Appellants' complaint alleged that, for this reason, all subsequent action by Appellees Hertel and Gagliardi were also illegal and ultra vires. Thus, Appellants' complaint successfully pleaded in avoidance of governmental immunity with respect to Appellees Hertel and Gagliardi, as well.

Constitutional Violation. Appellants' complaint alleged that Appellees' tortious conduct in this case constituted a regulatory taking in violation of the Michigan Constitution. This argument is detailed above. The same conduct that constituted a regulatory taking and a violation of the Michigan Constitution forms the bases of Appellants' tort claims in this case–the issuance and enforcement of the Executive Orders at issue in this case. Governmental immunity does not apply to conduct alleged to have violated the Michigan Constitution, and Appellants' complaint clearly alleged that Appellees' conduct violated the Michigan Constitution. For this reason alone, Appellants have successfully pleaded in avoidance of governmental immunity.

Conclusion and Relief Requested

For the reasons stated above, Appellants respectfully requests that this Honorable Court grant leave to appeal. In the alternative, Appellants ask this Court to issue an order reversing the Court of Appeals, reversing the Court of Claims' denial of Appellants' motion to transfer, and reversing the Court of Claims' grant of summary disposition on all of Appellants' claims.

Respectfully Submitted,
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This brief contains 12,718 countable words