STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
HOOD, P.J., and JANSEN and K. F. KELLY, JJ.

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.

MSC No. 165169

COA No.: 358755

Court of Claims No. 2021-000126-MZ

Circuit Court Case No. 2021-001836-CZ

Appellants' Reply to Appellees' Supplemental Brief in Opposition to Application for Leave to Appeal

* * * Oral Argument Requested * * *

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Argument

I. Defendants' Brief fails to properly apply the *Penn Central* factors.

Regulatory taking jurisprudence has historically been one of the most perplexing areas of constitutional law.[1] It has been described as "'muddled,' 'confused,' and 'a constitutional quagmire.'"[2] Prior to its decision in *Lingle v Chevron*, the United States Supreme Court's ad hoc, case-by-case approach to regulatory takings produced a "crazy-quilt pattern of decisions"[3] forming "a murky sea of competing theories, alternative analytical tests, and seemingly results-oriented decision-making."[4] *Lingle* provided much needed clarity to the Court's regulatory taking jurisprudence, differentiating takings inquiries from due process inquiries and explaining how the *Penn Central*[5] factors should be weighed.[6] In order to avoid the result demanded by *Lingle*, Defendants ask this Court to add a new patch to the crazy-quilt pattern, advancing a muddled, confused argument inconsistent with both *Lingle* and pre-*Lingle* cases.

A. The direct focus of the *Penn Central* test is the severity—not the proportionality—of the burden imposed on private property rights.

The most impactful and pervasive error in Defendants' analysis is Defendants' argument that *Penn Central*'s "true north star is the *proportionality* of the burden

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[1] 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).
[2] Kent, *Construing the Canon: An exegesis of Regulatory Takings Jurisprudence After Lingle v Chevron*, 16 NYU Envtl LJ 63 (2008).
[3] *San Diego Gas & Elec Co v City of San Diego*, 450 US 621, 650 n 15; 101 S Ct 1287; 67 L Ed 2d 551 (1981).
[4] *Construing the Canon*, 16 NYU Envtl LJ 63.
[5] *Penn Cent Transp Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).
[6] Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 Harv Envtl L Rev 371, 397 (2006).

imposed."[7] The true lodestar of the *Penn Central* analysis—the direct focus of the *Penn Central* inquiry—is "the *severity* of the burden that government imposes upon private property rights."[8] Proportionality is a complementary but clearly subordinate consideration examined under the character-of-the-government-action factor.[9]

B. Factors 1 and 2: Economic Impact and Interference with Investment-Backed Expectations

1. Factors 1 and 2 are of primary importance in the *Penn Central* analysis.

Defendants argue that economic impact and interference with investment-backed expectations are not the primary *Penn Central* factors. This argument directly conflicts with the plain language of *Lingle*, the United States Supreme Court's last word on how the *Penn Central* factors should be weighed:

> Primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.
>
> . . .
>
> . . . 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.[10]

Defendants argue that these statements are mere obiter dicta. Not so. Obiter dicta are "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand."[11] In *Lingle*, the issue was whether the "substantially advances" test announced in *Agins*[12]

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[7] Defs.' Supp. Br. at 2 (emphasis added).
[8] *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074; 161 L Ed 2d 876 (2005).
[9] *Id.*; *K & K Const, Inc v Dept of Envtl Quality*, 267 Mich App 523, 559; 705 NW2d 365 (2005).
[10] *Lingle*, 544 US at 538–40.
[11] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).
[12] *Agins v City of Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980).

was a valid regulatory-takings test.[13] To resolve this issue, it was necessary for the Court to evaluate the regulatory taking tests announced in *Loretto*,[14] *Lucas*,[15] and *Penn Central*.[16] The Court held that these three tests shared a "common touchstone" in that they "focuse[d] directly upon the severity of the burden that government imposes upon private property rights."[17] In the context of the *Penn Central* factors, the Court so concluded because the economic-impact and interference-with-investment-backed-expectation factors were "[p]rimary among [the *Penn Central*] factors."[18]

The Court held that the substantially advances test was not a valid regulatory takings test because it did not focus directly on the severity of the burden on property rights. Thus, to reach the ultimate conclusion in *Lingle*, the Court's examination of *Penn Central* and the primacy of the first two factors was essential. Without it, the Court would not have found a common touchstone among the regulatory takings tests, and this touchstone was what the Court used to distinguish the substantially advances test from the valid regulatory takings tests. For these reasons, *Lingle*'s statements regarding the primacy of the first two *Penn Central* factors are not dicta.

This is not a controversial conclusion, as it has been reached by courts across the country. Following *Lingle*, a majority of federal circuit courts and numerous state

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[13] *Lingle*, 544 US at 532.
[14] *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982).
[15] *Lucas v SC Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992).
[16] *Lingle*, 544 US at 539.
[17] *Id.*
[18] *Id*. at 538–39.

supreme courts have explicitly recognized that the first two *Penn Central* factors are of primary importance and largely control the *Penn Central* analysis.[19]

2. Factor 1 examines the magnitude—not the proportionality—of the economic impact on Plaintiffs.

Defendants argue that the primary consideration under the economic-impact factor is the proportionality of the regulation's economic impact.[20] Not so. *Lingle* makes abundantly clear that Factor 1 concerns the magnitude of the economic impact—not its proportionality.[21]

3. The EOs had a profoundly negative economic impact on Plaintiffs.

"The term 'taking' can encompass governmental interference with rights to both tangible and intangible property."[22] "A business owner's right to engage in and continue

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[19] See, e.g., *Piszel v United States*, 833 F3d 1366, 1373 (Fed Cir, 2016) (holding that the primary *Penn Central* factors are economic impact and interference with investment backed expectations); *1256 Hertel Ave Assoc, LLC v Calloway*, 761 F3d 252, 264 (CA 2, 2014) (same); *Clayland Farm Enterprises, LLC v Talbot Cnty, Maryland*, 987 F3d 346, 353 (CA 4, 2021) (same); *Hawkeye Commodity Promotions, Inc v Vilsack*, 486 F3d 430, 441 (CA 8, 2007) (same); *Guggenheim v City of Goleta*, 638 F3d 1111, 1120 (CA 9, 2010) (same); *Wensmann Realty, Inc v City of Eagan*, 734 NW2d 623, 633 (Minn, 2007) (same); *Wild Rice River Estates, Inc v City of Fargo*, 705 NW2d 850, 855 (ND, 2005) (same); *W Linn Corp Park, LLC v City of W Linn*, 349 Or 58, 78 n 15; 240 P3d 29 (2010); *Franklin Mem Hosp v Harvey*, 575 F3d 121, 127 (CA 1, 2009) (holding that 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"); *Nekrilov v City of Jersey City*, 45 F4th 662, 672 (CA 3, 2022) (same); *State ex rel AWMS Water Sols., LLC v Mertz*, 162 Ohio St 3d 400, 415; 165 NE3d 1167 (2020) (same); *Mann v Georgia Dept of Corr*, 282 Ga 754, 757; 653 SE2d 740 (2007) (same); *Rodehorst Bros v City of Norfolk Bd of Adjustment*, 287 Neb 779, 796; 844 NW2d 755 (2014) (same); *Gove v Zoning Bd of Appeals of Chatham*, 444 Mass 754, 764; 831 NE2d 865 (2005) (same); *Washington Food Indus Ass'n & Maplebear, Inc v City of Seattle*, 524 P3d 181, 198 (Wash, 2023) (same).

[20] Defs.' Supp. Br. at 39.

[21] *Lingle*, 544 US at 540 ("[T]he *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.").

[22] *AFT Michigan v State of Michigan*, 497 Mich 197, 218; 866 NW2d 782 (2015).

his or her business has long been recognized as a property right."[23] Business interests, such as assets, real property, and control of the business, are private property.[24] "The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case."[25] In determining just compensation, "[w]hatever damage is suffered, must be compensated."[26]

The going concern or goodwill value of a business is recoverable under some circumstances. For example, the going concern or goodwill value of a business is recoverable where the business is taken for use as a going concern.[27] Similarly, where the taking of a business's location destroys the business because there is no suitable alternative location available, going concern or good will value is recoverable.[28]

In this case, the magnitude of the economic impact that the executive orders at issue (the EOs) had on Plaintiffs was profound. Plaintiffs barely survived the EOs, and they are still attempting to recover to this day. These formerly thriving businesses were decimated by the EOs, vastly reducing their value as a going concern. These businesses lost revenues and profit, employees, and overhead costs. The EOs have irreparably harmed Plaintiffs, both through total shutdown mandates and, later, significant capacity restrictions, which forced Plaintiffs to either operate at significant cost despite drastically

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[23] *Dept of Transp v Gilling*, 289 Mich App 219, 240; 796 NW2d 476 (2010).
[24] *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 102; 367 NW2d 1 (1985) (Levin, J, dissenting in part).
[25] *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378; 663 NW2d 436 (2003) (cleaned up).
[26] *City of Detroit v Michael's Prescriptions*, 143 Mich App 808, 811; 373 NW2d 219 (1985).
[27] *Id.* at 813.
[28] *Id.*

reduced capacity or allow their going concern and goodwill value to further plummet. The economic-impact factor unmistakably weighs in favor of a taking, and Plaintiffs must be given an opportunity to show just how far this factor tips the scales.

4. Factor 2 examines the extent of the interference with investment-backed expectations formed at the time that the property interest is acquired, not at the time of the taking.

Defendants incorrectly argue that Factor 2 examines Plaintiffs' investment-backed expectations formed at the time of the taking.[29] To the contrary, the second *Penn Central* factor examines the extent of the interference with expectations held by the property owner at the time that the property at issue was acquired—that is, at the time that the investment was made.[30]

5. The EOs caused significant and extensive interference with Plaintiffs' investment-backed expectations formed at the time that the property at issue was acquired.

In this case, the EOs extensively interfered with Plaintiffs' reasonable investment-backed expectations. The property interests at issue in this case are, primarily, the Plaintiffs themselves. This property was acquired decades ago, when Plaintiffs were first incorporated. At the time that these interests were acquired, the EOs had not been issued yet, and, thus, Plaintiffs had no notice of the regulatory scheme challenged here.

Plaintiffs had no reason to expect that Defendants would issue executive orders shuttering their businesses without warning. Plaintiffs had no reason to expect that they

[29] Defs.' Supp. Br. at 63 (arguing that "once [COVID-19] emerged, no one could hold a reasonable, distinct expectation that the State would remain idle").

[30] See, e.g., *Love Terminal Partners, LP v United States*, 889 F3d 1331, 1345 (Fed Cir, 2018) ("The reasonable, investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted.").

would be forced to pay vendors for supplies, properties, and services that they were abruptly unable to use. Plaintiffs had no reason to expect that they would be forced to watch as the value cultivated over a lifetime in their businesses was reduced to virtually nothing while other businesses were left untouched. Plaintiffs had no reason to expect any of this because these actions were unprecedented. Even during the 1918 flu pandemic, restaurants were not ordered to close.[31] Instead, they were viewed as essential businesses across the country.[32] Even if COVID-19 could have been predicted, the drastic restrictions of food-service establishments could not have been predicted. This is especially true where the pandemic was not foodborne or directly attributable to food-service establishments, and less restrictive measures could have been implemented.

C. Factor 3: Character of the Government Action

1. Factor 3 does not contemplate the purpose of the government action.

Defendants argue that Factor 3 weighs against a taking based on the *purpose* of the EOs.[33] As explained at length throughout this case, the government's purpose in acting is not relevant to whether a taking has occurred. This issue is discussed in Section V of Plaintiffs' Application for Leave to Appeal, beginning at page 27. For convenience, Plaintiffs have attached this Section of the Application for Leave to Appeal as Exhibit A. This issue is discussed in the context of Factor 3 in Section III.C. of Plaintiffs' Supplemental Brief, beginning at page 28, and again in Section IV.B., beginning at page

[31] See Fries, *Frighteningly Familiar: How the 1918 Spanish Flu Played Out in Michigan* <https://www.hourdetroit.com/community/1918-spanish-flu-metro-detroit-coronavirus> (accessed October 31, 2023).
[32] E.g., Squires, *Why Restaurants Didn't Shut Down in the Previous Pandemic* <https://heated.medium.com/why-restaurants-didnt-shut-down-in-the-previous-pandemic-a9484634bda1> (accessed November 1, 2023).
[33] Defs. Supp. Br. at 47.

33. For convenience, Plaintiffs have attached this Section of the Supplemental Brief as Exhibit B.

2. Factor 3 does not contemplate the amount of just compensation at issue.

Defendants argue that Factor 3 weighs against a taking because the amount of just compensation required in this case would be so great that it might bankrupt the State. This argument is a nonstarter. "It has always been a basic principle of the law that, 'If the work is of great public benefit, the public can afford to pay for it.'"[34] In fact, it is *the State* that is prohibited from bankrupting *citizens* and *businesses* by imposing regulations for public benefit that do not provide the required just compensation.[35] Contrary to Defendants' argument, drastic State action should be tempered by the prospect of just compensation. In this way, state actors may be less likely to make rash decisions that have devastating results for Michigan citizens and businesses.

3. Factor 3 weighs in favor of a taking because food-service establishments were singled out to bear the burden of curbing the spread of COVID-19.

Defendants argue that the burdens imposed by the EOs were evenly distributed, and Plaintiffs were not singled out. This is simply not true. The EOs specifically identified food-service establishments for strangling restrictions. Businesses like banks, credit unions, grocery stores, dentists' offices, hotels, convenience stores, gas stations, drug stores, pharmacies, laundromats, and even marijuana dispensaries stayed open while food-service businesses were forced to close. This is what it means to be singled out. This is not "even distribution." Food-service businesses should not be forced to bear the

[34] *Thom v State*, 376 Mich 608, 623; 138 NW2d 322 (1965).
[35] *Id.* (rejecting the argument that "society may justly benefit itself at the expense of an individual by failing to compensate him for damage done to him in order to procure society's benefit.").

burden for the public good when banks, marijuana dispensaries, and a host of other businesses were not asked to do the same. This factor weighs in favor of a taking, and just compensation is required.

D. It is the Defendants burden to prove that the nuisance exception applies, and Defendants' conclusory allegations regarding the purpose of the EOs fail to meet this burden.

The so-called nuisance exception to general takings principles is a recognition that limitations on property ownership that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," do not require compensation.[36] "For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place."[37] This is because "the Takings Clause does not require compensation when an owner is barred from putting land to a [proscribed] use . . . ."[38] To fall within the exception, a regulation must "do no more than duplicate the result that could have been achieved in the courts."[39] And when a regulation's effect "goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[40]

It is Defendants' burden to prove that the nuisance exception applies.[41] To meet this burden, the State must do the same "as it would be required to do if it sought to restrain [a property owner] in a common-law action for public nuisance."[42] Mere *ipse*

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[36] *Lucas*, 505 US at 1029.
[37] *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2079; 210 L Ed 2d 369 (2021).
[38] *Lucas*, 505 US at 1030.
[39] *Id*. at 1029.
[40] *Id*. at 1030.
[41] *Id*. at 1031.
[42] *Id*.

dixit or a "conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*" is not enough.[43]

Consistent with modern regulatory takings principles,[44] a regulation's purpose is completely irrelevant to analysis of the nuisance exception. The regulation's purpose reveals nothing about whether the property use at issue is actually proscribed by background principles of state law or whether the effect of the law merely duplicates the result obtainable through the courts.

Despite this, Defendants focus exclusively on the purpose of the EOs in arguing that the nuisance exception bars Plaintiffs' claims.[45] Defendants provide no analysis concerning whether Plaintiffs' property constituted a nuisance or created an imminent danger to the public.[46] Defendants' argument dogmatically assumes these conclusions, conflating Plaintiffs' property with COVID-19 itself. This is mere *ipse dixit*, which is entirely insufficient to carry Defendants' burden of proving that the nuisance exception applies.[47]

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[43] *Id*. at 1031.
[44] See Exhibits A and B.
[45] Defs.' Br. at 33.
[46] The nuisance exception could theoretically implicate necessity principles as well as nuisance principles. This analysis is, however, premature, as discussed in Section IV of Plaintiffs' Reply to Defendants' Brief in Opposition to Application for Leave to Appeal, beginning on page 6. For convenience, the relevant portion of Plaintiffs' Reply is attached as Exhibit C.
[47] Defendants' burden to prove that the nuisance exception applies is more fully discussed in Section III of Plaintiffs' Reply to Defendants' Brief in Opposition to Application for Leave to Appeal, beginning on page 3. For convenience, the relevant portion of Plaintiffs' Reply is attached as Exhibit D.

Conclusion and Relief Requested

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

Respectfully Submitted,
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