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.: 165169

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' Reply to Brief in Opposition to Application for Leave to Appeal

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Argument

I. Application of the *Penn Central* factors is premature because those factors are not relevant to whether Appellants properly pleaded a non-categorical regulatory taking claim.

Appellees claim that Appellants "urge" this Court to apply the *Penn Central* factors and that doing so demonstrates that no taking occurred in this case.[1] But Appellants have *never* argued that this Court (or the Court of Appeals) should apply the *Penn Central* factors. To the contrary, Appellants have consistently and repeatedly argued that application of the *Penn Central* factors in this case is premature.[2] The issue on appeal is whether Appellants have properly *pleaded* a regulatory taking claim[3]—not whether a taking has actually *occurred*.[4] No Michigan appellate court has ever applied the *Penn Central* factors where only a (C)(8) motion for summary disposition was at issue. Similarly, the Court of Federal Claims has explicitly rejected such a procedure, holding that the *Penn Central* factors are simply not relevant to whether a plaintiff has pleaded a plausible non-categorical regulatory taking claim.[5] Accordingly, this Court should reject

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[1] Appellees' Brief in Opposition at 34–40.

[2] See, e.g., Appellants' Application for Leave to Appeal at 26.

[3] To properly plead a regulatory taking cause of action, a plaintiff must allege facts that, when taken as true, show that plaintiff possessed a property interest that the State has taken through regulation or executive order. See *Aviation & Gen. Ins. Co., Ltd. v. United States*, 121 Fed. Cl. 357, 362 (2015) ("In order to prevail on the Government's motion to dismiss, Plaintiffs must only plead sufficient facts that, when accepted as true, show that Plaintiffs had a cognizable property interest in their claims against Libya, and that the Government took the claims by Executive Order and the FCSC's jurisdictional limitations."). Appellants have satisfied this requirement. Appellants' Application for Leave to Appeal at 20–22. Moreover, to whatever extent this Court finds that Appellants' pleadings were deficient, Appellants are entitled to amend their complaint under MCR 2.116(I)(5).

[4] The Court of Claims granted summary disposition of Appellants' regulatory taking claim under MCR 2.116(C)(8), holding that Appellants had failed to state a regulatory taking claim on which relief could be granted.

[5] *Aviation*, 121 Fed. Cl. At 366 (holding that 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

Appellees' attempt to muddy the waters by injecting a *Penn Central* analysis into what should be an assessment of Appellees' pleading.

II. Contrary to Appellees' Brief in Opposition, an exercise of the police power can constitute a regulatory taking.

Despite United States Supreme Court and binding Michigan precedent on point, Appellees cite several non-binding federal cases to argue that a police-power regulation cannot constitute a regulatory taking.[6] This is simply not true and reflects a fundamental error both in Appellees' reasoning and the cases on which Appellees rely.[7] This Court has stated that "a taking may occur . . . where a governmental entity exercises its police power through regulation which restricts the use of property."[8] Michigan courts do not "distinguish between takings accomplished by the use of police power or by eminent domain," as "[t]he key consideration [is] whether there ha[s] been a taking."[9] The idea that "the eminent domain and police power are distinguishable, and that regulation under the police power can never be a taking because the power of eminent domain is not invoked" has been rejected by the United State Supreme Court for over 100 years.[10]

Plaintiffs have stated a plausible taking claim."). See also *Alimanestianu v United States*, 124 Fed Cl 126, 133 (2015) (holding that government was "attempt[ing] to muddy the issue by injecting a regulatory taking analysis into what should be an assessment of Plaintiffs' pleading.").

[6] Appellees' Brief in Opposition at 19.

[7] For additional discussion of why the non-binding federal cases cited by Appellees were poorly reasoned and wrongly decided, see Section V, infra at 8–9.

[8] *Bevan v Brandon Tp*, 438 Mich 385, 390; 475 NW2d 37 (1991) (quotation marks and citations omitted).

[9] *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 89–90; 445 NW2d 61 (1989) (quotation marks and citations omitted).

[10] See, e.g., Blaesser & Weinstein, Federal Land Use Law & Litigation (October 2021 Update), §§ 3:3–5 ("Although no longer followed by the Court in its takings jurisprudence, *Mugler* stood for the now-discredited constitutional principle that the exercise of police power regulations is not compensable so long as government does not invoke the power of eminent domain."); *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922); Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 Harv Envtl L

Accordingly, Appellants' argument that a police power regulation cannot constitute a regulatory taking is simply wrong.[11]

III. Appellees have failed to meet their burden of proving that Appellants' property was a nuisance that could be abated without providing just compensation.

In arguing that there is a broad harm-prevention exception to general takings principles, what Appellees essentially seek is a significant extension of the exceptionally narrow nuisance exception. The nuisance exception is not really an exception at all but, rather, simply 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.[12]

It is the State's burden to prove that the nuisance exception applies.[13] To meet its 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."[14] The State's burden:

> will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.[15]

Rev 371, 377 (2006) ("To the extent that *Mugler* and other early cases held that valid police power regulation cannot be conditioned on payment of compensation, and implicitly suggested that regulation cannot effect a taking, it seems impossible to avoid the conclusion that *Pennsylvania Coal* effectively overruled those cases.").

[11] For additional discussion relevant to this issue, see Appellant's Application for Leave to Appeal at Section V.B., p 29–35.

[12] *Lucas v SC Coastal Council*, 505 US 1003, 1029; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

[13] *Id*. at 1031.

[14] *Id*.

[15] *Id*. at 1030–31.

Mere *ipse dixit* or a "conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*" is not enough.[16] Where the regulation "goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[17]

In Michigan, the nuisance exception has generally been applied in nuisance-abatement cases where sufficient evidence showed that the use or property at issue was actually a nuisance. For example, in *Ypsilanti Charter Tp v Kircher*,[18] cited by Appellees, Ypsilanti filed a nuisance-abatement action after the owner of an apartment complex started pumping raw sewage into the Huron River.[19] The circuit court held a hearing at which "**several witnesses testified** concerning the **nature**, **extent**, and **severity** of defendant's sewage discharge."[20] Based on this evidence, "[t]he circuit court declared Eastern Highlands a public nuisance and directed plaintiff to take all reasonable steps to abate the nuisance."[21] On appeal, the Court of Appeals held that the nuisance exception applied such that the nuisance-abatement measures employed did not require compensation.[22]

In this case, not only is nuisance analysis premature,[23] Appellees have utterly failed to carry their burden of showing that Appellants' businesses constituted a nuisance that could be abated without compensation. Unlike *Kircher*, this appeal did not arise from a nuisance-abatement case.

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[16] *Id*. at 1031.

[17] *Id*. at 1030.

[18] *Ypsilanti Charter Tp v Kircher*, 281 Mich App 251; 761 NW2d 761 (2008).

[19] *Id*. at 255.

[20] *Id*. at 256 (emphasis added).

[21] *Id*.

[22] *Id*. at 272.

[23] See Section IV, p 27, of Appellants' Application for Leave to Appeal.

The Court of Claims did not hold a hearing on whether Appellants' businesses constituted a nuisance. No witnesses have testified. Absolutely no evidence has been presented. The factual record is bare.

Appellees have offered, and continue to offer, only *ipse dixit* and conclusions wholly lacking in support from the record or pleadings. Appellees essentially proceed from the unsupported conclusion that operation of Appellants' businesses were completely responsible for the spread of Covid-19. Even if judicial notice was or is taken regarding potential dangers associated with Covid-19,[24] it is a massive leap of logic to simply conclude that operation of Appellees' businesses was a danger to the public.[25] Appellees have presented no evidence or analysis regarding:

(1) the degree of harm potentially posed by operation of Appellants' businesses;

(2) what, if any, percentage of Covid-19 cases or deaths were attributable to Appellants' businesses;

(3) how Appellants' businesses allegedly spread Covid-19;

(4) why Appellants' businesses, as opposed to any other business, had to be shut down;

(5) the social value of Appellants' businesses; or

(6) the relative ease with which the spread of Covid-19 could have been mitigated through less intrusive methods, such as testing, ventilation, spacing, masking, or other requirements or safeguards.

[24] Appellants have disputed and continue to dispute that Covid-19 represented a significant threat to the health, safety, and welfare of the public.

[25] To this point, following expiration of the orders at issue in this case, Appellees allowed Appellants to operate despite higher Covid-19 case numbers.

All of the above is required to properly analyze whether the nuisance exception should apply. All of the above is lacking in this case. Consequently, Appellees have failed to meet their burden of proving that the so-called nuisance exception should apply.

IV. Necessity analysis is premature at best because there has been no factual development.

As with application of the *Penn Central* factors and nuisance analysis, application of the doctrine of necessity is premature.[26] In *TrinCo v US*, a case cited by Appellees, TrinCo owned 2429.6 acres of timbered land in California.[27] This land was surrounded by or adjacent to the 2.1-million-acre Shasta-Trinity National Forest, the largest national forest in California.[28] To combat a 2008 wildfire within Shasta-Trinity, the National "Forest Service intentionally lit fires directly on and adjacent to TrinCo's properties," damaging 1782.4 acres of the appellants' land.[29] TrinCo sued, alleging that the damage to their property was a taking that required just compensation.[30] The government filed a pre-answer motion to dismiss, arguing "that the intentional lighting of fires by the Forest Service to manage existing wildfires cannot sustain a plausible takings case because the doctrine of necessity absolves the Government from liability for any taking or destruction of property in efforts to fight fires."[31] The United States Court of Federal Claims accepted the government's argument and granted the motion, and TrinCo appealed.[32]

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[26] For additional discussion of this issue, see Section IV, p 27, of Appellants' Application for Leave to Appeal.

[27] *TrinCo Inv Co v United States*, 722 F3d 1375, 1376 (Fed Cir, 2013).

[28] *Id*.

[29] *Id*. at 1377.

[30] *Id*.

[31] *Id*.

[32] *Id*.

The Court of Appeals for the Federal Circuit reversed.[33] The Court of Appeals held that the doctrine of necessity did not automatically absolve the government of liability in any case involving fire control.[34] The Court held that this "stretche[d] the doctrine too far," "impermissibly expanding its scope."[35] The Court held that "Supreme Court precedent requires an actual emergency with immediate and impending danger to support a necessity defense."[36] The Court held that TrinCo had adequately pleaded a takings claim, and it was "impossible, without further inquiry, to determine whether the requisite imminent danger and actual emergency giving rise to the actual necessity of the Forest Service's burning of TrinCo's property was present to absolve the Government under the doctrine of necessity."[37] The Court concluded that it was "clearly relevant to the present case to learn in discovery why [TrinCo]'s property had to be sacrificed, as opposed to other property."[38]

This case is on all fours with *TrinCo*. In this case, just as in *TrinCo*, Appellees argue that the doctrine of necessity should apply as an *automatic bar* to governmental liability *at the pleading stage* simply because Appellees claim, without support, that it was acting to address an actual emergency involving imminent and impending danger. This Court, just like the Court in *TrinCo*, should reject this argument. The pleadings in this case, like the pleadings in *TrinCo*, do not support the conclusion that an actual emergency or imminent and impending danger existed. Therefore, just as in *TrinCo*, it is impossible at this stage of the litigation—without further factual

[33] *Id*. at 1376.
[34] *Id*. at 1378.
[35] *Id*.
[36] *Id*. at 1379.
[37] *Id*. at 1380.
[38] *Id*.

development—to conclude that the government has a viable necessity defense. And as the Court noted in *TrinCo*, if the government can show an actual emergency and imminent and impending danger, discovery is still necessary to determine why Appellants' property—as opposed to any other property—had to be sacrificed. Stated simply, application of the doctrine of necessity in this case is premature at best. For this reason, this Court should reject Appellees' necessity argument.

V. The non-binding Covid-19-related trial court decisions cited by Appellees were poorly reasoned and wrongly decided.

Appellees cite a series of Covid-related trial courts decisions from across the county as support for its regulatory-taking argument, but these cases were wrongly decided for several reasons. For example, many of these cases[39] improperly engage in the fact-intensive *Penn Central* analysis when considering a pre-answer motion to dismiss—before any factual development or discovery has occurred.[40] In doing so, many of these cases[41] misapply the "character of the government action" factor, improperly focusing on whether the government was acting for a

[39] *Peinhopf v Leon Guerrero*, No. CV 20-00029, 2021 WL 2417150, at *3 (D Guam, June 14, 2021); *TJM 64, Inc v Harris*, 526 F Supp 3d 331, 338 (WD Tenn, 2021); *Underwood v City of Starkville, Mississippi*, 538 F Supp 3d 667, 680 (2021); *Alsop v Desantis*, No. 8:20-CV-1052-T-23SPF, 2020 WL 9071427, at *3 (MD Fla, November 5, 2020); *Blackburn v Dare Co*, 486 F Supp 3d 988, 998 (EDNC, 2020); *Skatemore, Inc v Whitmer*, No. 1:21-CV-66, 2021 WL 3930808, at *4 (WD Mich, September 2, 2021); *Amato v Elicker*, 534 F Supp 3d 196, 213 (D Conn, 2021); *Northland Baptist Church of St. Paul v Walz*, 530 F Supp 3d 790, 817 (D Minn 2021); *Daugherty Speedway, Inc v Freeland*, 520 F Supp 3d 1070, 1076 (ND Ind 2021).

[40] See Section I, supra at 1–2; Appellants' Application for Leave to Appeal at Section IV, p 25–27.

[41] *Peinhopf v Leon Guerrero*, No. CV 20-00029, 2021 WL 2417150, at *4 (D Guam, June 14, 2021); *Underwood*, 538 F Supp 3d at 681; *Blackburn*, 486 F Supp 3d at 1000; *Skatemore, Inc v Whitmer*, 2021 WL 3930808, *4 (WD Mich, Sept 2, 2021); *Amato*, 534 F Supp 3d at 214; *Northland Baptist*, 530 F Supp 3d at 817; *Daugherty Speedway*, 520 F Supp 3d at 1077.

legitimate or important purpose.[42] And many of these cases[43] cite outdated land-use opinions for the now-abandoned proposition that the government's purpose in acting is a critical consideration in determining whether a regulatory taking has occurred.[44] For these reasons, this Court should decline to follow these cases.

VI. Under the plain language of the Court of Claims Act, the Court of Claims does not retain exclusive jurisdiction over any part of a regulatory-taking claim if there is a jury-trial right on the issue of just compensation.

Appellees argue that even if Appellants have a jury-trial right on the issue of just compensation, the Court of Claims retains exclusive jurisdiction over the antecedent question of whether a taking has occurred. This is not true, and nothing in the text of the Court of Claims Act (COCA) suggests otherwise. Instead, MCL 600.6121(1) makes clear that the general rule is that if a party has the right to a jury, the circuit court may hear **the entire claim**:

> Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine **a claim** for which there is a right to a trial by jury . . . . [I]f a party has the right to a trial by jury and asserts that right as required by law, **the claim** may be heard and determined by a circuit, district, or probate court in the appropriate venue.[45]

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[42] 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, 354–55 (2006) ("[W]hether 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 . . . ."); *Lingle v Chevron USA Inc*, 544 US 528, 542; 125 S Ct 2074; 161 L Ed 2d 876 (2005) (holding that an "inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights" is not a valid takings test); *K & K Const, Inc v Dept of Nat. Res*, 456 Mich 570, 576; 575 NW2d 531 (1998) (the character-of-the-government-action prong examines "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.").

[43] *Case v Ivey*, 542 F Supp 3d 1245, 1282 (MD Ala, 2021); *TJM 64*, 526 F Supp 3d at 336; *McCutchen v United States*, 145 Fed Cl 42, 51 (2019); *State v Wilson*, 489 P 3d 925, 936 (NM 2021); *Blackburn*, 486 F Supp 3d at 999; *Flint v Cty of Kauai*, 521 F Supp 3d 978, 992 (D Hawaii 2021).

[44] See note 42, supra.

[45] MCL 600.6421(1) (emphasis added).

If the legislature had wanted the Court of Claims to retain exclusive jurisdiction over all issues of liability, it knew how to do so. The COCA states that "the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ, and the matter asserted for which a party has the right to a trial by jury . . . shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ."[46] Conspicuous by its absence, there is no parallel provision that states anything about retaining exclusive jurisdiction over all issues of liability. Accordingly, Appellees argument that the Court of Claims would retain exclusive jurisdiction over the question of whether a taking has occurred is completely unfounded.

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 3,200 countable words.

[46] MCL 600.6421(2).