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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' Supplemental Brief
in Support of 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. Appellants' Application for Leave is timely filed on December 29, 2022, which is 42 days after November 17, 2022. On May 31, 2023, pursuant to MCR 7.305(H)(1), this Court issued an Order directing the Clerk to schedule oral argument on the application and directing the parties to submit supplemental briefs.

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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.

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Allegations of Error

The Court of Appeals erred when it affirmed the Court of Claims' denial of Appellants' motion to transfer because Appellants have both a statutory and constitutional jury-trial right. Michigan's Takings Clause requires that just-compensation procedure be set by statute. The Uniform Condemnation Procedures Act provides standards for procedure in all eminent domain cases and provides a jury-trial right. The enabling statutes that confer the power of eminent domain on the Governor and state agencies also provide for a jury-trial right against the state. Michigan's constitution preserves this jury-trial right because these statutes were in force at the time that Michigan**'s Constitution was enacted** and because this right has always existed as far back as the Northwest Ordinance of 1787.

The Court of Appeals did not properly weigh the *Penn Central* factors in this case. The Court of Appeals did not analyze the economic-impact or interference-with-investment-backed-expectations factors. The Court of Appeals, at best, only engaged in a limited and flawed analysis of the character-of-the-government-action factor. The Court of Appeals primarily relied on the faulty *Penn Central* analysis in *Gym 24/7 Fitness, LLC, v State*. The Court of Appeals in *Gym 24/7 Fitness* incorrectly weighed the Penn Central factors when it concluded that although the economic-impact or interference-with-investment-backed-expectations factors weighed in favor of a taking, no taking occurred because the character-of-the-government-action factor weighed against a taking. The Court of Appeals in *Gym 24/7 Fitness* also improperly applied means-end scrutiny to the character-of-the-government-action factor. The Court of Appeals in this case also erred because *Penn Central* analysis was premature. Additional errors are detailed within this Brief.

Relief Sought

Appellants seek 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.

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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 and a regulatory-taking issue. 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 issue. The Court of Appeals decided the regulatory-taking claim without analyzing the economic impact and interference with investment

backed expectations of the regulations. The Court of Appeals failed to properly analyze the character of the government action. The Court of Appeal primarily relied on the faulty *Penn Central* analysis of the *Gym 24/7* case. And the Court of Appeals decided the regulatory taking issue in this case despite the fact that no factual development has taken place and the fact that the trial court never applied 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 concerning the application of the *Penn Central* test. The issues presented involve legal principles of major significance to the **state's jurisprudence. Lastl**y, 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.

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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]

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[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).

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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 that Michigan's first Constitution was adopted, 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."

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IV. At the time that **Michigan's** 1963 Constitution was adopted, the enabling statutes conferring the power of eminent domain on the state and its agencies granted a jury-trial right in eminent domain cases against the state. **Michigan's Constitution** preserves any jury trial right that existed at the time that the Constitution was adopted. 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."***

V. To properly weigh the *Penn Central* factors, a court must analyze the economic impact and interference with distinct investment-backed expectations that a regulation had on private property rights. In this case, the Court of Appeals did not analyze the economic impact and interference with distinct investment-backed expectations that the challenged orders had on Appellants' property rights. Did the Court of Appeals properly weigh the *Penn Central* factors?

The Appellant answers, "*No****."***

The Court of Appeals answered, "*Yes****."***

VI. To properly weigh the *Penn Central* factors, a court must weigh the economic impact and interference with distinct investment-backed expectations against the character of the government action. In this case, the Court of Appeals did not weigh the economic impact and interference with distinct investment-backed expectations against the character of the government action. Did the Court of Appeals properly weigh the *Penn Central* factors?

The Appellant answers, "*No****."***

The Court of Appeals answered, "*Yes****."***

VII. To properly weigh the *Penn Central* factors, a court must examine the severity and extent of the economic impact and interference with distinct investment-backed expectations. In *Gym 24/7 Fitness*, the Court of Appeals did not examine the severity and extent of the economic impact and interference with distinct investment-backed expectations. Did the Court of Appeals properly weigh the *Penn Central* factors when it relied on the *Penn Central* analysis in *Gym 24/7 Fitness*?

The Appellant answers, "*No****."***

The Court of Appeals answered, "*Yes****."***

VIII. Following United States Supreme Court precedent, for the past 17 years, Michigan courts have rejected mean-end scrutiny as the proper method of analyzing the character-of-the-government-action factor of the *Penn Central* test. In *Gym 24/7 Fitness*, the Court of Appeals used means-end scrutiny to analyze the character-of-the-government-action factor. Did the Court of Appeals properly weigh the *Penn Central* factors when it relied on the *Penn Central* analysis in *Gym 24/7 Fitness*?

The Appellant answers, "No."

The Court of Appeals answered, "Yes."

IX. Under the *Penn Central* test, the economic-impact and interference-with distinct-investment-backed-expectations factors are of primary importance. In *Gym 24/7 Fitness*, the Court of Appeals concluded that no taking had occurred despite the fact that both primary factors weighed in favor of a taking. Did the Court of Appeals properly weigh the *Penn Central* factors when it relied on the *Penn Central* analysis in *Gym 24/7 Fitness*?

The Appellant answers, "No."

The Court of Appeals answered, "Yes."

X. 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. Did the Court of Appeals properly weigh the *Penn Central* factors when it relied on the *Penn Central* analysis in *Gym 24/7 Fitness*?

The Appellant answers, "No."

The Court of Appeals answered, "Yes."

XI. To properly weigh the *Penn Central* factors, a court must engage in ad hoc, factual inquires. The Court of Appeals analyzed one *Penn Central* factor and relied on the *Penn Central* analysis from *Gym 24/7* Fitness despite the fact that no factual development has occurred in this case. Did the Court of Appeals properly weigh the *Penn Central* factors?

The Appellant answers, "No."

The Court of Appeals answered, "Yes."

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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] Plaintiffs sued all Defendants in their official capacities.[5]

i. Background

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

On March 16, 2020, Defendant Whitmer issued Executive Order 2020-9.[10] This order arbitrarily singled out restaurants, bars, and banquet hall facilities for total

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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.*
[10] *Id.* at 20(a).

closure, including **closure to any and all "ingress, egr**ess, use, and occupancy by **members of the public."**[11]

On March 23, 2020, Defendant 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**-ess**ential" 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, Defendant 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 Defendant Whitmer's executive orders that had forced restaurants, bars, and banquet hall facilities to close were ultra vires and unconstitutional.[20] Plaintiffs' complaint alleged that, following this ruling, Defendant Whitmer conspired with the Director of the Michigan

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[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).

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Department of Health and Human Services **to circumvent the Court's opinion.**[21] On this basis, Plaintiffs' 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 Plaintiffs 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 Plaintiffs or revoke Plaintiffs' liquor licenses.[28]

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

On June 29, 2023, a panel of the Michigan Court of Appeals held that MCL 333.2253 was an unconstitutional delegation of legislative power.[36] MCL 333.2253 is the statute on which the Director of the Department of Health and Human Services relied for authority to issue the EOs challenged in this case.[37]

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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 *T&V Assoc, Inc, v Dir of Dep't of Health and Human Servs*, ____ Mich App ____, ____; ____ NW2d ____ (2023) (Docket No. 361727); slip op at 15–16.
37 See *id.* at 1–3.

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ii. Procedural History

On May 25, 2021, Plaintiffs sued Defendants in the Macomb County Circuit Court.[38] Plaintiffs' 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.[39] Plaintiffs timely filed a jury demand.[40]

On March 4, 2021, Defendants filed a Notice of Transfer in the Macomb County Circuit Court stating that Plaintiffs' lawsuit was being transferred to the Court of Claims effective immediately.[41] In response, on July 16, 2021, Plaintiffs filed an emergency motion to transfer the case back to the Macomb County Circuit Court.[42] On July 9, 2021, Defendants filed a motion for summary disposition under MCR 2.116(C)(8).[43]

On September 14, 2021, the Court of Claims issued an opinion and order granting Defendants' motion for summary disposition and denying Plaintiffs' motion to transfer.[44] In deciding Defendants' challenge to the sufficiency of Plaintiffs' pleadings, the Court of Claims did not take Plaintiffs' facts, which alleged that Plaintiffs' property lacked any meaningful connection to the spread of COVID-19, as true and in the light most favorable to Plaintiffs. Instead, the Court of Claims seemed to accept Defendants' version of the facts. Applying inapposite due process principles, the Court of Claims held

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[38] *Id.* at 17(a), 35(a).
[39] *Id.* at 32(a)–34(a).
[40] See Jury Demand, Plaintiff-Appellants' Appx. 4, at 36(a).
[41] Notice of Transfer, Plaintiff-Appellants' Appx. 5, at 38(a).
[42] See Court of Claims Register of Actions, Case No. 21-000126-MZ, Plaintiff-Appellants' Appx. 2, at 16(a).
[43] *Id.* at 15(a).
[44] 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).

that the purpose of the Defendants' **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."**[45]

On November 17, 2022, the Court of Appeals affirmed the Court of Claims in a published opinion.[46] The Court of Appeals held that Plaintiffs 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 [Plaintiffs]' **property."**[47] The 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.[48]

The Court of Appeals held that Plaintiffs 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*[49] Opinion.[50] **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."**[51]

Plaintiffs now seek leave to appeal in this Court. In the alternative, Plaintiffs 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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[45] *Id.* at 11(a).
[46] *Mount Clemens Recreational Bowl, Inc. v. Director of Department of Health and Human Services*, ____ Mich App ____, ____; ____ NW2d ____ (2022) (Docket No. 358755).
[47] *Id.* at _____; slip op at 5.
[48] *Id.* at _____; slip op at 6.
[49] *Gym 24/7 Fitness, LLC v State*, 341 Mich App 238; 989 NW2d 844 (2022).
[50] *Mount Clemens Recreational Bowl*, ____ Mich App at _____; slip op at 10.
[51] *Id.* at _____; slip op at 10.

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ARGUMENT

I. **Plaintiffs' motion to transfer the case back to the Macomb Circuit Court** should have been granted because there is a statutory jury-trial right in takings cases against the state.

The Court of Claims should have granted Plaintiffs' motion to transfer this case back to the Macomb County Circuit Court because Plaintiffs have a statutory right to a jury trial. The Court of Claims Act grants the circuit court jurisdiction to hear and determine claims against the state for which there is a right to a jury trial. Michigan's Takings Clause requires that just compensation be determined in a manner prescribed by statute. The Uniform Condemnation Procedures Act provides standards for procedure in all eminent domain cases. In cases where the UCPA does not address a particular issue, the Condemnation by State Act and the Acquisition of Property by State Agencies and Public Corporations Act provide standards for procedure in eminent domain cases involving the governor and state agencies. All three of these statutes provide the right to a jury trial against the state on the issue of just compensation. Accordingly, Plaintiffs have a statutory jury-trial right, and the Court of Claims should have granted Plaintiffs' motion to transfer.

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 asserts a claim for which the party has the right to a jury trial against the state, however, the Court of Claims Act grants the circuit court

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

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jurisdiction to hear and determine the claim.[54] Contrary to arguments previously raised by the state, nothing in the language of the Court of Claims Act indicates that the issues of liability and damages should be bifurcated between the circuit court and the Court of Claims. To the contrary, the plain language of the Court of Claims Act indicates that if there is a right to a jury trial, the entire claim may be heard by the circuit court.[55]

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

Eminent domain is the state's inherent power to take private property for public use.[56] 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."[57] "The necessity, the occasion, time, and manner of its exercise are wholly legislative questions," except as limited by the Constitution.[58]

Michigan's Takings Clause requires that the state pay just compensation when it exercises the power of eminent domain:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.[59]

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[54] MCL 600.6421(1).
[55] MCL 600.6421(1) ("[I]f a party has the right to a trial by jury . . ., the claim may be heard and determined by a circuit" court.) (emphasis added).
[56] *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004).
[57] *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").
[58] *Loomis*, 165 Mich at 665.
[59] Const 1963, art 10, § 2. See also *Merkur*, 261 Mich App at 129; *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 452; 952 NW2d 434 (2020) ("The remedy for a taking of private property is just compensation . . . .").

The requirement that just compensation be made "in a manner prescribed by law" means that the Legislature must establish by statute "how and in what manner [just compensation] shall be made or secured."[60] Stated another way, the Takings Clause requires that the Legislature establish just-compensation procedure by statute.

It is per se unconstitutional for the state to take property in the absence of a just-compensation procedural statute.[61] In *People v Kimble*, the Michigan Supreme Court considered whether the absence of a statute governing inverse-condemnation procedure meant that a township road had been unconstitutionally laid out.[62] 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."[63] However, the statutes in force when the 1850 Constitution

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[60] *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 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).

[61] *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 . . .").

[62] See *id.* at 98.

[63] *Id.* at 96.

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was adopted allowed highway construction on petition of fewer than 12 freeholders, and no statute enacted after the 1850 Constitution provided just-compensation procedure relative to takings for the construction of township roads.[64]

The Supreme Court held that the road at issue was unconstitutionally laid out.[65] The Court first 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.**"[66] Thus, the laws in effect at the time that the 1850 Constitution was enacted were repugnant to the 1850 Constitution and void.[67] 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 Constitution.[68] For this reason, the Court held that the road at issue was unconstitutionally laid out.[69]

C. <u>The UCPA establishes just-compensation procedure in eminent domain cases.</u>

Many states have procedural statutes specifically to inverse condemnation actions.[70] Michigan does not. Some have statutes specific to regulatory taking actions.[71]

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[64] *Id.*
[65] *Id.* at 98.
[66] *Id.* at 97 (emphasis added).
[67] *Id.*
[68] *Id.* at 98.
[69] *Id.*
[70] 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

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Michigan does not. Instead, Michigan has the Uniform Condemnation Procedures Act (UCPA), MCL 213.51, *et seq*. The UCPA was enacted to create a uniform system of procedures to be used in all eminent domain actions.[72] As required by the Michigan Constitution,[73] the UCPA title section describes the object of the UCPA. The object of the UCPA is, among other things, to provide procedures for all exercises of eminent domain, to provide for damages, and to prescribe remedies:

> 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.[74]

As shown above, the UCPA title section separately identifies procedures for condemnation of property, procedures for acquisition of property, and procedures for the exercise of eminent domain of property.[75] 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.[76]

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eminent domain condemnation in accordance with 66 O.S.1991 §§ 51 et seq."); NM Stat Ann 42A-I-29 (West); Wis Stat Ann 32.10 (West).

[71] 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).

[72] *State Hwy Com'n v Biltmore Inv Co, Inc*, 156 Mich App 768, 775; 401 NW2d 922, 925 (1986).

[73] Const 1963, art 4, § 24.

[74] 1980 PA 87, title (emphasis added).

[75] *Id.*

[76] According to 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

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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*.[77]

Again, the UCPA separately identifies "the conduct of condemnation actions" and "the determination of just compensation," showing that the UCPA intended to address the determination of just compensation in contexts outside of condemnation actions.[78]

The UCPA also acknowledges "constructive or de facto takings."[79] 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."[80] 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.[81]

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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").

[77] MCL 213.52(1) (emphasis added).
[78] *Id.*
[79] See MCL 213.52(2).
[80] MCL 213.51(e).
[81] MCL 213.52(2).

The UCPA creates a statutory jury-trial right in eminent domain cases on the issue of just compensation.[82] 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.[83]

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.[84]

In this case, the UCPA provides a jury-trial right in regulatory taking cases against the state. 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

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[82] MCL 213.62(1).
[83] *Id.*
[84] *Id.*

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intentionally cause a property owner to have to do so.[85] 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,[86] 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.

The plain language of the UCPA therefore demonstrates that the UCPA applies to regulatory taking cases. Moreover, application of the UCPA to regulatory taking cases provides just-compensation procedure required by Michigan's Takings Clause.

1. The state's argument that *Lim v Dept of Transp* establishes that the UCPA does not apply to inverse condemnation case is mistaken.

In this case, the state has previously argued that the Michigan Court of Appeals' decision in *Lim v Michigan Dept of Transp*[87] establishes that the UCPA does not apply to inverse condemnation cases. This argument is incorrect for at least two reasons. First, this argument is at odds with the plain language of the UCPA. In *Lim*, 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 . . . ."[88] The *Lim* Court provided no analysis to support this conclusion. The UCPA does not state that it only applies to actions

[85] 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.").
[86] MCL 213.62(1).
[87] *Lim v Michigan Dept of Transp*, 167 Mich App 751; 423 NW2d 343 (1988).
[88] *Id.* at 755.

initiated by agencies. The UCPA does not state that it does not apply to actions initiated by aggrieved property owners. To the contrary, as examined in Section I.C above, the UCPA applies to all eminent domain proceedings and provides procedures for the determination of just compensation.[89]

Second, *Lim* is inapposite because, under language no longer found in the Court of Claims Act, the issue presented in *Lim* was whether the UCPA expressly conferred jurisdiction on the circuit court.[90] Under language not found in the Court of Claims Act at the time that *Lim* was decided, the issue in this case is whether the UCPA grants the right to a jury trial against the state in regulatory taking cases.[91] The language used by the *Lim* Court was regrettably overbroad, but *Lim*'s holding was that the UCPA did not expressly confer jurisdiction on the circuit court in cases against the state.[92] That is not the issue presented in this case, and *Lim* is therefore inapposite.

D. The statutes that give the Governor and state agencies the authority to exercise the power of eminent domain grant litigants a jury-trial right against the state.

As stated above, the exercise of the sovereign power of eminent domain is completely controlled by the Legislature.[93] The Acquisition of Property by State

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[89] See 1980 PA 87, title; MCL 213.52(1).
[90] At the time that *Lim* was decided, MCL 600.6419(4) provided that the grant of exclusive jurisdiction to the court of claims did "not deprive the circuit court of this state of jurisdiction over . . . actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . ." MCL 600.6419(4), as amended by 1984 PA 212. This language is no longer found in the Court of Claims Act. See MCL 600.6419(4).
[91] See MCL 600.6421(1).
[92] See *Lim*, 167 Mich App at 755.
[93] *Loomis*, 165 Mich at 665; *Fitzsimmons & Galvin*, 243 Mich at 656 (exercise of eminent domain limited by "constitutional and statutory provisions").

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Agencies and Public Corporations Act (State Agencies Act or SAA)[94] and the Condemnation by State Act (CSA)[95] are eminent domain enabling statutes through which the Legislature allows the Governor and state agencies, commissions, and departments to exercise the power of eminent domain.[96] These acts also contain procedural components that establish a right to a jury trial on the issue of just compensation.[97]

At least one state (Colorado) that lacks a specific inverse condemnation statute applies formal-condemnation procedural statutes to inverse-condemnation actions.[98] Colorado does this because both formal and inverse condemnation proceedings are based on its takings clause.[99] 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.[100]

In this case, the only statutes under which the state could have instituted formal proceedings to condemn Plaintiffs' 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 to a jury trial on the issue of just compensation. Accordingly, every statute that could conceivably govern the exercise of eminent domain

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[94] MCL 213.21, *et seq*.
[95] MCL 213.1, *et seq*.
[96] See MCL 213.23; MCL 213.1; *KTS Indus*, 263 Mich App at 38.
[97] MCL 213.3; MCL 213.25.
[98] 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).
[99] *Stuart*, 61 Colo 58.
[100] See *Hill v State*, 382 Mich 398, 406; 170 NW2d 18 (1969).

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.

E. Principles of statutory construction require that the UCPA, CSA, and SAA apply to regulatory taking cases to provide just-compensation procedure.

If unambiguous, a statute speaks for itself and must be "enforced as written;" "further judicial construction is [neither] required [n]or permitted."[101] Courts must "construe statutes to avoid unconstitutionality, if possible, by a reasonable construction of the statutory language."[102] "A statute must also be construed to avoid absurd or unreasonable results."[103]

In this case, any construction of the UCPA, CSA, and SAA that leads to their non-application to regulatory 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 in eminent domain cases as required by the Constitution. If these statutes do not apply to provide the constitutionally required just-compensation standard in regulatory taking cases, then *all* regulatory takings would be unconstitutional takings without the just compensation required by Michigan's Constitution. Thus, a finding of

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[101] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).
[102] ***Rowland v Washtenaw Co Rd Com'n***, 477 Mich 197, 275; 731 NW2d 41 (2007).
[103] *People v Cousins*, 196 Mich App 715, 716–17; 493 NW2d 512 (1992).

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non-application of the UCPA and direct condemnation statutes to regulatory taking actions produces unconstitutional results. This would also produce absurd and unreasonable results, as it would mean that every past regulatory taking by the government was unconstitutional, as well.

Second, a finding of non-application of the UCPA and direct condemnation statutes to regulatory 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 in eminent domain cases against the state. 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 Plaintiffs 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.

II. Plaintiffs' motion to transfer the case back to the Macomb Circuit Court should have been granted because Plaintiffs have a constitutional jury trial right against the state on the issue of just compensation.

The Court of Claims wrongly denied Plaintiffs' motion to transfer this case back to the Macomb County Circuit Court because Plaintiffs have a constitutional right to a jury trial. The Court of Claims Act grants the circuit court jurisdiction to hear and determine claims against the state for which there is a right to a jury trial. All of

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Michigan's Constitutions have preserved the right to a jury trial in cases where the right existed prior to the adoption of the Constitution. At the time that Michigan's first Constitution was adopted in 1835, it was the law under the Northwest Ordinance of 1787 that a Michigan inhabitant could not be deprived of property without a jury trial. Further, at the time that Michigan's 1963 Constitution was adopted, the right to a jury trial applied to factual findings, including the amount of damages. Lastly, at the time that Michigan's 1963 Constitution was adopted, the enabling statutes that give the state and its agencies the power to exercise eminent domain provided for a jury trial against the state. Accordingly, Plaintiffs have a constitutional jury-trial right, and the Court of Claims should have granted Plaintiffs' motion to transfer.

A. Michigan's first Constitution preserved the right to a jury trial in cases where the state seeks to take a person's property.

"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."[104] Indeed, the Magna Carta declared that a person could not be disseised of property "unless by the lawful judgment of his peers."[105] This right was initially granted in order to "check the power of the monarch."[106] Following the American Revolution, "the right to a jury trial became not a check against the power of the English throne, but a check against the power of the state."[107] Similarly, the takings clause was "adopted for the

[104] *People v Antkoviak*, 242 Mich App 424, 441; 619 NW2d 18 (2000).
[105] *Id.*
[106] *Id.*
[107] *Id.* at 442.

protection of and security to the rights of the individual as against the government . . . ."[108]

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.[109] In 1835, before Michigan became a state, Michigan enacted its first Constitution, which stated that the "right of trial by jury shall remain inviolate."[110] 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."[111] This language has remained largely unchanged ever since.[112]

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."[113] 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."[114] This means that the right to a jury trial is "preserved in all cases where it existed prior to adoption of the Constitution . . . ."[115] And "at the time of the drafting and ratification of the 1963 Constitution, those sophisticated in the law understood, and thus the instrument adopted, that the right of trial by jury encompassed a jury that could find facts, *including the amount of*

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

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damages."[116] 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.[117]

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."[118] 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 . . . ."[119] 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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[116] *Phillips*, 470 Mich at 427–28 (emphasis added).
[117] 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").
[118] *Chamberlin v Detroit Edison Co*, 14 Mich App 565, 572; 165 NW2d 845 (1968).
[119] *Hill*, 382 Mich at 406.

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B. Michigan's 1963 Constitution preserved the right to a jury trial against the state in eminent domain cases that existed under the Condemnation by State Act or the Acquisition of Property by State Agencies and Public Corporations Act.

As stated above, Michigan's Constitution states that "[t]he right of trial by jury shall remain . . . ."[120] Accordingly, "the right to trial by jury is preserved in all cases where it existed prior to adoption of the Constitution."[121] This includes cases where a statutory right to a jury trial existed at the time that the Constitution was adopted.[122] "Further, "the constitutional guarantee also applies to cases arising under statutes enacted subsequent to adoption of the Constitution which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted."[123] The focus "is whether a party bringing a similar cause of action would have been afforded a right to a jury trial at that time."[124] To determine whether a subsequent cause of action is similar in character to a cause of action for which a jury-trial right exists, courts "focus on the nature of the controversy between the parties . . . ."[125]

At the time that Michigan's 1963 Constitution was adopted, the Acquisition of Property by State Agencies and Public Corporations Act (State Agencies Act or SAA)[126] and the Condemnation by State Act (CSA)[127] provided a right to a jury trial in eminent domain cases against the state.[128] These eminent domain enabling statutes enacted in

[120] Const 1963, art 1, § 14.
[121] *State Conservation Dept v Brown*, 335 Mich 343, 346; 55 NW2d 859 (1952).
[122] *Guardian Depositors Corp of Detroit v Darmstaetter*, 290 Mich 445, 451; 288 NW 59 (1939).
[123] *Madugula*, 496 Mich at 704–05 (quotation marks omitted).
[124] *Anzaldua v Band*, 216 Mich App 561, 565–66; 550 NW2d 544 (1996), aff'd, opinion vacated 457 Mich 530; 578 NW2d 306 (1998).
[125] *Madugula*, 496 Mich at 705.
[126] MCL 213.21, *et seq*.
[127] MCL 213.1, *et seq*.
[128] MCL 213.3; MCL 213.25.

1911 confer the power of eminent domain on the Governor and state agencies, commissions, and departments.[129]

In this case, this Court should hold that a constitutional jury-trial right exists in non-categorical regulatory taking cases against the state. The nature of the controversy in this case is similar in character to a formal condemnation proceeding brough under the CSA and SAA. In formal condemnation under these statutes and in regulatory taking actions, the controversy centers on the state's exercise of eminent domain and the determination of just compensation. The parties involved—the state or state agencies and the property owner—are identical in both causes of action. While a regulatory taking case involves the determination of whether a taking has occurred and formal proceedings do not, a property owner should not be penalized for the state's decision not to institute formal proceedings.

The enabling statutes that give the Governor and state agencies the authority to exercise the power of eminent domain provide a jury-trial right against the state. These statutes were in force at the time that Michigan's Constitution was adopted. Regulatory taking cases against the state are substantially similar to formal condemnation proceedings initiated under the CSA and SAA. For these reasons, article 1, section 14 of Michigan's Constitution preserves this jury-trial right in regulatory takings cases.

[129] See MCL 213.23; MCL 213.1; *KTS Indus*, 263 Mich App at 38.

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III. The Court of Appeals did not properly weigh the *Penn Central* factors in this case because, at best, the Court of Appeal only provided a cursory and flawed analysis of one of the three *Penn Central* factors and failed to analyze the two primary factors.

This Honorable Court should reverse the Court of Appeals because the Court of Appeals did not properly weigh the factors from *Penn Central*. The Court of Appeals based its decision in this case primarily on a mistaken belief that the *Penn Central* analysis in *Gym 24/7 Fitness* controlled the outcome in this case. For this reason, the Court of Appeals did not engage in a *Penn Central* analysis. The Court of Appeals did not weigh or even address economic impact and interference with distinct investment-backed expectations—the two primary factors under *Penn Central*—instead relying wholesale on the analysis in Gym 24/7. The Court of Appeals addressed the character-of-the-government-action factor in a cursory and flawed manner, but only to reach erroneous conclusion that, regardless of whether or not the correct legal standard was applied, *Gym 24/7* was not distinguishable from this case. For these reasons, and as explained in greater detail below, the Court of Appeals failed to properly weigh the *Penn Central* factors in this case.

A. In order to determine whether a non-categorical regulatory taking has occurred, the *Penn Central* test must be applied.

The **purpose of all regulatory takings tests is** "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."[130] For this

[130] *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074; 161 L Ed 2d 876 (2005) (emphasis added).

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reason, regulatory takings tests focus "directly upon the severity of the burden that government imposes upon private property rights."[131]

While "all taking cases require a case-specific inquiry,"[132] this is especially true for regulatory takings cases. Indeed, "a more fact specific inquiry" is "the default rule" in regulatory taking cases.[133] Whether a regulatory taking has occurred involves "essentially ad hoc, factual inquiries."[134] These inquiries are "designed to allow careful examination and weighing of all the relevant circumstances."[135] The United States Supreme Court[136] "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."[137] "[B]ecause Takings Clause questions are questions of degree they cannot be disposed of by general propositions."[138]

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*.[139] Under the *Penn Central* analysis, the court must balance three factors:

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

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[131] *Id.* at 539.
[132] *K & K Const, Inc v Dept of Nat. Res*, 456 Mich 570, 576; 575 NW2d 531 (1998).
[133] *Tahoe-Sierra Pres Council, Inc v Tahoe Regl Planning Agency*, 535 US 302, 332; 122 S Ct 1465; 152 L Ed 2d 517 (2002).
[134] *Id.* at 326.
[135] *Id.* at 322 (quotation marks omitted).
[136] 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).
[137] *Tahoe-Sierra*, 535 US at 326 (quotation marks omitted).
[138] *BCBSM v Milliken*, 422 Mich 1, 109; 367 NW2d 1 (1985) (quotation marks omitted) (emphasis added).
[139] *Tahoe-Sierra*, 535 US at 342. See also *Cummins*, 283 Mich App at 719.

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

(3) the character of the government's action.[140]

"*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[141]

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

Because all regulatory taking tests focus directly on the severity of the burden imposed on private property rights, "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."[142] Thus, while no single factor is dispositive,[143] the economic-impact and interference-with-investment-backed-expectations factors are of primary importance.[144]

1. The Court of Appeals failed to engage in a case-specific analysis of Factors 1 and 2 in this case.

In this case, the Court of Appeals did not weigh the economic-impact or the interference-with-investment-backed-expectations factors. The Court of Appeals did not consider how the Executive Orders (EOs) at issue affected the food-service industry. The Court of Appeals did not analyze the food-service industry to discover what the

[140] *Lingle*, 544 US at 529.
[141] *Palazzolo v Rhode Island*, 533 US 606, 634; 121 S Ct 2448; 150 L Ed 2d 592 (2001) (O'Connor, J., concurring).
[142] *Lingle*, 544 US at 540.
[143] *K & K Const*, 267 Mich App at 553.
[144] *Lingle*, 544 US at 538–39 (cleaned up).

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economic impact of severe regulation and a multiple-month total shutdown would be. The Court of Appeals did not consider how much money the Plaintiffs actually lost as a result of the EOs. The Court of Appeals did not consider whether the Plaintiffs lost employees, customers, or goodwill as a result of the EOs. The Court of Appeals did not inquire into what distinct investment-backed expectations were held by the food-service establishments involved in this case. The Court of Appeals did not consider how the EOs interfered with and subverted those expectations.

Much, if not all, of the above analysis would have been impossible because no factual development has occurred in this case. This case was disposed of by pre-answer motion for summary disposition. The record is bare. Instead of analyzing what actually happened in this case, the Court of Appeals simply relied on the *Penn Central* analysis in the *Gym 24/7* case. No Michigan caselaw supports this.

Case-specific factual inquiries were required in this case. Food-service establishments are different businesses than gyms, and the EOs affected food service establishments differently than they affected gyms. These businesses have different operating costs and overhead. The number and type of employees differs. Equipment and supplies differ. The manner in which gyms generate and collect revenue differs from the manner in which food service establishments generate and collect revenue.

The food service and gym industries both suffered uniquely, and Plaintiffs deserve their own day in court. Food-service establishments deserve the chance to offer evidence relevant to how the EOs impacted *them* economically. They deserve the chance to show how the EOs interfered with *their* unique and specific investment-backed expectations. They should not be lumped in with gyms and fitness centers. The fact that

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the Court of Appeals failed to analyze the two most important factors of the *Penn Central* test shows without question that the Court of Appeals did not properly weigh the *Penn Central* factors in this case.

C. Factor 3: Character of the Government Action

No single prong of the *Penn Central* test is dispositive.[145] But, because all regulatory taking tests focus directly on the severity of the burden on private property rights, the economic-burden and investment-backed-expectation factors are of primary importance.[146] By comparison, the character-of-the-government-action factor may not be relevant in all takings cases.[147]

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 p**ublic good" or** whether the regu**lation "burdens and benefits all citizens relatively equally."**[148] This factor requires the court to place the challenged regulatory action along a spectrum.[149] On one end of the spectrum are regulations that produce a physical taking.[150] This end of the spectrum weighs in favor of a taking.[151] **On the other end of the spectrum are "far-** reaching, ubiquitous governmental regulation[s] that provide[ ] all property owners

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[145] *K & K Const*, 267 Mich App at 553. See also ***Keystone Bituminous Coal Ass'n v*** *DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
[146] *Lingle*, 544 US at 538.
[147] *Id.* at 539 (emphasis added).
[148] *K & K Const*, 267 Mich App at 559.
[149] *Id.* at 558.
[150] *Id.*
[151] *Id.*

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with an 'average reciprocity of advantage.'"[152] This end of the spectrum weighs against a taking.[153]

1. The Court of Appeals failed to properly weigh Factor 3 because it assigned dispositive weight to the least important factor without actually placing the EOs on a spectrum from physical taking to ubiquitous regulation.

In this case, the Court of Appeals engaged in, at best, a cursory and flawed analysis of the character-of-the-government-action factor. In fact, it is arguable whether the Court of Appeals truly weighed this factor at all. Plaintiffs had argued that *Gym 24/7* did not control because, among other reasons, the *Gym 24/7* Court did not apply the correct legal standard for the character-of-the-government action factor. The Court of Appeals concluded out of hand that, even if the correct legal standard were applied, Plaintiffs claim should not proceed **because** "the actions challenged here applied to all similarly situated property owners."[154] This analysis was flawed for at least two reasons.

First, the Court of Appeals did not properly analyze the character-of-the-government-action factor. place the challenged action on a spectrum from physical taking to ubiquitous regulation. The Court of Appeals failed to consider whether and to what extent the EOs burdened all property owners equally. The Court of Appeals did not consider how many property owners were burdened by the EOs. The Court of Appeals did not consider whether and to what extent Plaintiffs benefitted from the EOs.

In fact, the EOs did not burden all citizens relatively equally. Many businesses were not affected by the EOs. The EOs did not state that all businesses were required to

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[152] *Id.*
[153] *Id.*
[154] *Mount Clemens Recreational Bowl*, ____ Mich App at _____; slip op at 10.

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close. The EOs did not state that all citizens were prohibited from working. The EOs did not force all industries to limit productivity to 25% capacity. The EOs did not force all industries to operate only within certain hours of the day. No, these devastating restrictions were levied against a select few, and the food-service industry was specifically targeted within the EOs for closure and severe restrictions. These restrictions did not affect all property, all parcels, all businesses, or all citizens blindly and indiscriminately. The EOs identified certain businesses to bear the burden for the public good.

Second, the Court of Appeals failed to weigh the character-of-the-government-action factor against the economic-burden and interference-with-investment-backed-expectations factors. Instead, the Court of Appeals simply concluded that Plaintiffs' regulatory taking claim could not succeed because the character-of-the-government-action factor did not weigh in favor of a taking. As noted above, the Court of Appeals never analyzed the economic-burden and interference-with-investment-backed-expectations factors. Without this analysis, it was impossible to properly balance the character-of-the-government-action factor. No single factor is dispositive. It was error to conclude that no taking had occurred without weighing the character-of-the-government-action factor against the economic-burden and interference-with-investment-backed-expectations factors.

For the reasons stated above, the Court of Appeals failed to properly weigh the *Penn Central* factors.

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IV. The Court of Appeals did not properly weigh the *Penn Central* factors in this case because the Court of Appeals did not engage in a case-specific factual analysis of the *Penn Central* factors, instead adopting the flawed *Penn Central* analysis from the *Gym 24/7 Fitness* case.

This Honorable Court should reverse the Court of Appeals because the Court of Appeals did not properly weigh the factors from *Penn Central*. As stated above, the Court of Appeals based its decision primarily on a mistaken belief that the *Penn Central* analysis in *Gym 24/7 Fitness* controlled the outcome in this case. For this reason, the Court of Appeals effectively adopted the *Penn Central* analysis in *Gym 24/7 Fitness* as its own. But the *Gym 24/7 Fitness* failed to properly weigh the *Penn Central* factors. For this reason, and as explained in greater detail below, the Court of Appeals in this case, by adopting the *Penn Central* analysis in *Gym 24/7 Fitness*, failed to properly weigh the *Penn Central* factors.

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

1. The Court of Appeals in *Gym 24/7 Fitness* did not properly weigh Factors 1 and 2 because the Court of Appeals failed to examine the severity and extent of the economic impact and interference with investment-backed expectations the EOs had on the Gym.

In *Gym 24/7*, **the Court of Appeals erred when it did not give "all that much weight" to the fact that** both the economic-impact and interference-with-investment-backed-expectations factors weighed in favor of a taking.[155] These are the primary factors for consideration, bearing directly on the severity of the burden that the EOs imposed **on the Gym's** private property rights. The Court of Appeals in *Gym 24/7* failed to examine the *severity* and *extent* of the economic impact and interference with

[155] *Gym 24/7*, 341 Mich App at 267.

investment-backed expectations the EOs had on the Gym. Instead, the Court of Appeals examined the length of the closure in a perfunctory manner.

The Court of Appeals held that the Gym's "business was in fact shuttered under the EOs" **for a period of six months, which the Court of Appeals characterized dismissively as "short lived."**[156] But there were no facts of record to support any conclusion that the economic impact and interference with investment backed expectations were minimal **because of this purportedly "short" six**-month duration.[157] To the contrary, the impact of this 6-month shutdown was devastating.

The Court of Appeals did not analyze how much money the Gym lost during and as a result of the closure; **did not analyze the extent to which the value of the Gym's** property diminished during and as a result of the closure; did not analyze whether the Gym lost clients during and as a result of the closure; and did not analyze the extent to **which the Gym's business was affected as a result of this six**-month closure. The Court of Appeals could not engage in any of this analysis because the undeveloped record was silent on these points**. The Court of Appeals' analysis of Factors 1 and 2 in** *Gym 24/7* was nominal at best, falling well short of the ad hoc, factual inquiries required. For this reason, the Court of Appeals in this case erred in adopting the *Gym 24/7 Penn Central* analysis as its own.

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[156] *Id.* at 266–67.

[157] **In analyzing the categorical taking issue, the Court of Appeals reasoned that "the** closure of fitness centers for six months was temporary and considerably shorter in duration than the 32-month period involved in *Tahoe-Sierra Preservation Council*." *Id.* at 266.

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B. Factor 3: Character of the Government Action

1. The Court of Appeals in Gym *24/7 Fitness* ignored 17 years of established caselaw when it applied means-end scrutiny instead of analyzing whether the EOs singled the Gym out to bear the burden for the public good.

Prior to 2005, Michigan courts analyzed the character-of-the-government-action factor by applying various levels of means-end scrutiny[158] commonly applied to due-process and equal-protection claims.[159] Some of these pre-2005 cases essentially applied rational-basis review,[160] while others seemed to apply intermediate scrutiny, looking to "whether the government action was reasonably necessary to the effectuation of a substantial public purpose."[161] In other cases, the level of scrutiny applied was unclear,

[158] Means-end scrutiny examines the relationship between the purpose of a government action and the means selected to achieve that purpose. There are three levels of means-end scrutiny: rational basis review, intermediate scrutiny, and strict scrutiny. "Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). Under intermediate scrutiny, courts will uphold legislation that is "substantially related to an important governmental objective." *Id*. at 260. "Under a strict scrutiny standard of constitutional review, the State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 21; 740 NW2d 444 (2007) (cleaned up).

[159] See, e.g., *Phillips*, 470 Mich at 436 (noting that the test for analyzing due-process claims was the same rational-basis review applied to equal-protection claims).

[160] *Michigan Soft Drink Ass'n v Dept of Treasury*, 206 Mich App 392, 407; 522 NW2d 643 (1994) (holding that "prospective amendments [were] rationally related to the general welfare"); *Butcher v City of Detroit*, 131 Mich App 698, 707; 347 NW2d 702 (1984) (finding that the ordinance at issue "ensure[d] that one- and two-family dwellings meet certain minimum requirements," ensur[ed] that a buyer has more recourse on buying a house less valuable than anticipated than merely stoically accepting the saw 'caveat emptor;'" and "help[ed] combat housing deterioration."); *Adams Outdoor Adver v City of E Lansing*, 463 Mich 17, 26; 614 NW2d 634 (2000) (concluding that the ordinance at issue was a reasonable exercise of the police power).

[161] See *Blue Water Isles Co v Dept of Nat. Res*, 171 Mich App 526, 536; 431 NW2d 53 (1988); *Cryderman v City of Birmingham*, 171 Mich App 15, 27; 429 NW2d 625 (1988).

but the focus was on the purpose of the government action and not on the burden imposed on private property rights.[162]

In 2005, the United States Supreme Court repudiated means-end scrutiny as a takings test in *Lingle v Chevron USA Inc*, holding that means-end scrutiny was a due process inquiry that "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[163] *Lingle* rejected the "substantially advances" takings test, under which a government action was a taking if it failed to substantially advance a legitimate public purpose.[164] The United States Supreme Court has not used means-ends rationality in analyzing a regulatory taking claim following *Lingle*.

In apparent response to *Lingle*, Michigan appellate courts immediately abandoned means-ends analysis of the character-of-the-government action factor.[165] In a stark departure from prior cases, following *Lingle*, Michigan appellate courts began analyzing this factor by "plac[ing] the challenged regulatory action along a spectrum ranging from an actually physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an 'average reciprocity of advantage' on the other."[166] Under this new framework, the Michigan Court of Appeals routinely held that "[t]he relevant inquiries are whether the governmental

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162 *BCBSM*, 422 Mich at 47 (holding that the regulation at issue could not "be characterized as a 'physical invasion by government' over BCBSM's corporate direction" because the purpose of the regulation was "to promote the interests of all component groups BCBSM was designed to serve and to reduce the possibility of any one group gaining unassailable dominance over the corporation").
163 *Lingle*, 544 US at 540, 542.
164 *Id*. at 540.
165 *Lingle* was decided on May 23, 2005. *K & K Const* was decided on July 26, 2005.
166 *K & K Const*, 267 Mich App at 558.

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regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally."[167] Thus, the focus shifted from the purpose of the regulation to the character and extent of the burden imposed on private property rights by the government action.

In *Gym 24/7*, the Court of Appeals reverted to pre-2005 means-ends scrutiny when it concluded that the EOs were rationally related to achievement of a legitimate public purpose: stopping the spread of COVID-19.[168] Through this analysis, the Court of Appeals simply ignored the preceding 17 years of case law analyzing the character-of-the-government-action factor. The Court of Appeals did not evaluate where the EOs fell on the spectrum ranging from an actually physical taking to a far-reaching, ubiquitous governmental regulation. There was no analysis of whether or to what extent the EOs produced an average reciprocity of advantage and burdened and benefitted all citizens relatively equally. The Court of Appeals did not consider whether and to what extent the EOs singled the Gym out to bear the burden for the public good. The Court of Appeals failed to consider the extent and character burden imposed on private property rights.

The *Gym 24/7* panel disregarded 17 years of unbroken precedent when it used means-end scrutiny to analyze the character-of-the-government-action factor. For this reason, the Court of Appeals failed to properly analyze the *Penn Central* factors.

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[167] *Id*. at 559; *Cummins v Robinson Twp*, 283 Mich App 677, 720; 770 NW2d 421 (2009); *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 262; 792 NW2d 781 (2010); *Schmude Oil, Inc v Dept of Envtl Quality*, 306 Mich App 35, 53; 856 NW2d 84 (2014).

[168] *Gym 24/7*, 341 Mich App at 267.

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2. The Court of Appeals in *Gym 24/7 Fitness* assigned too much weight to the character-of-the-government-action prong.

As stated above, Factors 1 and 2 of the *Penn Central* test—economic impact and interference with investment-backed expectations—are of primary importance.[169] Factor 3—the character of the government action—is only potentially relevant to whether a taking has occurred.[170]

In *Gym 24/7*, the Court of Appeals assigned too much weight to the character-of-the-government-action factor. Despite finding that both of the primary factors—economic impact and interference with investment backed expectations—weighed in favor of a taking, the Court of Appeals concluded that no taking occurred on the strength of the character-of-the-government-action factor alone.[171] The Court of Appeals held that the economic impact of the EOs on the Gym was great enough to constitute a **taking. The Court of Appeals held that the EOs interfered with the Gym's investment**-backed to such a degree as to constitute a taking. And yet the Court of Appeals held that no taking occurred because the purpose of the EOs was really important. This was error because no single *Penn Central* factor is dispositive, and the character-of-the-government-action factor is only of secondary importance. When the Court of Appeals determined that both of the primary factors weighed in favor of a taking, the Court of Appeals should have determined that the EOs worked a taking. For this reason, the Court of Appeals failed to properly analyze the *Penn Central* factors.

[169] *Lingle*, 544 US at 538–39.
[170] *Id.*
[171] *Gym 24/7*, 341 Mich App at 267.

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3. The Court of Appeals in *Gym 24/7 Fitness* failed to properly weigh Factor 3 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 . . . ."[172] 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."[173] For this reason, regulatory takings "tests focus[ ] directly upon the severity of the burden that government imposes upon private property rights."[174] 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.[175]

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."[176]

In *Gym 24/7*, whether the EOs 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 was distributed. For this reason, whether the EOs were issued to stop the spread of Covid-19 is a due process inquiry that has no proper place in modern takings

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[172] *Id.*
[173] *Lingle*, 544 US at 539.
[174] *Id.*
[175] *Id.* at 543.
[176] *Id.* at 540.

jurisprudence. For this reason, the Court of Appeals failed to properly analyze the *Penn Central* factors.

V. The Court of Appeals did not properly weigh the *Penn Central* factors in this case because application of the *Penn Central* factors was premature.

To the minimal extent that the Court of Appeals may have engaged in a *Penn Central* analysis, this was error because analysis of the *Penn Central* factors was premature. *Penn Central* analysis requires ad hoc, factual inquiries, but no factual development occurred in the trial court. Moreover, it was improper for the Court of Appeals, an error correcting court, to apply the *Penn Central* test when the trial court never did so. The proper course would have been to remand this case to the trial court to allow the trial court to apply the *Penn Central* test. For these reasons, the Court of Appeals did not properly weigh the *Penn Central* factors.

A. The record on appeal was insufficient to apply the *Penn Central* test because no factual development had taken place in the trial court.

Whether a regulatory taking has occurred involves "essentially ad hoc, factual inquiries."[177] **"[B]ecause** Takings Clause questions are questions of degree they cannot **be disposed of by general propositions."**[178] Accordingly, the *Penn Central* analysis requires a thoroughly developed factual record.[179] It is improper for an appellate court to apply the *Penn Central* test where the record on appeal has not been adequately developed.[180]

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177 *Tahoe-Sierra*, 535 US at 326.
178 *BCBSM*, 422 Mich at 109 (quotation marks omitted).
179 *Carpenter v United States*, 69 Fed Cl 718, 731 (2006).
180 *K & K Const*, 456 Mich at 588 (**"It would be imprudent to decide whether the**re was a **taking of plaintiffs' property on the basis of an inadequate record."**).

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In this case, the Court of Appeals did not properly weigh the *Penn Central* factors because there had been no factual development in the Court of Claims. This case was disposed of on a pre-answer motion for summary disposition. No discovery had yet occurred. The State did not support its motion with documentary evidence. The trial court did not hold an evidentiary hearing. No testimony was taken. The record in this case was simply inadequate for the purpose of engaging in the ad hoc, factual inquiries required under the *Penn Central* test. For this reason, the Court of Appeals did not properly weigh the *Penn Central* factors.

B. The Court of Appeals abandoned its role as an error-correcting court when it failed to remand to the Court of Claims for application of the *Penn Central* test.

The Court of Appeals is an error correcting court.[181] Review by the Court of Appeals, therefore, "is generally limited to matters actually decided by the lower court."[182] The trial court must be given an opportunity to decide an issue before it is decided by an appellate court.[183] Where the trial court fails to apply the correct legal framework or applies the wrong legal test in a given case, the Court of Appeals should remand in order to permit the trial court to engage in the correct analysis.[184]

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[181] *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018).
[182] *Id.*
[183] See *Hernandez v Consumers Power Co*, 51 Mich App 288, 291; 214 NW2d 846 (1974) ("The trial court must be given an opportunity to pass upon the constitutionality of the rule involved.").
[184] See, e.g., *In re Forfeiture of $5300*, 178 Mich App 480, 496; 444 NW2d 182 (1989) (remand for findings specific to correct test after trial court applied wrong test); *Jozwiak v N Michigan Hosps., Inc*, 231 Mich App 230, 240; 586 NW2d 90 (1998) (same); *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 304; 882 NW2d 563 (2015) (same); *Dowd v Dowd*, 97 Mich App 276, 279; 293 NW2d 797 (1980) (remand for new hearing after trial court failed to make the required analysis of statutory factors).

In this case, the Court of Claims never applied the *Penn Central* test. Because the Court of Claims failed to apply the correct legal framework, the Court of Appeals, in its capacity as an error-correcting court, should have corrected this error by remanding this case to allow the Court of Claims to engage in the correct analysis—the *Penn Central* analysis. Instead, the Court of Appeals took it upon itself to decide the merits of the case. This error was compounded by the fact that no facts of record were available through which the Court of Appeals could have engaged in a meaningful *Penn Central* analysis. For these reasons, the Court of Appeals failed to properly weigh the *Penn Central* factors.

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 on all of Plaintiffs' claims.

Respectfully Submitted,
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Dated: August 9, 2023

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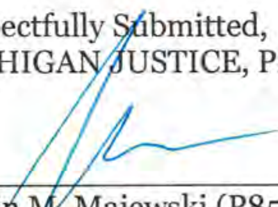
Certificate of Compliance

I certify that this Supplemental Brief complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this document. This brief uses at least 12-point font and 1.5 inch line spacing except for quotations and footnotes. This Supplemental Brief contains 11,618 countable words.

Respectfully Submitted,
MICHIGAN JUSTICE, PLLC



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