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STATE OF MICHIGAN
IN THE SUPREME COURT

THE GYM 24/7 FITNESS, LLC,
and all those similar situated in Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, Huron, Gratiot, Clinton, Shiawassee, Eaton, and Ingham Counties,
Plaintiffs/Appellants,

v.

STATE OF MICHIGAN,
Defendant/Appellee
_______________________________________/

Supreme Court Case No.: 164557
Court of Appeals Case No.: 355148
Court of Claims Case No.: 20-132-MM

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REPLY

The State claims that shutting down (and keeping shutdown) gyms and fitness centers was both "reasonable and legitimate." We disagree. Here, the Oslo Study confirms that what the State did was both unnecessary and unreasonable, and this Court has explained that, at minimum, the executive shutdowns continuing after April 30, 2020 were illegitimate. *In re Certified Questions from the United States Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332; 958 NW2d 1 (2020). However, this misses the correct viewpoint in a takings case. The question is not whether the actions of the State were reasonable or unreasonable—the proper question is whether the State "took" property for a public purpose. The State acknowledges it did—to combat the potential public spread of COVID. It is black letter law that when private property is seized by the government for a public purpose, just compensation is required. Regardless of whether the government's action heavily or lightly advances the public welfare, it is unconstitutional to take what amounts to a condemnation of property for a public purpose *without compensation*. *Troy Campus v City of Troy*, 132 Mich App 441, 451; 349 NW2d 177 (1984). And in the regulatory context, a regulation that "goes too far" is such a taking that also requires just compensation. *Pennsylvania Coal Co v Mahon*, 260 US 393, 41 (1922).

The State ignores this understanding because such does not support its strained and overly narrow view of taking without just compensation. This Court's view is different. *Thom v State Highway Comm'ner*, 376 Mich 608, 613; 138 NW2d 322 (1965) (takings should not be understood "in an unreasonable or narrow sense"). Yet, boiled to the core, the State's argument is that it did not physically invade the businesses' real property and

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the deprivation of property it did cause by excessive regulation was only temporary. So, in its view, there was no taking. The position is at direct odds with takings precedents. *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2074 (2021) ("temporariness "bears only on the amount of compensation" required); see also *US v Dow*, 357 US 17, 26 (1958) and *Am Pelagic Fishing Co, LP v United States*, 379 F3d 1363 fn11 (CA Fed, 2004). Again, "takings" protections within the federal and Michigan Constitutions are an important *conditional* curb on sovereign power—the government can take, but it must pay for what it takes when done for a public purpose.

As it did below, the State again confuses police power with takings power. Takings power is one of the many different types of "police power." For example, in *Loretto* there was a "legitimate police power" purpose in requiring installations of cable boxes. *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 425 (1982). "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Id.* at 426. It is this separate question that the State misses from its analysis and proper understanding. Physical appropriations are unquestionably takings, but so too is a regulation that "goes too far." *Mahon*, 260 US at 41. What is too far? It is when the government does more than simple adjustments of "the benefits and burdens of economic life to promote the common good." *Penn Central Transp Co v NY City*, 438 US 104, 124 (1978).

Here, Plaintiff has plausible pled[1] that the State went too far. When the State fully halted the entirety of the business activities at gyms and fitness centers, it was not simply

[1] We must not forget; this case comes to this Court at the pre-answer, pre-discovery posture.

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adjusting burdens—it was "forcing some people alone," i.e. the owners of the gym and fitness centers, "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v United States*, 364 US 40, 49 (1960). This is especially true given that there was no increased COVID-19 spread at fitness facilities with good hygiene and simple social distancing measures. In such circumstances, the government can nevertheless take (i.e. shut down the economic use of fitness-related property), but it must pay just compensation to the private owner of publicly-used property. US Const. amend V; Const 1963, art X, § 2. In a takings lawsuit, the wrong is not the actual taking of the private property, this is allowed; it is the failure to pay just compensation. Slapping on a pandemic label does not change or excuse that obligation. See *Hts Apts, LLC v Walz*, 30 F4th 720 (CA 8, 2022). Both the State and the Court of Appeals clearly misunderstood. This *Application* should be granted.[2]

ADDITIONAL ARGUMENT

Constitutional takings obligations protect from far more than illegitimate uses of private property by the government. The government needs land to build a bigger runway; it can take it. See *Lenawee Cnty v Wagley*, 301 Mich App 134; 836 NW2d 193 (2013). The government needs a laundry facility for the war effort; it can take it. See *US v General Motors Corp*, 323 US 373 (1945). Where the government floods the lands of one to prevent flooding to another; it can take it. See *Arkansas Game and Fish Comm'n v United States*, 568 US 23 (2012). Nevertheless, where both the State and the Court of Appeals

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[2] The State points to a number of cases where a takings claim has been rejected. Most are wrong and have been issued by inexperienced trial courts who lack the clear understanding of how takings fit into the overall constitutional scheme of property protection. Fortunately, none of those cases are binding upon or are handcuffs upon this Court. This Court should take the correct path as provided by the Eighth Circuit in *Hts Apts*.

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seem to get highly confused is that "just compensation" for takings is required regardless of whether the quality of use of the private property for a public use is excellent, mediocre, or even down-right awful. The State spends an inordinately-large initial portion of its brief outlining how important the State's reaction to a pandemic was to the public. Appellant does not necessarily disagree; the public purpose—regardless if undertaken in an excellent, mediocre, or awful manner—is both undisputed and acknowledged. However, the quality of that public purpose does not transform the public use of private property from a taking to a non-taking. So whether one thinks what Governor Whitmer and Director Gordon did was a good idea or otherwise, it does not matter for takings/just-compensation claims. An uncompensated take is always unconstitutional. When a regulation—whether good, bad, or otherwise—goes too far, it is also a taking. *Mahon*, 260 US at 41. And whether a regulation goes too far is a *fact* intensive inquiry—not something that can be done on a single pleading with no government proffered evidence (as improperly done by the Court of Appeals' panel). E.g. *Yee v Escondido*, 503 US 519, 523 (1992) (regulatory takings "necessarily entai[l] complex *factual* assessments of the purposes and economic effects of government actions"); see also *Lemon Bay Cove, LLC v United States*, 147 Fed Cl 528, 534 (2020). These "factual assessments" require evidence and, here, the State presented none to our Court of Claims.

To date, the State has not provided objective evidence confirming that gyms and fitness centers were the cause of or an accelerator of COVID-19. The only established record evidence is the Oslo Study, which confirmed that shuttering gyms and fitness centers was expressly *unneeded* because with "good hygiene and social distancing measures, there was no increased COVID-19 spread at [fitness] training facilities."

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Appendix #65. Gyms and fitness centers were no different than super markets or hardware stores. Again, seizing and total shuttering of the business operations of gyms and fitness centers was not simply "adjusting the benefits and burdens of economic life to promote the common good." Because there was a "take" rather than an adjustment, the owners of gyms and fitness centers were forced to suffer heavy public burdens at their private expense—and just compensation is now required.

The State heavily—even perhaps exclusively—argues that because agents of the government or third parties did not personally transcend upon the property, a taking could never be found to have occurred. This Court has expressly rejected the State's false theme. A taking can occur without the "actual and total conversion of the property," *Hart v City of Detroit*, 416 Mich 488, 500; 331 NW2d 438 (1982), and takings obligations are not "limited to the absolute conversion of property." *Thom,* 376 Mich at 613. Yet, the State's *modus operandi* in its answer is to just ignore, as non-existing, the case law that fails to fit the government's preferred narrative. It has no explanation for the wider taking protections principles provided in cases like *Thom* and *Hart*. And for good reason—the State is simply wrong and hopes this Court misses it.

Unquestionably, regulatory takings are rare. Why? Because governments so rarely halt the total economic ongoing uses of business property. But when it does happen, the government must pay. *Mahon*, 260 US at 41. The Gym previously offered the wedding facility analogy that was, again, ignored and unanswered by the State. A hypothetical fire marshal issues a regulation which limits the wedding facility occupancy of the 400-person building to only 250-persons to ensure safety in case of fire. At 250-persons, the facility owner can still rent the building and still profit from wedding receptions, albeit in somewhat

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smaller ways. Yet, what happens when, like what the State did here to the gyms and fitness centers, the government issues a regulation making the occupancy to one person? It becomes a regulation that "goes too far" under *Mahon*. Never forget, a 'going-to-far' regulation does not mean the local fire marshal cannot issue the regulation—he still can. However, his government now has the constitutional obligation to pay just compensation when excessively regulating the use of private property to the point of a taking. See *Hts Apts, supra*. To require the government to pay for that which it takes will not cause the sky to fall under the false "prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." *Arkansas Game and Fish*, 568 US at 521.

CONCLUSION

The State wants a total defense in this case to turn on whether the State's shut down orders were "proper" or "legitimate." This is the wrong question. The proper analysis seeks to answer "whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto*, 458 US at 426. Totally shutting down businesses for months on-end provides for plausible takings claims under various takings theories, including under *Penn Central*. The State's claims of temporariness and police powers are invalid death-knell defenses too. The Court of Appeals' decision should be vacated as being in error.

RELIEF REQUESTED

WHEREFORE, the Court is requested to take action on this *Application* by peremptorily reversing the Court of Appeals' decision, granting a MOAA, or adjudicating these issues on a full grant for leave to appeal to this Court.

Date: August 26, 2022

RESPECTFULLY SUBMITTED:

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