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

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Co-Counsel for The Gym 24/7 Fitness
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

GRONDA PLC
MATTHEW E. GRONDA (P73693)
Co-Counsel for The Gym 24/7 Fitness
PO Box 70
St. Charles, MI 48655
(989) 233-12639
matt@matthewgronda.com

FADWA A. HAMMOUD (P74185)
B. ERIC RESTUCCIA (P49550)
DEPUTY SOLICITOR GENERAL
CHRISTOPHER ALLEN (P75329)
DARRIN F. FOWLER (P53464)
DANIEL J. PING (P81482)
KYLA L. BARRANCO (P81082)
ANDREA MOUA (P83126)
Assistant Attorneys General
Counsel for the State of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

APPELLANT THE GYM 24/7 FITNESS, LLC'S
SUPPLEMENTAL BRIEF

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INTRODUCTION[1]

Governments can and do react to emergencies – both large and small. And sometimes when they do, they need to commandeer private property from private owners to combat a shared public threat. When that happens, the government, acting for and in the public good, must pay "just compensation" to its owner. That constitutional requirement prevents those in charge from "forcing some people alone 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).

Here, COVID-19 reached our state in March 2020. Our state government reacted. To combat the common threat, the government concluded it needed to take total possession of and complete control over gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and like-kind businesses to halt the common enemy. It has been acknowledged it can do so. And the government has long understood it could do so. E.g. *United States v General Motors Corp*, 323 US 373, 378 (1945) (seizing control of a warehouse). But what Michigan has forgotten is that it must ***compensate*** these particular businesses for what was taken for the public good. *Id.* at 379. That is true even if the State only needs to take private property for a temporary period of time. *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2074 (2021). Because both the state and federal constitutions require just compensation, this Court should reverse the Court of Appeals' erroneous decision and remand to the Court of Claims for further proceedings.

[1] Appellant The Gym 24/7 Fitness LLC relies upon its same appendix previously filed with the Court.

BACKGROUND

This case is pled solely as a takings case. As previously noted, the takings clauses are "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v Cnty of Los Angeles*, 482 US 304, 315 (1987). The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." US Const amend V. The Takings provision of the Michigan Constitution similarly provides that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, Art X, § 2.

On March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency shortly after the first case of COVID-10 was detected in Michigan. **Ver Compl, ¶7.** Various executive orders then followed "for the public purpose of protecting Michigan's public health, safety and welfare." ***Id.*, ¶8.** Throughout these Executive Orders, the one constant had been the continuous ordered "shut down" of gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and like-kind businesses for the public purpose of stopping or minimizing the spread of COVID-19. ***Id.*, ¶10.** In Plaintiff's view, the cost of these Executive Orders – issued for the benefit of the public – have been placed "squarely upon the shoulders of private businesses and" the State "has failed to justly compensate affected parties for these takings undertaken

for the benefit to the general public." ***Id.*, ¶11.** Plaintiffs have sought damages in the form of just compensation.[2]

MOAA

This Court has granted a MOAA for this case and asked for supplemental briefing on two questions—

1. Whether the temporary impairment of business operations can be a categorical regulatory taking if there are no reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited?

2. If the answer to that question is no, whether the Court of Appeals properly weighed the factors from *Penn Central Transp Co v City of New York*, 438 US 104 (1978), in addressing plaintiff's claims involving a temporary prohibition of its normal business operations.

The answer is the first question is yes; the answer to the second question is no.

ARGUMENT

I. Threshold Observation

As a short threshold note, the refrain by the State Defendant has been to highlight the dangerous nature of COVID-19 and detail the success of its response. But Plaintiff questions neither. Takings cases do not concern themselves with how well a government or its officials responded to the emergency needs of the public. Generally, courts do not review the headiness or shallowness of the public need in deciding takings claims. As long as there is ***a*** public purpose behind the seizing of private property for the common good, courts generally do not interfere with that determination and Plaintiff does not ask

[2] As the Verified Complaint recounts, "this suit does not seek to contest whether Governor Whitmer's decision to issue the Executive Orders that have perpetually closed gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and like-kind businesses since March 10, 2020 were prudent or were not within her authority to issue." **Ver Compl, ¶14**. "Instead, this suit accepts as fact that Governor Whitmer took the action[s] she did against said gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and like-kind businesses (in whatever legal form) solely for a public purpose." ***Id.*, ¶15.**

the Court to do so here. But see *Wayne Cnty v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004) (barring the involuntary transfer of private property by the government to a private entity for a private use). However, when a government takes private property for a public use, the state and federal constitutions require prompt payment of "just compensation." Failure to provide it violates our constitutional takings mandates. *Knick v Twp of Scott*, 139 S Ct 2162, 2167 (2019) ("A property owner acquires a right to compensation immediately upon an uncompensated taking because the taking itself violates the Fifth Amendment.").

Take, for example, *Pewee Coal*. There, the federal government seized a coal company for the purpose of averting a nation-wide strike of miners. Whether or not a 'taking' for this purpose was a good policy idea was never reviewed by the Supreme Court. Simply put, the government generally can take for its citizens' benefit. The relevant inquiry instead is whether or not there has been a failure to remit full and timely "just compensation" that is due for the period the government took control of the businesses and their assets (i.e. the coal mines). "Fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use." *US v Pewee Coal Co*, 341 US 114, 117 (1951).

Here, The Gym and its putative class members have alleged that they are entitled to just-compensation during the period the State Defendant took total control of (i.e. totally shuttered) their fitness and gym facilities. The Court of Claims has never had the chance to do an in-depth factual analysis[3] of what exactly happened or why, which is almost always required in regulatory takings case. *Penn Coal Co v Mahon*, 260 US 393, 419

[3] Thus far, no answer has been filed and no discovery has been permitted.

(1922). (most regulatory takings cases involve "questions of degree they cannot be disposed of by general propositions"). Neither the State nor the Court of Appeals can death-knell this case on broad general propositions. And again, that there was an excellent justification for the taking is irrelevant here.

The current question is not whether The Gym and the class members win the case; the question is whether enough has been pled to require an answer and to start discovery. Because The Gym has both offered a MCR 2.116(H) affidavit (**Appendix #84-85**) as well as pled more than enough to fulfill required notice pleading, the Court of Claims should undertake its required trial-level review of the allegations of categorical takings or alternatively the required "ad hoc, factual inquiries" under *Penn Central.* The Court of Appeals overstepped in spiking this case at the State Defendant's premature request. Reversal is required.

II. Takings and Regulatory Takings

A taking occurs when, for a public purpose, a government official (1) takes private property and (2) fails to compensate justly. *Prater v City of Burnside,* 289 F3d 417, 425 (CA 6, 2002). The scope of a taking should not be interpreted "in an unreasonable or narrow sense" and "should not be limited to the absolute conversion of property." *Thom v State Highway Comm'ner*, 376 Mich 608, 613; 138 NW2d 322 (1965). "No matter how weighty the public purpose behind" the law may be that totally deprived citizens of their private property, the Constitution "require[s] compensation." *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992). This Court has confirmed that a taking occurs "where the effect of a governmental regulation is to prevent the use of much of plaintiffs' property for any profitable purpose." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994). "Any injury to property [] which deprives the

owner of the ***ordinary*** use of its equivalent is a taking, and entitles him to compensation." *Id.*[4]

Prior to *Mahon* in 1922, it was generally thought that takings protections only reached "direct" or "physical" appropriations of property—i.e. the government's boots on the ground seizing title to the property itself. *Mahon* altered that view forever. The US Supreme Court explained that "while property may be regulated to a certain extent, if regulation goes too far it will [also] be recognized as a taking." *Mahon,* 260 US at 415. But, as it has later explained, "*Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment" takings purposes. *Lucas*, 505 US at 1015. Since that time, several cases have emerged to put flesh on the regulatory takings bones. Two are raised in this case: categorical takings and *Penn Central* takings.

A. Categorical Taking

In *Lucas*, a property owner became subject to a government land-use regulation prohibiting the erection of any "permanent habitable structures" on his parcels he owned on a barrier island in South Carolina. The government neither took actual title to David Lucas' land nor assumed physical possession of the property. Instead, it barred him from afar, by the stroke of a pen, from using his property for a particular public purpose—coastline protection. While the property could seemingly still be used for other minor activities (like overnight temporary camping and other recreational activities not associated with permanent habitable structures), the regulatory prohibition rendered the

[4] In the *Application*, Plaintiff pointed out that the Michigan Constitution per the *Peterman* line of cases evidences more protective constitutional coverage than its federal counter-part. See **App for Lv at 25-26.** This Court recognized such before. *Rafaeli LLC v Oakland Cnty*, 505 Mich 429, 454; 952 NW2d 434 (2020).

parcels effectively "valueless." *Lucas*, 505 US at 1020. The Supreme Court found that there was no need for a *Penn Central* balancing of factors—such was a "categorical" taking.

The State did the exact same thing to the gyms and fitness centers as the coastal regulatory agency did to Mr. Lucas in South Carolina—with the stroke of a pen, it effectively took complete and total control of the gyms and fitness centers' properties and shuttered them for public purpose. It is undisputed—the State's COVID-19 regulations completely shuttered lawfully-operated gyms and fitness centers. As this case has been pled, there was unquestionable public purposes in doing so. And given there was a sufficient public purpose, the government can unquestionably take. But what it must then do then is compensate. See also *Hts Apts, LLC v Walz*, 30 F4th 720 (CA 8, 2022).

The only real difference between the clear teaching of *Lucas* and the instant one is that the State decided in the current case—mid-litigation—to cease its categorical taking (i.e. the Governor lifting the shut-down orders) while in *Lucas* the coastal regulatory agency flatly refused to back down. Due to this difference, the State believes that takings jurisprudence stands for the proposition that categorical takings only apply to permanent regulatory takings while what they did was a temporary taking and thus no compensation is due. **Answer to App at 8** (the shutdown orders "are reasonable [and] *temporary*… and are thus not subject to takings or inverse condemnation theories as a matter of law"). That argument is inconsistent with controlling jurisprudence.

In *First English*, a county government imposed an interim order against a church's property in response to flooding. The interim order prohibited any substantial use of the property (i.e. constructing, reconstructing, placing or enlarging any building or structure

within a particular boundary). That was deemed a taking. Once a taking has occurred, the government has a "whole range of options" including "amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." 482 US at 321. However, when government action works a taking, it "implicates the 'constitutional obligation to pay just compensation.'" *Id.* at 315. From there, "the government may elect to abandon its intrusion or discontinue regulations." *Id.* at 317. However, what has happened in the past effectively become "temporary" by the governments' discontinuation of over-regulation and compensation is still due. *Lucas*, 505 US 1033 (Kennedy, J., concurring) ("If [a] deprivation amounts to a taking, its limited duration will not bar constitutional relief.") The obligation to pay just compensation for temporary takings "is not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 US at 318. Thus, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period" of temporary control of the property for a public purpose. *Id.* at 319.

First English does not stand alone or as an outlier. Recently, the US Supreme Court reaffirmed the principle in *Cedar Point Nursery*. There, California had adopted a regulation which required the owner of private farm property to be ousted from control and use of his own property so that third parties—union officials and organizers—could use the land for up to three hours per day, 120 days per year. The Supreme Court reaffirmed that the "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Cedar Point Nursery*, 141 S. Ct. at 2074. The "duration of an appropriation," it explained,

"bears *only* on the amount of compensation." *Id.* The US Supreme Court has repeatedly "rejected the argument that government action must be permanent to qualify as a taking." *Arkansas Game & Fish Comm'n v United States*, 568 US 23, 33 (2012); see also *United States v Dow*, 357 US 17, 26 (1958) (explaining that just compensation includes "the taking of a right to use property temporarily."); *Lucas*, 505 US at 1033 (Kennedy, J., concurring) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones."); *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 321-323 (2002) ("compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, *even though that use is temporary*."). In short, a government seeking to avoid the payment of just compensation cannot label its taking as "temporary" to avoid the compensatory mandate. The temporary taking of property is still an unconstitutional taking when done without just compensation.

This Court has further inquired whether "the temporary impairment of business operations" is still compensable as "a categorical regulatory taking" when "there are no reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited." The answer is yes. The very nature of a "categorical" taking is when the government does not leave any reasonable alternative uses. If there were "reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited," the taking would not be categorical—it would be subject to the *Penn Central* balancing test.

This case is a perfect example. When the State shuttered all the gyms and fitness centers, it effectively locked out everyone from the public from ever using the facilities in

the first instance to the detriment of the business owners. The State has suggested that a gym or fitness center could have pivoted into a totally different business. What would gyms and fitness centers – which have workout equipment, muscle toning machines, and heavy-duty exercise equipment – reasonably convert into? There is nothing. As such, a categorical taking has occurred.

B. *Penn Central* Regulatory Taking

The alternate *Penn Central* regulatory takings theory applies to non-categorical regulatory takings. *Penn Central* seeks 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." *Lingle v Chevron USA Inc*, 544 US 528, 539 (2005). The standard balances "complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Murr v Wisconsin*, 137 S Ct 1933, 1943 (2001).

This Court has sought input whether the Court of Appeals properly weighed the *Penn Central* factors in addressing plaintiff's claims which involve a temporary prohibition of its normal business operations. Before answering that, the Court must first be cognizant that answering that question is currently premature. The posture of this case comes to this Court on a pre-answer motion for summary disposition. The *Penn Central* inquiry is "fact intensive" and these types of "taking cases require a case-specific inquiry." *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). Only in a "categorical [regulatory] taking" case would "a reviewing court need not apply a case-specific analysis" because "the owner should automatically recover for a taking of his property." *Id.* at 577. In other words, there is nothing to balance for categorical takings;

there is much to ascertain and balance in a *Penn Central* analysis. So in this case, the Court of Appeals should not ***yet*** be balancing anything—it should only be reviewing whether the verified complaint provided sufficient notice pleading. *Detroit Caucus v Indep Citizens Redistricting Comm'n*, __ Mich __; 969 NW2d 331, 336 (2022) ("[w]e are a notice-pleading state, and, as a result, the function of the complaint is simply to give notice of the claims being lodged against the defendants."); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992) (all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.).

The State also added a request for relief under MCR 2.116(C)(10) yet attached no evidence, no affidavit, and no evidence to its motion. The Court of Claims held, without prejudice, that the current record "does not satisfy" the State's "burden as the moving party on a motion for summary disposition under MCR 2.116(C)(10)." **Appendix #92**. The motion must be (and was correctly) denied on its face. *Quinto v Cross & Peters Co*, 451 Mich 358; 362-363; 547 NW2d 314 (1996) (the moving party has the initial burden to come forward "***with evidence*** to support its summary disposition motion" pursuant to MCR 2.116(C)(10)). When "the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009).

Despite this, the Court of Appeals dove head-first into weighing the case facts with no factual record. On the non-existent record, the Court of Appeals found the first two *Penn Central* factors—economic impact of the EOs and their interference with reasonable investment-backed expectations—weigh in favor of gyms and fitness centers because

the businesses were, in fact, shuttered under the EOs. **Appendix #111.** It then counter-weighed those favorable factors by asserting that "the closure orders were short lived." ***Id.*** As previously noted, that was in error—the fact of being a temporary regulatory "bears only on the amount of compensation" required and not on whether a taking occurred. *Cedar Point Nursery*, 141 S Ct at 2074. As such, both of the first factors weigh in favor of the gyms and fitness centers. Those two factors are "primary among those" *Penn Central* "factors." *Lingle*, 544 US at 538-539.

As to the third (and non-primary) factor, courts review "the character of the governmental action." Plaintiff has previously explained that the US Supreme Court and courts nation-wide have done relatively little to clarify what it meant by or sought to be analyzed by the character-of-the-governmental-action factor. Thus far, the State here provided no evidence of its rationale for why it did what it did and The Gym has provided counter-evidence - the Oslo study - confirming that the total shuttering the gyms and fitness centers was unnecessary. The character of the government here is clear – it took the entirety of the private property of gyms and fitness centers – for a public purpose. That is the very essence of a taking. And it was permissible to do so—it is just that constitutional compensation is required.[5]

The Court of Appeals simply dove in too soon and with too little of a factual record to render a proper decision. Further, this Court was correct in questioning whether the Court of Appeals properly weighed the factors from *Penn Central*. It incorrectly counter-

[5] The only possible rational for this factor might be those special circumstances identified by the Supreme Court as not being a taking. For example, a moratorium against private land development during the process of devising a comprehensive land-use plan does not constitute a taking. Reasonable political delays in the future development of properties are exempted from ever being a taking. See *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302 (2002). But this is not that type of case. The gyms and fitness centers were already built and operating fully at the time of the regulations' ordination. As such, this limited exception to a taking is not applicable here.

weighed the two "primary" factors based on a rationale that is contrary to established case law. Moreover, the third factor also weighs in favor of a taking. As previously noted, the whole premise of a proper taking is when private property is pressed into public service—especially those done for 'a really good public purpose.' Here, the government believes and has asserted it had a really good reason to take –"to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders." **Appendix #112.** That is a clear public purpose. Plaintiff has expressly recognized that. **Ver Compl, ¶15**. And the Court of Appeals should have recognized that the more benefit the public at large receives at the expense of the individual private property owner in relation to a specific or impending threat, the more likely the character of the government actions should be deemed a taking rather than the simple rebalancing of the public and private property owners' interests. *See K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559; 705 NW2d 365 (2005) (focusing on "whether the governmental 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"). The panel's view to the contrary was misbalanced and in error.

RELIEF REQUESTED

WHEREFORE, the Court is requested to take action on this *Application* by reversing the Court of Appeals' decision and remand to the trial court for further proceedings.

Date: April 28, 2023

RESPECTFULLY SUBMITTED:

/s/ Philip L. Ellison
OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

/s/ Matthew E. Gronda
GRONDA PLC
MATTHEW E. GRONDA (P73693)
PO Box 70
St. Charles, MI 48655
(989) 233-1639
matt@matthewgronda.com

Counsel for Plaintiff/Appellant

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