STATE OF MICHIGAN
IN THE SUPREME COURT

THE GYM 24/7 FITNESS, LLC, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellant/Cross-Appellee.

Supreme Court No. 164557

Court of Appeals No. 355148

Court of Claims No. 20-000132-MM

THE STATE OF MICHIGAN'S ANSWER TO GYM 24/7'S APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher Allen (P75329)
Assistant Solicitor General

Darrin F. Fowler (P53464)
Assistant Attorney General

Attorneys for the State
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

Dated: July 25, 2022

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction to review Gym 24/7's application for leave. See MCR 7.305(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In 2020, the Governor issued executive orders designed to protect the public health and safety of Michigan's residents during this pandemic emergency. Gym 24/7 does not contest the legitimacy of the Governor's orders and affirmatively agrees that they were issued for a public purpose. Even so, the complaint alleges that they caused harm to Gym 24/7, and other similarly situated businesses, and that the State is responsible for compensation under federal and state takings claims as well as under an inverse condemnation theory. The Court of Appeals ruled that the claims failed as a matter of law. The questions therefore are as follows:

I. As part of its exercise of police power to protect the public health from a deadly pandemic, the State placed a temporary limitation on gym facilities' use of their property for indoor fitness services. It did not physically invade the property of gym facilities and did not authorize third persons to do so. Dozens of courts throughout the country have faced similar claims in the context of this pandemic and have routinely rejected them. Whether evaluated as a threshold matter or as a regulatory taking, did the Court of Appeals properly rule that there was no taking as a matter of law?

Gym 24/7's answer: No.

The State of Michigan's answer: Yes.

The Court of Appeals' answer: Yes.

II. For an inverse-condemnation claim against the State, a party must prove both that the property owner suffered a unique injury and that the government abused its powers. Gym 24/7 expressly concedes that it is not contending that the State abused its authority, and its allegations of common, class-wide harm belie any notion of unique injury. Even if an inverse-condemnation claim could lie here, did the Court of Appeals properly rule as a matter of law that the claim fails?

Gym 24/7's answer: No.

The State of Michigan's answer: Yes.

The Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS INVOLVED

Takings Clause of the Fifth Amendment of the U.S. Constitution:

> [N]or shall private property be taken for public use, without just compensation.

Takings Clause of the Michigan Constitution, article 10, section 2

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

INTRODUCTION

This putative class action, brought by fitness center Gym 24/7 Fitness, LLC (Gym 24/7), seeks to impose takings liability on the State for its response to the COVID-19 pandemic – namely, Governor Whitmer's executive orders temporarily restricting, among other things, public access to indoor fitness facilities. Gym 24/7 maintains that this admittedly reasonable and legitimate measure constitutes a regulatory taking or inverse condemnation for which it, and all other similar businesses, are constitutionally entitled to compensation.

In a published decision, the Court of Appeals dismissed Gym 24/7's claims, and rightly so. Settled law makes clear that a compensable taking does not, as a matter of law, arise from the State's exercise of its police power to protect the public health and safety from the imminent and deadly threat of COVID-19, particularly where, as here, that exercise of police power did not work any physical invasion of private property by the State, or third parties authorized by the State. And while that threshold legal point is alone dispositive of Gym 24/7's claims, further analysis only confirms that they fail as a matter of law. Discovery in this case would not, and could not, change that legal conclusion.

Courts across the country are in accord, routinely rejecting COVID-related takings claims of the sort advanced here. The Court of Appeals' unanimous decision aligns with this overwhelming consensus and the settled legal principles underlying it, and properly disposes of this case. Further review is neither needed nor warranted. This Court should deny leave.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a family of viruses that cause respiratory illnesses), but the strain is novel. When COVID-19 hit the United States in 2020, there was no general or natural immunity built up in the population, and few treatments existed to combat the disease itself.

It is widely known and accepted that COVID-19 can cause severe illness and death. It is highly contagious, spreading easily from person to person through respiratory droplets when an infected person coughs, sneezes, talks, or breathes.[1] The virus spreads most efficiently when infected droplets land in the mouths or noses of people who are nearby, and spread is more likely when people are in close contact. Many symptomatic people experience trouble breathing and shortness of breath, fever, cough, and loss of taste or smell. Some cases result in a severe, life-threatening pneumonia, but others produce no symptoms at all. And infected individuals can spread the disease regardless of whether they are symptomatic. Given the virus's ease of transmission, novel nature, and potentially fatal consequences, the Centers for Disease Control and Prevention have indicated the

[1] (See Def Mot for Summary Disp, p 1 & n 1, citing World Health Organization, *Modes of transmission of virus causing COVID-19*, available at https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations).

best way to prevent illness is to "avoid being exposed" through various social distancing measures.[2]

The State of Michigan's response to the COVID-19 pandemic.

On March 10, 2020, in anticipation of the pandemic spreading in Michigan, Governor Whitmer declared a state of emergency and invoked the emergency powers available to her under Michigan law.[3]

With this authority invoked, the Governor began to issue substantive executive orders to stem the tide of COVID-19 infections. These included caps on large assemblies,[4] closures of premises of certain places of public accommodation,[5] and various iterations of the now-rescinded Stay Home, Stay Safe Order, which was frequently adjusted in light of the ever-evolving challenges presented by this pandemic.[6]

---

[2] (See Def Mot for Summary Disp, pp 3–4 & n 3, citing U.S. Centers for Disease Control and Prevention, *COVID-19 Frequently Asked Questions* https://www.cdc.gov/coronavirus/2019-ncov/faq.html.

[3] All executive orders can be found at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

[4] See, e.g., Executive Order 2020-5, http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[5] See, e.g., Executive Order 2020-9, http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[6] See Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

Like other businesses, government buildings, and places of accommodation across the State, the Governor ordered indoor fitness centers to be closed to public access to stop the spread of the virus.[7] As conditions on the ground improved in the ensuing weeks, certain lower-risk in-person business activities were slowly permitted to resume with significant mitigation measures in place, while other restrictions, including on public access to indoor fitness centers and similar establishments, remained necessary and in place.[8]

The executive order effective at the time of the Complaint was E.O. 2020-110, issued June 1, 2020, which ordered the continued closure to the public of indoor movie theaters and performance venues, facilities offering non-essential personal care services, casinos, bowling alleys, and, pertinent here, indoor fitness centers because they each "present a heightened risk of infection."[9] Indeed, the physical activity of exercising is by its very nature a sustained vigorous physical activity, which necessarily means heavy breathing and, therefore, acute, propulsive bursts of

---

[7] See generally Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, available at http://www.legislature.mi.gov/(S(ojwjgvr1bgsajzswprgsjcnd))/mileg.aspx?page=executiveorders

[8] E.O. 2020-92 (issued May 18, 2020) (adding exceptions for certain activities, and permitting opening of retail, office, and restaurants with limitations, but otherwise closing business and operations except "critical infrastructure"); E.O. 2020-96 (issued May 21, 2020) (adding exceptions for certain activities, and permitting opening of retail, office, and restaurants with limitations, but otherwise closing business and operations except "critical infrastructure"); E.O. 2020-110 (issued June 1, 2020) (permitting broader reopening but "certain businesses will remain closed and specific activities that present a heightened risk of infection will remain prohibited," including "[i]ndoor gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and the like").

[9] See E.O. 2020-110, § 12.

virus shed by anyone in that confined space who might be infected – and the risk of such spread only heightens even further when that indoor exercise occurs in organized group settings.[10] Because they could be performed without such heightened risk of spreading the virus, fitness centers were permitted to offer, on their premises or otherwise, outdoor fitness classes under certain circumstances, including maintaining social distancing, minimizing the use of shared equipment, and frequent and thorough disinfection and cleaning.[11]

The order also did not preclude employees of fitness centers from accessing the centers' indoor facilities, nor did it preclude those businesses from using their facilities to engage in other, lower-risk commercial activity, fitness-related or otherwise (such as the provision of remote fitness services through recorded or live online classes, or the sale of products in a manner consistent with the order).

In the ensuing months, the State continued its deliberate and incremental approach to lifting COVID-19 restrictions as its efforts to combat the pandemic progressed. On September 3, 2020, the Governor issued E.O. 2020-176, which

---

[10] (Def Mot for Summary Disp, p 7 & n 11, citing C.D.C., Emerging Infectious Diseases, *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, Vol 26, No 8 (Aug 2020) (summarizing infections linked to gyms); *USA Today, Is group exercise safe? Study raises questions about coronavirus risk in gyms* (June 5, 2020), available at https://www.today.com/health/coronavirus-group-exercise-are-classes-safe-coronavirus-risk-gyms-t183428; *New York Times, Is It Safe to Go Back to the Gym?* (May 13, 2020), available at https://www.nytimes.com/2020/05/13/well/move/coronavirus-gym-safety.html.) See also E.O. 2020-151, Preamble (explaining that the ongoing restrictions continued to reflect "accumulating evidence that COVID-19 often spreads via aerosolized droplets" and "the risk of [such] spread in indoor spaces").

[11] E.O. 2020-110, § 14(a).

allowed Gym 24/7's indoor facility and other indoor fitness facilities across Michigan to reopen for public access, effective September 9, 2020.[12]

The Director of the Department of Health and Human Services issues substantially similar orders that are not challenged in this case.

Concurrent with the Governor's actions to combat the COVID-19 pandemic, on April 2, 2020, then-Director of the MDHHS, Robert Gordon, began issuing emergency orders under Michigan's Public Health Code, MCL 333.1101*, et. seq.*[13] Throughout the pandemic, MDHHS consistently issued orders to protect the public health as the needs of the State required. Among them were orders reinforcing the Governor's executive orders at issue here, having essentially the same scope, albeit supported by independent legal authority.[14]

For example, the April 2, 2020 emergency order from Director Gordon incorporated the protective measures set out in executive orders 2020-11, 2020-20,

---

[12] E.O. 2020-176(3)(b). Pursuant to E.O. 2020-115, indoor fitness centers in two regions of Michigan reached this reopening stage sooner because those regions had "significantly fewer new cases per million each day than other regions in the state and ha[d] not shown an increase in viral activity in response to earlier relaxations of [the Governor's] orders." E.O. 2020-115, Preamble.

[13] Director Gordon issued the first emergency order on April 2, 2020, and mandated that "[e]very person . . . must comply with the procedures and restrictions outlined in E.O. 2020-11, E.O. 2020-20, and E.O. 2020-21" and "any future Executive Order that may be issued that rescinds and replaces" those Executive Orders. Emergency Order Pursuant to MCL 333.2253 (April 2, 2020), https://www.michigan.gov/documents/coronavirus/DHHS_Order_Incorporating_EOs_into_epidemic_finding_final_4-2-20_002_685693_7.pdf.

[14] All MDHHS public health orders can be found at: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html, and https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-546528--,00.html.

and 2020-21 and continued through the time the Gym 24/7 filed its complaint. See e.g., April 2, 2020 Emergency Order, ¶ 1 ("Every person, as that term is defined in MCL 333.1106, in this State, must comply with the procedures and restrictions outlined in E.O. 2020-11, E.O. 2020-20, and E.O. 2020-21 and their accompanying FAQs."); June 10, 2020 Emergency Order,¶¶ 1, 2 ("Every person in this state must comply with the[ ] rules, procedures, and restrictions" set forth in E.O. 2020-110, E.O. 2020-114, and E.O. 2020-115.").

Gym 24/7 did not raise any challenges to the MDHHS orders.

Gym 24/7 files suit seeking compensation on the basis of the Governor's admittedly proper orders.

On July 13, 2020, Gym 24/7 filed its verified putative class action complaint in the Court of Claims against the State asserting unconstitutional takings claims under the federal and state constitutions, and an inverse condemnation claim.

In short, Gym 24/7 alleged that the State, by imposing regulations on its indoor fitness facility business that required it to close for public access temporarily, was required to compensate Gym 24/7 for its lost "revenues and profits." (Compl, ¶¶ 34, 40.) It further alleged that the State's regulation was equivalent to "taking" Gym 24/7's property interest in its business, and that the State failed to initiate condemnation proceedings or otherwise compensate Gym 24/7 for its lost revenues while its business was ordered closed to public access. (*Id.*)

Notably, Gym 24/7 expressly "accept[ed] as fact" that the Governor's COVID-19 orders were "for the public purpose of protecting Michigan's public health, safety

and welfare." (*Id.*, p 6, ¶ 9.) It also asserted "this suit does not seek to contest whether Governor Whitmer's decision to issue the Executive orders that have perpetually closed [indoor fitness facilities] since March 10, 2020 were prudent or were not within her authority to issue." (*Id.*, p 7, ¶ 14.) Gym 24/7 took the position that, "notwithstanding their legitimate public purpose," the Governor's orders regulating its business "made it impracticable" for Gym 24/7 to benefit from its property interest, and the State was required to provide compensation to Gym 24/7 arising from "diminution of value in . . . property interests." (*Id.*, p 3, ¶¶ 17–18.)

The Court of Claims denied the State's motion for summary disposition.

The State filed a motion for summary disposition in lieu of an answer. In its motion, the State made three primary arguments: (1) the Governor's orders are reasonable, temporary exercises of the State's police power to respond to public health threats and are thus not subject to takings or inverse condemnation theories as a matter of law; and even assuming those legal claims could lie here, (2) Gym 24/7 failed to state an inverse condemnation claim; and (3) Gym 24/7 failed to state a regulatory taking claim.

The Court of Claims denied the State's motion. As an initial matter, although the State premised its motion on both MCR 2.116(C)(8) and (C)(10), the Court indicated that it would only review the motion under MCR 2.116(C)(10) because the State included within its brief references to "various internet

materials."[15] (COC Op and Order, Sept 24, 2020, p 2.) The Court explained the relevant standards governing inverse condemnation and regulatory takings claims, and also correctly noted that "the framework for evaluating government action designed to curb public health emergencies requires a degree of deference to the government's action." (*Id.*, pp 3–4.) The Court of Claims observed that "the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts." (*Id.*, p 5, quoting *League of Independent Fitness Facilitators & Trainers, Inc v Whitmer*, 814 Fed Appx 125, 128 (CA 6, 2020) (*LIFFT*).) Specifically, the Court of Claims observed that the "scope of this type of judicial review is narrow" and limited to whether the public health regulation "has no real or substantial relation to [public health], or is beyond question, a plain, palpable invasion of rights secured by the fundamental law." (*Id.*, p 6, quoting *Jacobson v Commonwealth of Massachusetts*, 197 US 11, 31 (1905).)

Yet, the Court of Claims concluded the State's motion should be denied because it was not satisfied the State had provided adequate proofs documenting the basis for its decision-making in imposing the regulation at issue. According to the Court of Claims, the State failed to produce evidence in support of its decision to close fitness facilities initially or to continue prohibiting use of those facilities. (*Id.*, p 7.) Further, it concluded the State was required to produce evidence why other indoor activities were permitted to resume while gyms and indoor fitness facilities

[15] As reflected in the footnotes above, these were publicly available resources such as CDC research papers and reference materials.

were required to remain closed. (*Id.*) The Court of Claims concluded that the State's inclusion of internet reference materials regarding these matters was insufficient to carry its burden as the moving party, and that the State was required to provide additional documentary evidence to prove that its regulation of indoor fitness facilities during the COVID-19 pandemic was not arbitrary and bore a substantial relation to public health. (*Id.*)

Apart from this analysis, the Court of Claims did not substantively discuss or analyze the State's arguments regarding the adequacy of Gym 24/7's claims.

The State filed an application for leave to appeal, which the Court of Appeals granted. (3/16/21 Mich Ct App Order.) Gym 24/7 filed a cross-application, alleging that the Court of Claims reached the right result for the wrong reason.

The Court of Appeals unanimously reverses and remands for judgment in favor of the State.

In a unanimous published decision, the Court of Appeals reversed, rejecting each of Gym 24/7's claims. *Gym 24/7 Fitness, LCC v State*, ___ Mich App ___ (2022) (No. 355148); slip op at 1. In its analysis, the court first surveyed the ample police power of the state to act for a public purpose, including to respond to public health epidemics. Slip op at 9–10, discussing *Jacobson v Commonwealth of Massachusetts*, 197 US 11 (1905), and *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388 (1923). The court noted that the plaintiff "accepts for the sake of argument that the governor properly acted for a public purpose, but nevertheless demands 'just compensation' for a taking of private property." Slip op at 11.

Leading off its discussion of Gym 24/7's takings claims, the court "beg[a]n by noting that to the best of our knowledge, every federal court and state appellate court that has addressed a takings claim stemming from the government's closure of a business as a safeguard against the spread of COVID-19 has rejected the claim." *Id.* at 15 (collecting cases).

The court first determined that Gym 24/7 had not pled a "physical taking" claim since there was no allegation "that the State physically acquired, took possession of, occupied, or appropriated the Gym's private property." *Id.* at 15.

Reviewing whether a regulatory taking occurred, the court recognized that a *categorical* regulatory taking "is limited to extraordinary circumstances in which no productive or economically beneficial use of land is allowed" and requires "a 100% complete elimination or obliteration of value." *Id.* at 16 (emphasis added), citing *Tahoe-Sierra Pres Council Inc v Tahoe Reg'l Plan Agency*, 535 US 302 (2002). Therefore, Gym 24/7's "temporary" closure and the fact that "[t]he property clearly still had value" meant that it could not establish a categorical taking as a matter of law. *Id.* at 17. As the court noted, "[t]he [EOs] did not preclude . . . those businesses from using their facilities to engage in other, lower-risk commercial activity, fitness-related or otherwise." *Id.* at 17, n 16 (quoting the State's brief).

After rejecting as a matter of law that there was a categorical taking, the Court of Appeals then evaluated whether there may be a viable non-categorical regulatory taking claim. *Id.* at 16–17. But under the *Penn Central* test, the court found as a matter of law that the third factor – the character of the government

action in protecting against the early spread of COVID-19 – was "compelling" and "strongly favors the State, or perhaps actually demands that we find no taking." *Id.* at 17–18. The court understood that government action "*to forestall . . . grave threats to the lives . . . of others*," does not create any constitutional obligation for compensation. *Id.* at 18, quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1017–1020 (1992) (emphasis in original; first ellipses added). The court emphasized the principle that regulatory action that "restrains uses of property that are tantamount to public nuisances" are "part of the burden of common citizenship." *Id.* at 18, quoting *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 491–492 (1987).

Even though the court found that the "economic impact of the EOs and their interference with reasonable investment-backed expectations" favored Gym 24/7, those factors were not given "all that much weight" because "the closures orders were short lived," *id.* at 17, and they were measured against what this Court described as "the most threatening public-health crisis of modern times." *Id.*, quoting *In re Certified Questions*, 506 Mich 332, 337–338 (2020).

Since each claim failed as a matter of law, the court reversed and remanded for entry of judgment. *Id.* at 19. Gym 24/7 filed for leave. The State now responds.

STANDARD OF REVIEW

This Court reviews rulings on motions for summary disposition de novo. *Cummins v Robinson Twp*, 283 Mich App 677, 689 (2009). In a case involving takings claims among others, this Court stated that it "review[s] de novo constitutional issues and any other questions of law that are raised on appeal." *Id.*

ARGUMENT

I. The Court of Appeals properly ruled that the takings claim fails as a matter of law against the State of Michigan.

The Governor's executive orders were traditional exercises of the police powers of the State to protect the health and safety of Michigan's residents. Gym 24/7 concedes that they were a valid exercise of governmental authority for a proper public purpose. (See 24/7's App, p 1.) As the Court of Appeals recognized, this exercise of police power to protect the community from the dangers presented by a particular use of property – public gatherings that presented a heightened risk of spreading the coronavirus – is not a taking. Dozens of other courts have ruled the same.

Moreover, under a categorical regulatory takings analysis, the Court of Appeals correctly ruled that the temporary and limited nature of the orders, which have long since expired, make clear that there was no categorical taking. As for a non-categorical taking, as ruled below the universal position of the courts is that this type of exercise of police power does not give rise to a claim as a matter of law when applying the *Penn Central* factors. Gym 24/7 itself and gyms more generally were not singled out, and the economic effects of the pandemic and the governmental response were not limited to one business but affected businesses across the state. And the state's exercise of authority was of the highest order.

The arguments in Gym 24/7's application are dependent on cases that involve a physical invasion, either by the government or third parties, see Gym 24/7's App, pp 12–16, and the Court of Appeals correctly concluded – indeed, Gym 24/7 admits – there is no such invasion here. Slip op, p 15. This Court's review is not warranted.

A. The Court of Appeals correctly determined that the exercise of the police powers here does not implicate the Takings Clause.

Both the U.S. Constitution and Michigan's Constitution require just compensation for the taking of private property for "public use." US Const, Am V; Const 1963, art 10, § 2. These Takings Clauses are "substantially similar," and they should "generally be interpreted coextensively." *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 555 n 22, reversed on other grounds, 480 Mich 910 (2007), citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184 n 10 (1994) ("Because the federal guarantee is no more protective than the state guarantee in the instant case, we do not examine the provision separately.").

There are "two types of 'categorical takings' regarding regulatory action that generally will be deemed per se takings for Fifth Amendment purposes." *Cummins v Robinson Twp*, 283 Mich App at 707 (cleaned up), citing *Lingle v Chevron USA Inc*, 544 US 528, 538 (2005).

For the first, the owner must "suffer a permanent physical invasion of her property—however minor." *Cummins,* 283 Mich App at 707, citing *Lingle,* 544 US at 538. Gym 24/7 does not claim that here. (See Gym 24/7's App, pp 8–9).

For the second, a regulation must "completely deprive an owner of all economically beneficial use of her property" in order to be a "categorical" taking. *Cummins,* 283 Mich App at 707, quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 (1992). This second theory, a categorical regulatory taking under *Lucas*, is one of the two theories that Gym 24/7 raises in its application.

Otherwise, apart from these "two relatively narrow categories," the question whether there is a non-categorical regulatory taking is governed by *Penn Central Transportation Co v New York City*, 438 US 104 (1978). *Cummins,* 283 Mich App at 707, citing *Lingle*, 544 US at 538. The Court in *Penn Central* established a balancing test that requires a reviewing court to engage in a factual inquiry based on three factors:

> (1) the character of the government's action,
>
> (2) the economic effect of the regulation on the property, and
>
> (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.
>
> [*Cummins,* 283 Mich App at 707, citing *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 577 (1998), which was quoting *Penn Central*, 438 US at 124.]

This is the other takings theory on which Gym 24/7 relies, i.e., a non-categorical regulatory taking under *Penn Central*.

The Court of Appeals ruled here that there was no categorical taking, see slip op, pp 15–17, and it also applied the *Penn Central* factors in rejecting the claim as a matter of law as a non-categorical claim, see *id.* at 17–19. In reaching the latter conclusion, it recognized this overarching point that "the character of the Governor's actions strongly favors the State, or perhaps actually demands that we find no taking" based on precedent from the U.S. Supreme Court. *Id.* at 18–19.

Indeed, as noted by the U.S. Supreme Court, "the [government] might avoid the conclusion that a compensable taking had occurred by establishing that the *denial of all use was* ***insulated*** *as a part of the State's authority to enact safety regulations*." See *Tahoe-Sierra Pres Council v Tahoe Reg'l Plan Agency*, 535 US

302, 329 (2002) (emphasis added), quoting *First English Evangelical Lutheran Church v Los Angeles Cty*, 482 US 304, 313 (1987), citing *Goldblatt v Hempstead*, 369 US 590 (1962) (upholding a safety ordinance), and *Mugler v Kansas*, 123 US 623 (1887) (upholding a state law prohibiting the manufacture of alcohol).

The primary anchor is the principle from the U.S. Supreme Court that secures the ability of the states to combat public nuisances and protect the public safety. See *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 492 n 22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.") In this regard, the owner's use of property is subject to the police power of the state to protect the community's health and safety:

> Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community[,] . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.
>
> [*Keystone Bituminous Coal*, 480 US at 491 (internal quotes omitted), citing *Mugler*, 123 US at 668–669.]

See also *Gym 24-7,* slip op, p 18. Accord *Mugler,* 123 US at 668–669 ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."). See also *Miller v Schoene*, 276 US 272, 280 (1928) (holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees destroyed to prevent a disease from spreading to nearby apple orchards).

Also, as noted by the opinion below, "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." Slip op, p 18, quoting *Penn Central,* 438 US at 125. In an earlier case, the Court of Appeals recognized the same principle that "the nuisance exception to the prohibition of unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, the State has not taken anything when it asserts its power to enjoin a nuisance-like activity." See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272 (2008) (cleaned up), citing *Keystone Bituminous Coal*, 480 US at 491 n 20, 492 n 22; see also *id*. at 276 ("A condition that is so threatening as to constitute an impending danger to the public welfare is a nuisance"). In that circumstance, the Court of Appeals ruled that because the township "was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred." *Id.* at 272.

There is a second strain of U.S. Supreme Court precedent, based on the law on the doctrine of "necessity," which is generally invoked during time of war. As noted by the U.S. Supreme Court, "the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v Caltex*, 344 US 149, 154 (1952).

This principle was in play in *United States v Central Eureka Mining Company*, 357 US 155, 157 (1958), which involved the government's ordered closure of non-essential gold mines in an attempt to free up resources for different types of mining that supported the war effort. The government "did not take physical possession of the gold mines [and] did not require the mine owners to dispose of any of their machinery or equipment." *Id.* at 158. The closure order remained in effect for almost three years. *Id.* Some of the affected mines alleged that the closure order comprised a taking in violation of the Fifth Amendment. *Id.* at 162. The U.S. Supreme Court disagreed. The Court noted that, ordinarily, a takings inquiry was "a question properly turning upon the particular circumstances of each case." *Id.* at 168, citing *Pennsylvania Coal Company v Mahon*, 260 US 393 (1922). But that inquiry was inappropriate when the needs of the government – and the country's residents at large – were sufficiently dire to require the use of the police power:

> In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. *But wartime economic restrictions,* ***temporary in character****, are insignificant when compared to the widespread uncompensated* ***loss of life*** *and freedom of action which war traditionally demands.* We do not find in the temporary restrictions here placed on the operation of gold mines a taking of private property that would justify a departure from the trend of the above decisions.
>
> [*Eureka Mining*, 357 US at 168–169 (citations omitted; emphasis added).]

Based on these precedents and the reasoning of the Court of Appeals, there was no taking as a matter of law. This is true whether the case is reviewed as an abatement of a nuisance-like activity or based on the doctrine of necessity.

Significantly, as noted by the Court of Appeals, "[t]he purpose of the EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders." Slip op, p 18. And Gym 24/7 expressly conceded the regulation's "legitimate public purpose" (Complaint, ¶ 17) and stressed that it did not contest the validity of the orders:

> 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.
>
> Instead, this suit accepts as fact that Governor Whitmer took the action 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. [Complaint, ¶¶ 14, 15.)]

Gym 24/7 also stated that it "does not seek to contest" whether the executive orders "were prudent" (Pl's X-Appellant's COA Br, filed May 6, 2021, pp 1, 2), or whether they were reasonable. (See also *id.* at 1 ("whether the taking by the government was reasonable or unreasonable is legally irrelevant").) The Court of Appeals noted this acknowledgement too. Slip op, p 17 ("[Gym 24/7] did not contest the prudence of the Governor's actions or her authority to issue the EOs.").

The prevention of the spread of disease rests at the heart of a state's police power. See, e.g., *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388, 390 (1923) (recognizing "the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, and will prevent the spread of this dread disease"). The same is true here. The Court of Appeals properly ruled on this issue, and no further review is necessary.

As already noted – and as the Sixth Circuit recently confirmed in affirming dismissal of another takings challenge to Governor Whitmer's orders – "the overwhelming majority of caselaw indicates that [pandemic-era regulations limiting the use of individuals' commercial properties] are not takings." *Skatemore, Inc v Whitmer*, ___ F 4th ___; 2022 WL 2813531, at *8 (CA 6, July 19, 2022) (collecting cases from multiple jurisdictions). As another court aptly summarized:

> The Supreme Court has consistently stated that the Takings Clause does not require compensation when a government entity validly exercises its police powers. . . . Several circuit courts, including the Sixth Circuit, have also specifically held that actions the government performs pursuant to its police power, as compared to its power of eminent domain, cannot constitute a taking for "public use." . . . The Court finds that because the Closure Order was a legitimate exercise of Defendants' police powers, it was not a taking for "public use" and therefore the Takings Clause does not require compensation. [*TJM 64, Inc v Harris*, 526 F Supp 3d 331, 336 (WD Tenn, 2021).]

See also, e.g., *Bojicic v DeWine*, 569 F Supp 3d 669, 689–690 (ND Ohio 2021) (concluding COVID regulations impacting dance studios did not constitute a taking and recognizing "the basic fallacy in plaintiffs' attempt to treat a health-related order issued under the police power as a taking"); *Case v Ivey*, 542 F Supp 3d 1245, 1281–1283 (MD Ala, 2021) (no taking where Alabama used its police power to order temporary closure of owner's barbershop), affirmed by 2022 WL 2441578 (CA 5, July 5, 2022) (per curiam); *Underwood v City of Starkville*, 538 F Supp 3d 667, 678–681 (ND Miss, May 11, 2021) (city ordinance that mandated that fitness and exercise gyms to remain closed to the public did not subject the city to takings claim because the "doctrine of necessity" applied and it was "immune from liability"); *Alsop v Desantis*, 2020 WL 9071427, *3 (MD Fla, Nov 5, 2020) (Governor's executive

orders reasonably and temporarily exercised the police power to promote public health by prohibiting short-term vacation rentals and owners of vacation rental properties had no takings claims); Ex A, *Mt Clemens Rec Bowl v Hertel* (No. 21-000126-MZ), p 8 (" 'Takings' jurisprudence instructs that valid regulations promoting public health, safety and welfare are not compensable").[16]

The State Supreme Courts that have examined the issue have also dismissed such claims, independent from whether there was a "non-categorical taking" under *Penn Central*. See *State v Wilson*, 489 P 3d 925, 936–937 (NM 2021) ("Since there is no taking where this exception applies, the [public health orders], as reasonable use regulation to prevent injury to the public health, are insulated from further takings analysis. Thus, the Real Parties' arguments for *Penn Central* inquiries below cannot avail them at this

[16] For examples of recognition of this general principle in various other contexts, see, e.g., *United States v Droganes*, 728 F3d 580, 591 (CA 6, 2013) (explaining that "the government's seizure and retention of property under its police power does not constitute a 'public use' " and thus is not a compensable taking, and "[t]his rule does not admit of any exceptions") (cleaned up); *McCutchen v United States*, 145 Fed Cl 42, 51 (2019) ("[I]t is well established that there is no taking for 'public use' where the government acts pursuant to its police power, *i.e.*, where it criminalizes or otherwise outlaws the use or possession of property that presents a danger to the public health and safety."); *National Amusements Inc v Borough of Palmyra*, 716 F3d 57, 63 (CA 3, 2013) (categorically rejecting claim that a taking had occurred from government-mandated five-month closure of flea market in response to unexploded munitions discovered on the property because the abatement of the danger posed by the property was "an exercise of its police power that did not require just compensation"); *Hendler v United States*, 38 Fed Cl 611, 615 (1997) ("[B]ecause a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights.").

time") (cleaned up);[17] *Friends of Danny DeVito v Wolf*, 227 A3d 872, 895–896 (Pa, 2020) ("[t]he Executive Order results in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to "protect the lives, health, morals, comfort, and general welfare of the people[.]").

In addition, and consistent with this line of authority, numerous state and federal courts "have consistently rejected business owners' claims that COVID-related restrictions" – including those on fitness centers – "constitute either a per se taking or a partial taking under *Penn Central*." See, e.g., *MetroFlex Oceanside LLC v Newsom*, 532 F Supp 3d 976, 982 (SD Cal, April 5, 2021). Anchoring these regulatory-takings analyses is the same core legal proposition discussed above: "[c]ourts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking," *Blackburn v Dare Cty*, 486 F Supp 3d 988, 999 (ED NC, 2020), and "[a]ctions like those taken through these orders, which are undertaken to address a global pandemic, do not constitute a regulatory taking," *Our Wicked Lady LLC v Cuomo*, 2021 WL 915033, *6 (SD NY, March 9, 2021).[18]

---

[17] The New Mexico Supreme Court also reviewed under *Lucas,* concluding that "the public nuisance exception to the categorical rule in *Lucas* would apply." *Id.* at *14.

[18] See, e.g., *Best Supplement Guide, LLC v Newsom*, 2022 WL 2703404, at *1 (CA 9, July 12, 2022); *Nowlin v Pritzker*, 34 F 4th 629, 635 (CA 7, 2022) (businesses), citing *Sandy Point Dental, PC, v Cincinnati Ins Co*, 20 F 4th 327, 335 (7th Cir. 2021); *640 Tenth, LP v. Newsom*, 78 Cal App 5th 840, 859–865 (2022) (restaurants and gyms); *JWC Fitness, LLC v Murphy*, 469 NJ Super 414, 432–437 (2021) (gyms);

In this way, the decision of the Court of Appeals here was just a straight-forward application of the precedent of the U.S. Supreme Court and Michigan case law. The courts throughout the country have reached the same result, relying on the same basic universe of U.S. Supreme Court cases. No review here is necessary.

B. The Court of Appeals correctly held that there was no categorical taking as a matter of law.

As reflected in the fleet of decisions cited above, there is nothing remarkable about the decision here by the Court of Appeals in ruling that there was no categorical taking as a matter of law. It correctly ruled that the restrictions were "temporary," see slip op, p 17 ("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*"), and that any limitation in use was not total, *id.* ("The property clearly still had value, even if no revenue or profit was generated

---

[18] (Cont.) *Mission Fitness Ctr, LLC v Newsom*, 2021 WL 1856552, *9 (CD Cal, May 10, 2021) (gyms); *Amato v Elicker*, 534 F Supp 3d 196, 212–214 (D Conn, April 15, 2021) (restaurant); *Northland Baptist Church of St. Paul v Walz*, 530 F Supp 3d 790, 815–817 (D Minn, March 30, 2021) (church); *Flint v Co of Kauai*, 521 F Supp 3d 978, 993 (D Hawaii, Feb 18, 2021) (rental property owners) affirmed, *Glow In One Mini Golf, LLC v Walz*, 37 F 4th 1365, 1374–1375 (CA 8, 2022); *Daugherty Speedway, Inc v Freeland*, 520 F Supp 3d 1070, 1077 (ND Ind, Feb 17, 2021) (racetracks); *Peinhopf v Guerrero*, 2021 WL 2417150, *3–4 (D Guam, June 14, 2021) (businesses); *Oregon Rest & Lodging Ass'n v Brown*, 2020 WL 6905319, *7 (D Oregon, Nov 24, 2020) (food and drinking establishments); *AJE Enter LLC v Justice*, 2021 WL 4241018, *8 (ND WV, Jan 6, 2021) (bars and restaurants), vacated as moot by 2022 WL 1797322 (CA 4, June 2, 2022); *Bimber's Delwood, Inc v James*, 496 F Supp 3d 760, 784–785 (WD NY, 2020) (businesses); *Luke's Catering Serv, LLC v Cuomo*, 485 F Supp 3d 369, 386 (WD NY, 2020) (event and banquet centers); *Lebanon Valley Auto Racing Corp v Cuomo*, 478 F Supp 3d 389 (ND NY, 2020) (auto-racing); *Savage v Mills*, 478 F Supp 3d 16, 32 (D Me, 2020) (businesses); *PCG-SP Venture I LLC v Newsom*, 2020 WL 4344631, *10 (CD Cal, June 23, 2020) (hotel); *McCarthy v Cuomo*, 2020 WL 3286530, *5 (ED NY, June 18, 2020) (restaurant and bar).

during the closure.") This conclusion followed directly from U.S. Supreme Court precedent and precedent in Michigan.

The U.S. Supreme Court has rejected the argument that "a temporary deprivation—no matter how brief—of all economically viable use . . . trigger[s] a *per se* rule that a taking has occurred." *Tahoe-Sierra*, 535 US at 330–331 (holding that 32-month moratorium on development is best analyzed under a non-categorical framework under *Penn Central*). An interest in real property has two dimensions – physical and temporal – and both "must be considered." *Id.* at 331–332. A temporary restriction on use does not take the entire property: "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* See also *Cummins*, 283 Mich App at 717 (discussing *Tahoe-Sierra* favorably); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 536 n 17 (2005) (same).

There is no dispute that the limitations on Gym 24/7's use of its property were temporary in nature, i.e., the first executive order was dated March 10, 2020 and the substance of this order was rescinded, effective September 9, 2020, which allowed Gym 24/7's indoor facility and other indoor fitness facilities across Michigan to reopen for public access. (See COC Op and Order, Sept 24, 2020, p 2 ("these facilities were permitted to re-open, on or about September 8, 2020, at 11:59 p.m. See Executive Order No. 2020-176.")

The U.S. Supreme Court case law is clear that a categorical claim requires a total loss of value. See *Tahoe-Sierra*, 535 US at 330 ("the categorical rule would not apply if the diminution in value were 95% instead of 100%"; "Anything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central*."), quoting *Lucas*, 505 US at 1019–1020, n 8. This Court's holdings are in accord. See *Adams Outdoor Advert v City of E Lansing*, 463 Mich 17, 27 (2000) ("Because this provision does not deprive the lessors of 'all economically beneficial or productive use of land,' it would not effect a categorical taking of the lessors' interests."); *K & K Const*, 456 Mich at 587 ("While the commercial value of the land may have been reduced by the restrictions placed on it by the [Wetland Protection Act], it was not rendered worthless or economically idle.").

As noted by the Court of Appeals, see slip op, p 17 n 16, the restrictions at issue here, on their face, were not only temporary, but still permitted Gym 24/7 to engage in a variety of other, lower-risk avenues of commercial fitness-related activity, on its property or otherwise, such as: (1) outdoor fitness services, (2) remote fitness services (such as recorded or live online classes), (3) in-home fitness services (such as in-home personal training), and (4) the sale of products (via delivery, curbside pickup, or outdoor classes).

In short, as courts have uniformly recognized in evaluating this question as postured here in the COVID-19 context,[19] the Court of Appeals correctly ruled that there was no categorical regulatory taking as a matter of law.

C. The Court of Appeals correctly ruled that there was no non-categorical taking as a matter of law.

The Court of Appeals also ruled like other courts that there was no non-categorical taking as a matter of law. See slip op, p ("we hold as a matter of law that there was no regulatory taking under *Penn Central* analysis."). As noted, the

[19] See, e.g., *TJM 64*, 526 F Supp 3d at 337 (rejecting as legally insufficient restaurants' allegations "that the Closure Order took away all economically beneficial uses of their properties" given the plain terms of the order, which only limited the provision of "in-building services" while leaving "[o]ther business models" available); *Excel Fitness Fair Oaks,* 2021 WL 795670, *5 (ED Cal, 2021) ("Given that the Supreme Court [in *Tahoe-Sierra*] did not find a 32-month moratorium to constitute a regulatory taking, Plaintiffs' allegations of a few months of gym closures followed by reopening with COVID-19-safety-related restrictions are clearly insufficient to establish a regulatory taking.") (citations omitted); *Mission Fitness*, 2021 WL 1856552 at *9 ("Here, assuming plaintiffs have alleged a protected property interest, they have not alleged a complete loss of economic value. To the contrary, the Orders permit operating outdoors, among other things."); *Case*, 542 F Supp 3d at 1281–1282 (plaintiffs' "per se regulatory takings claim fails because the closure of their business did not permanently deprive their property of all value" given that the order at issue only required "a temporary closure of [their] business"); *Northland Baptist Church*, 530 F Supp 3d at 815 ("Here, some E.Os. temporarily, but entirely, foreclosed some Business Plaintiffs from utilizing their properties as intended. But *Tahoe-Sierra* indicates that such actions do not constitute a categorical taking."); *TJM 64, Inc v Harris*, 475 F Supp 3d 828, 838 (WD Tenn 2020) ("While it may not accord with Plaintiffs' pre-pandemic financial plans to operate their businesses in ways the Order allows, it does not follow that the Closure Order has necessarily stripped Plaintiffs' businesses of *all* their value."). See also the state cases reaching the same conclusion. *Wilson*, 489 P 3d at 941 (noting *Tahoe-Sierra* and "the temporary nature of COVID-19-related use restrictions" in rejecting takings claim); *Friends of Danny DeVito*, 227 A3d at 895–896 (same).

Penn Central framework comprises consideration of three factors: "[1] 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." 438 US at 124. While the Court found the first two factors "weighed in favor of the Gym," it found that the third factor was decisive, i.e., it "was compelling in that the aim of the EOs was to stop the spread of COVID-19." Slip op, p 17. This point dovetails with the U.S. Supreme Court's emphasis on this factor, in which the Court stated that "the nature of the State's action is critical in takings analysis." *Keystone Bituminous Coal*, 480 US at 488. As reflected in footnotes 18 and 19 above, the decision here aligns with that of other courts.

First, while not relied on by the Court of Appeals, the analysis of economic impact supports dismissal in this case. Gym 24/7 and gyms generally were not singled out from other public businesses. As the U.S. Supreme Court noted, where the government regulates property, "compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly ***singled out*** *the property owner* to bear a burden that should be borne by the public as a whole." *Yee v City of Escondido*, 503 US 519, 522–523 (1992) (emphasis added), citing *Penn Central*, 438 US at 123–125. Furthermore, Gym 24/7's allegations regarding economic impact were sparse and conclusory, and at odds with the plain

terms of the orders.[20] While the restrictions at issue may have had an economic impact on Gym 24/7, that supposition as alleged is inadequate to show this factor can be weighed in Gym 24/7's favor.[21]

Second, the consideration of any interference with investment-backed expectations also supports the ruling to dismiss. As with the first factor, Gym 24/7 alleged nothing in particular with respect to its investment-backed expectations, and the temporary and limited nature of the restrictions at issue belies any notion that Gym 24/7's investment-backed expectations for its property were unreasonably disrupted – particularly given the circumstances in which those restrictions arose. As a federal district court stated in rejecting the same basic claim against Governor Whitmer advanced by bowling and skating businesses, the entire country's

---

[20] Namely, Gym 24/7 alleged that the orders' restrictions "halted all economic activity for the Class Members" and that they "suffered substantial – and perhaps total – diminution of value in their property interests as a result" of it. (Complaint ¶¶ 17, 18.) But it alleged nothing beyond these bald assertions, nor did it attempt to reconcile them with the actual, plainly stated scope of the restrictions, which, as discussed, only limited, on a temporary basis, Gym 24/7's ability to engage in one form of commercial fitness-related activity. See, e.g., *Bojicic*, 569 F Supp 3d at 690–691 (deeming allegations of this sort insufficient to state a claim); *TJM 64*, 2021 WL 863202 at *4 (same); see also, e.g., *Varela v Spanski*, 329 Mich App 58, 79 (2019) ("A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action.").

[21] Also, it bears noting that Gym 24/7's complaint only challenges the Governor's executive orders, but Gym 24/7 cannot show such orders caused the alleged closures for which it claims relief. As noted above, throughout the time the Governor's orders were in place, the Director of MDHHS issued concurrent orders with identical restrictions under independent statutory authority in MCL 333.2253. Thus, even if Gym 24/7 had sufficiently alleged harm, it still could not show that the challenged actions by the Governor caused that harm. This is yet another reason that application does not present a question that warrants this Court's review.

reasonable expectations changed as a result of the pandemic, particularly for a business that posed the risk of "spreading a contagious and dangerous virus":

> On the other hand, it is less obvious that Defendants' regulations interfered with Plaintiffs' *investment-backed expectations*. Although Plaintiffs understandably expected to conduct business as usual when 2020 began, the pandemic forced everyone to adjust their expectations. *Plaintiffs cannot plausibly contend that they expected to continue operating normally when doing so posed an obvious risk of spreading a contagious and dangerous virus.* [*Skatemore, Inc v Whitmer*, 2021 WL 3930808, at *4 (WD Mich Sept 2, 2021) (emphasis added), affirmed, ___F 4th ___(CA 6, July 19, 2022).]

See also *Oregon Rest & Lodging Ass'n v Brown*, 2020 WL 6905319, at *6 (D Oregon, Nov 24, 2020) ("There is no reasonable, investment-backed expectation that the state would not act in the face of a historic public health crisis."); *Underwood*, 2021 WL 1894900 at *8 ("'A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need. The Plaintiffs fail to present any such expectation beyond their own unilateral conceptions about the speculative profits of their business when compared to pre-pandemic circumstances.").

Third, and most importantly, the Court of Appeals correctly ruled that the character of the government action required dismissal as a matter of law. This factor weighs "the character of the governmental action." *Penn Central*, 438 US at 124. See also *Tahoe-Sierra*, 535 US at 320 (highlighting "the importance of the public interest served by the regulation" as part of a non-categorical inquiry). As already noted, the Court of Appeals explained that executive orders at issue here were of the highest importance, which "was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders." Slip op, p 18. This lies at the heart of the State's traditional police power to protect the public health.

For that reason, "[u]nsurprisingly, courts across the country agree that the final *Penn Central* factor, the character of the disputed government action during the COVID-19 pandemic, weighs heavily in Defendants' favor." *Daugherty Speedway, Inc,* 2021 WL 633106 at *5 (collecting cases). See n 19 above (citing *Penn Central* cases). Michigan courts recognize this same point. See, e.g., *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 147 (2014) ("[A] regulatory taking will not be found where a state tribunal reasonably concludes that the land-use limitation promotes the general welfare, even if it destroys or adversely affects recognized real property interests.") (cleaned up).

The Court of Appeals correctly ruled, and it relied on well-established principles of takings law both from the U.S. Supreme Court's jurisprudence and from this Court. This Court should deny leave.

D. The arguments from Gym 24/7 asking for this Court's review are unavailing.

In its application, Gym 24/7 re-presents basically the same arguments that were rejected by the Court of Appeals and generally do not require an additional response. But there are a couple of points that merit further comment.

Gym 24/7 concedes that it is only advancing regulatory takings claims, as both a categorical and non-categorical matter. See Gym 24/7 App, pp 8–9. Consistent with this concession, Gym 24/7 acknowledges that "[a]gents of the government did not enter onto and physically seize The Gym's property." *Id.* at 15. Thus, its effort to shoehorn this claim into that category of physical-taking cases is mistaken. The Supreme Court explained in *Cedar Point Nursery* that a regulation

that "appropriates a right to invade the growers' property . . . constitutes a per se physical taking." *Cedar Point Nursery v Hassid,* 141 S Ct 2063, 2072 (2021). But it was a "physical taking" case, one in which the government granted the "right to physically enter and occupy" the property. 141 S Ct at 2072. The Court of Appeals distinguished the case, noting that "[b]ecause *Cedar Point Nursery* addressed an alleged physical taking, it has no relevance to the instant case." Slip op, p 19.

The same analysis explains why Gym 24/7's self-described "best example" to support its claim, *Loretto v Teleprompter Manhattan CATV Corp,* 458 US 419 (1982), see Gym 24/7 App, p 12, only confirms why the Court of Appeals was right to order the case's dismissal. The question there was "whether a minor but permanent *physical occupation of an owner's property* authorized by government constitutes a 'taking.' " 458 US at 421 (emphasis added). There was no physical invasion here.

The same error pervades its effort to rely on one case that did not dismiss a takings challenge related to the pandemic. See Gym 24/7 App, p 16, citing *Heights Apartments, LLC v Walz*, 30 F 4th 720 (CA 8, 2022). But *Heights Apartments* was addressing a circumstance that is not at issue here, the "right to exclude" a person from one's property. See *id.* 728 ("The right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property"), citing *Cedar Point Nursery,* 141 S Ct at 2072. The claim there was one of physical invasion, i.e., the State "forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation." 30 F 4th at 733. As in *Cedar Point Nursery,* that is not at issue here as the Court of Appeals ruled.

This Court's decision in *Peterman v State Department of Natural Resources*, 446 Mich 177 (1994), see Gym 24/7's App, pp 18–19, is also of no help to Gym 24/7 here. If anything, the case only highlights the deficiencies of Gym 24/7's claims. In *Peterman*, the plaintiffs' private property was singularly affected – and indeed, physically destroyed – by the government's construction of a boat launch and jetties that "served no public purpose." *Peterman,* 446 Mich at 191, 202 ("[N]o essential nexus existed between the construction of the boat launch and the utter destruction of plaintiffs' beach."). As warned by the Petermans, these jetties established by the Department of Natural Resources had "the effect" of "bulldozing the [Peterman's lakefront] property into the bay." *Id.* at 191. By contrast, the pandemic orders at issue here applied broadly, imposed on Gym 24/7 (and others) only a temporary limitation on one commercial use of its property, and admittedly served a legitimate public purpose.

Finally, Gym 24/7 attempts to save its case from dismissal by claiming it is entitled to discovery. Not so. For the many reasons detailed above, Gym 24/7 has failed to allege a cognizable takings claim. This conclusion inexorably follows from settled legal principles and the plain terms of the regulation at issue; further factual development here would not and could not change it. As the Court of Appeals correctly recognized, Gym 24/7's allegations fail as a matter of law, and the courts to rule on such takings claims against state response to the pandemic have ruled just as here. There is no need for further guidance from this Court. It should deny leave.

II. Gym 24/7's inverse condemnation claim fails as a matter of law.

Gym 24/7 barely briefs its inverse condemnation claim, even omitting a question presented for that claim. Its barebones citation of a couple of cases, without accompanying argument, constitutes abandonment. See *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959). Its abandonment is unsurprising, though, because the law of inverse condemnation makes clear that Gym 24/7's claim fails as a matter of law, and at several levels. To start, the claim fails at the threshold for the same reason the regulatory-takings claim does: the State's exercise of police power here to protect public health and safety does not, as a matter of law, give rise to a constitutional entitlement to compensation. Furthermore, Gym 24/7's decision to not challenge the Governor's "prudence" or the "legitimate public purpose" of the regulations is fatal, as an inverse condemnation claim requires a showing that the "government abused its powers." See *Mays v Governor*, 506 Mich 157, 174 (2020). Moreover, Gym 24/7 fails to show that it suffered a unique harm that is distinct from those similarly situated. This Court should deny leave.

A. An inverse condemnation action requires a showing of abusive government action causing the owner a unique injury.

An inverse condemnation will not lie unless the plaintiff proves "(1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Mays*, 506 Mich at 174 (citation omitted).

Additionally, an inverse condemnation action must include an allegation of "a unique or special injury, that is, an injury that is different in kind, not simply in

degree, from the harm suffered by all persons similarly situated." *Id.* at 174 (quotation marks omitted). For this "unique or special injury" inquiry, a court compares "the plaintiffs to a generalized group of individuals who experience a similar but not identical harm." *Id.* at 177. If Gym 24/7 alleges a "common burden" shared by that group, then it is not redressable in court. *Id.* See also *Spiek v Michigan Dept of Transp*, 456 Mich 331, 349 (1998) ("[w]here harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby," not the judiciary).

B. Gym 24/7 concedes that the State did not abuse its power.

On this point, Gym 24/7 does not contest the Governor's "authority," her "prudence," or the "legitimate public purpose" of the regulations challenged here. (Compl, ¶¶ 14–16, 30.) Gym 24/7's concessions are sufficient to warrant dismissal, because they confirm its failure to show that the government "abused its powers" in its actions, a necessary element of the claim. *Mays*, 506 Mich at 174.[22]

[22] Furthermore, as noted above, the Governor's actions did not cause the alleged harm because, even without them, the unchallenged DHHS epidemic orders had the same restrictions. As part of its inverse condemnation claim, Gym 24/7 must prove that "the government's actions were a substantial cause of the decline of the property's value." *Mays*, 506 Mich at 174. But if the Governor's orders were not enforced, DHHS's orders would persist. Even if Gym 24/7 had alleged an abuse of power in the issuance of the Governor's orders, that allegation would be insufficient.

C. Gym 24/7 alleges only facts and harms common to those similarly situated.

Even if Gym 24/7 had challenged the propriety of the government's actions, an inverse condemnation claim typically concerns the singling out of persons for a "unique or special injury" that is "different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Spiek*, 456 Mich at 348. The *Spiek* plaintiff brought an inverse condemnation claim against the Department of Transportation after construction of I-696 and its service drive, which abutted the plaintiff's property, rendering the property undesirable due to increased noise and pollution. *Id.* at 334–335. Since the plaintiff did not allege a harm that "differs in kind from the harm suffered by all living in proximity to a public highway in Michigan," this Court rejected the case on the pleadings. *Id.* at 350.

The question becomes what is the proper comparator for determining whether Gym 24/7 suffered a unique and uncommon burden? Just as *Mays* determined that similarly situated municipal water users constituted the correct comparator for those allegedly injured in the Flint water crisis, similarly situated fitness centers should be the focus of this Court's evaluation whether Gym 24/7 has suffered "a unique and uncommon burden." *Mays*, 506 Mich at 178. Any broader comparator (all service industry businesses? all private businesses in the state?) would nullify the purpose of finding a "similarly situated" group.

Whatever the scope of the "similarly situated" group, Gym 24/7 cannot show that it was affected in a unique way, as two points confirm.

First, if the proper scope of those "similarly situated" is limited to fitness centers and the like, Gym 24/7's complaint fails to identify a unique injury. That is highlighted by the fact that it has filed a class action complaint, which is by its essence ill-fitted to an inverse condemnation claim. According to Gym 24/7's own complaint, the class of affected businesses all *suffered similar injuries*. (See Compl, ¶¶ 20, 21, 23, 25, 30.)

Class actions and inverse condemnation claims are like oil and water. One virtue of class actions is the similarity of the claims and harms at issue, while the linchpin of an inverse condemnation claim is that the harm is a "unique and uncommon" one. *Mays*, 506 Mich at 178. The complaint alleges not only that the questions of fact and law raised by the named plaintiffs "are *common to, and typical of*, those raised by the Class it seeks to represent," (Compl, ¶¶ 23–24 (emphasis added)), but that "[t]he takings (and resulting harms) alleged by the named Plaintiff *is typical of the* legal violations and *harms suffered by all class members*," (Compl, ¶ 25 (emphasis added)). See MCR 3.501(A)(1)(b), (c). These allegations doom Gym 24/7's inverse condemnation claim because they effectively nullify a required showing: that their injury is a unique and uncommon one when compared to those similarly situated.

Second, not only were Gym 24/7 and other fitness centers treated alike by the Governor's executive orders, but as summarized above, myriad other sectors of business were subject to the same type of regulation to mitigate the spread of

COVID-19.[23] And while some businesses may claim greater hardship than others, any such alleged distinctions would be matters of "degree," not "kind," and thus legally insufficient to state a claim. See *Mays*, 506 Mich at 174. In sum, the question is "whether the harm the plaintiff suffers is part of the 'common burden' shared among all, which, if not imposed, would halt a socially necessary activity." *Id.* at 177. That answer is "yes."

[23] See ns 4–14 and accompanying text, above.

CONCLUSION AND RELIEF REQUESTED

This pandemic, and the measures taken to protect Michigan's residents (particularly the most vulnerable among us), have affected every person and business. Gym 24/7 seeks compensation for bearing the burden of common citizenship in the face of a public health threat unprecedented in our nation's history. While Gym 24/7 can point to circumstances that evoke sympathy, it cannot establish claims for a taking or inverse condemnation as a matter of law, as the Court of Appeals ruled consistent with the other courts faced with this same question. This Court should deny leave to appeal.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher Allen (P75329)
Assistant Solicitor General

Darrin F. Fowler (P53464)
Assistant Attorney General

Attorneys for the State
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

Dated: July 25, 2022