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STATE OF MICHIGAN
IN THE SUPREME COURT

THE GYM 24/7 FITNESS, LLC,
and all those similarly 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.: ________
Court of Appeals Case No.: 355148
Court of Claims Case No.: 20-132-MM

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APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION vii

STATEMENT OF QUESTION PRESENTED viii

INTRODUCTION 1

FACTS 1

STANDARD OF REVIEW 5

ARGUMENT 6

I. About Takings Generally 6

II. The State Confuses the Meaning of "Police Power" 9

III. The Verified Complaint 12

A. What Should Have Happened? 13

IV. Plaintiff pled three takings-based claims. 15

A. Categorical Taking 15

B. Deprived of All Economically Beneficial Use 17

C. *Penn Central* 19

D. A *Peterman* Takings Claim 25

V. The State had other regulatory options 26

CONCLUSION 28

RELIEF REQUESTED 29

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RECEIVED by MSC 6/27/2022 2:33:34 PM

TABLE OF AUTHORITIES

CASES

Almota Farmers Elevator & Whse Co v United States,
409 US 470 (1973) 7

Am Pelagic Fishing Co, LP v United States,
379 F3d 1363 (CA Fed, 2004) 21

Arkansas Game & Fish Comm'n v United States,
568 US 23 (2012) 20

Armstrong v United States,
364 US 40 (1960) 10, 19, 21

Baker v City of McKinney,
2022 U.S. Dist LEXIS 102950 (ED Tex, 2022) 11

Cedar Point Nursery v Hassid,
141 S Ct 2063 (2021) 4, 8, 17, 21

Dextrom v Wexford Cnty,
287 Mich App 406;789 NW2d 211 (2010) 5

First English Evangelical Lutheran Church of Glendale v County of LA,
482 US 304 (1987) 7

Fountain v Metro Atlanta Rapid Transit Auth'y,
678 F2d 1038 (CA 11, 1982) 12

French Inv Co v City of NY,
39 NY2d 587 (1976) 10

Grand Trunk W R Co v Detroit,
326 Mich 387; 40 NW2d 195 (1949) 18

Hart v City of Detroit,
416 Mich 488; 331 NW2d 438 (1982) 7

Hendler v US,
952 F2d 1364 (CA Fed 1991) 23

Hts Apts, LLC v Walz,
30 F4th 720 (CA 8, 2022) 15, 16, 25

In re Acquisition of Land,
121 Mich App 153; 328 NW2d 602 (1982) 13, 14

In re Certified Questions from the United States Dist Court, Western Dist of Mich, Southern Div,
506 Mich 332; 958 NW2d (2020) 2

K&K Constr Inc v Dep't of Natural Resources,
456 Mich 570; 575 NW2d 531 (1998) 14

Kimball Laundry Co v United States,
338 US 1 (1949) 13

Knick v Twp of Scott,
139 S Ct 2162 (2019) 4, 6

Lemon Bay Cove LLC v United States,
147 Fed Cl 528 (2020) 20

LIFFT, Inc v Whitmer,
843 Fed App'x 707 (CA 6, 2021) 10

Lingle v Chevron USA Inc,
544 US 528 (2005) 9, 19, 20, 22

Loretto v Teleprompter Manhattan CATV Corp,
458 US 419 (1982) 8, 11, 12

Lucas v South Carolina Coastal Council,
505 US 1003 (1992) .... *in passim*

Mugler v Kansas,
123 US 623 (1887) 11

Murr v Wisconsin,
137 S Ct 1933 (2001) 9, 19

Palazzolo v Rhode Island,
533 US 606 (2001) 23

Penn Central Transportation Co v City of New York,
438 US 104 (1978) .... *in passim*

Pennsylvania Coal Co v Mahon,
260 US 393 (1922) 6, 8, 11, 16, 18

Peterman v Dep't of Natural Resources,
446 Mich 177; 521 NW2d 499 (1994) .... *in passim*

Prater v City of Burnside, Ky,
289 F3d 417 (CA 6, 2002) 7

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Richards v Washington Terminal Co,
233 US 546 (1914) 25

Rory v Continental Ins Co,
473 Mich 457; 703 NW2d 23 (2005) 5

Spanich v Livonia,
355 Mich 252; 94 NW2d 62 (1959) 18

Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency,
535 US 302 (2002) 20

Tamulion v State Waterway Comm'n,
50 Mich App 60; 212 NW2d 828 (1973) 7, 8

Thom v State Highway Comm'ner,
376 Mich 608; 138 NW2d 322 (1965) 7

Tolksdorf v Griffith,
464 Mich 1; 626 NW2d 163 (2001) 5

Troy Campus v City of Troy,
132 Mich App 441; 349 NW2d 177 (1984) 6

United States v General Motors Corp,
323 US 373 (1945) 14

US v Dow,
357 US 17 (1958) 21

US v Pewee Coal Co,
341 US 114 (1951) .... *vii*, 11, 26

Wayne Cnty v Hathcock,
471 Mich 445; 684 NW2d 765 (2004) 8

Yee v City of Escondido,
503 US 519 (1992) 1

STATUTES

MCL 10.31 2

MCL 30.401 2

MCL 213.1 13

COURT RULES

MCR 2.116 4

MCR 7.303 .... *vii*, 5

MCR 7.305 .... *vii*, 5, 29

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider the erroneous decision of the Michigan Court of Appeals as well as to grant leave or take other action pursuant to MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(H). A copy of the Court of Appeals decision is attached at **Appendix #95-113**. The *Application* is timely filed within 42 days of the denial of a timely motion for reconsideration. See **Appendix #114**.

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STATEMENT OF QUESTION PRESENTED

QUESTION: "Any injury to property [] which deprives the owner of the ordinary use of its equivalent is a taking, and entitles him to compensation," *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994), and "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).

Did the Court of Appeals commit reversible error in finding that the putative class failed to plead any plausible takings claim or theory in the Verified Complaint when seeking just compensation for the temporary but total possession of gym and fitness center business enterprises for sixth months in 2020?

The Gym 24/7 Fitness LLC says: Yes

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INTRODUCTION

The Takings Clause protections of the federal and Michigan Constitutions mandate an important principle—the government must pay for what it takes. Here, the government took much from Michigan's gyms and fitness centers despite none having ever been found to carry COVID-19 or had patrons actually infected with COVID-19. Instead, the government preemptively ended the business operations of countless gyms to combat a common enemy—which is unquestionably a public purpose. When the government wants or needs private property for a public purpose, it can—undisputedly—take it by either occupation or regulation. See *Yee v City of Escondido*, 503 US 519, 522-523 (1992). However, it must also *pay* for it in an amount equal to "just compensation." US Const. amend V; Const 1963, art X, § 2.

Here, the putative class members sought that just compensation. The Court of Claims refused to dismiss the State's pre-answer and pre-discovery motion for dismissal which only presented "after-the-fact internet materials." Incorrectly, the Court of Appeals reversed holding that there was no possible taking as a matter of law. This Court should grant this *Application*, reverse the Court of Appeals, and direct the State of Michigan to file an answer to the Verified Complaint. There is an insufficient court record for dismissal and more than enough has been pled to get past the pleading stage to begin discovery into this takings case.

FACTS

Plaintiff The Gym 24/7 Fitness, LLC is a 24-hour access health & fitness business formed and operating as a limited liability company located in Alma (Gratiot County), Michigan. **Appendix #3 (¶14).** On March 10, 2020, Michigan Governor Gretchen Whitmer

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declared a state of emergency under the *Emergency Management Act*, 1976 PA 390, as amended, MCL 30.401 et seq, and the *Emergency Powers of the Governor Act of 1945,* 1945 PA 302, as amended, MCL 10.31 et seq, in response to the then-forthcoming COVID-19 health concern in the State of Michigan. **Appendix #2 (¶7).** Since this initial declaration, Michigan's Chief Executive issued a number of executive orders in response to COVID-19 dramatically affecting businesses, individuals, and citizens. **Appendix #2 (¶8).** She issued a series of Executive Orders, starting on March 10, 2020, for the public purpose of protecting Michigan's public health, safety and welfare. **Appendix #2 (¶9).** Throughout these Executive Orders, there has been one constant for the continuous ordered "shut down" of gyms and fitness centers—the public purpose was to stop or minimize the spread of COVID-19. **Appendix #2 (¶10).** Michigan uniquely shifted the burden and cost of these Executive Orders—issued for the benefit of the public—squarely upon the shoulders of these private businesses[1] and the State has failed to justly compensate for these takings undertaken solely for the benefit to the general public. **Appendix #2 (¶11).**

Importantly, this suit does not seek to contest whether Governor Whitmer's decision to issue the Executive Orders—that fully closed and kept closed gyms and fitness centers on a long-term basis—were prudent or within the scope of statutory grants of authority.[2] **Appendix #3 (¶15).** Instead, this suit fully accepts—as fact—that the State took the action it did against the gyms and fitness centers solely for a public purpose.

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[1] Many gyms and fitness centers are facing economic collapse as a direct result of the actions taken in response to the novel coronavirus ("COVID-19") health response**. Appendix #3 (¶12).**

[2] Since this case started, this Court held that the Governor's actions after April 30, 2020 were outside her authority. *In re Certified Questions from the United States Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332; 958 NW2d 1 (2020).

Appendix #3 (¶15). However, when the government takes property for a public purpose, the US and Michigan Constitutions require the payment of just compensation. **Appendix #3 (¶16).** With a conceded legitimate public purpose, the Governor's Executive Orders halted all economic activity for the putative Class Members and made it impracticable to benefit from the property interests belonging to the Class Members for any economically beneficial purpose, and inflicted very nearly the same effect for constitutional purposes as appropriating or destroying the property as a whole. **Appendix #3 (¶17).** Despite issuing the Executive Orders terminating the business operations of gyms and fitness centers for a readily-apparent public purpose, the State did not provide compensation to the putative Class Members who suffered substantial – and perhaps total – diminution of value in their property interests as a result. **Appendix #3 (¶18).**

On April 14, 2020, The Gym filed a notice of intent and later filed a class action suit on July 8, 2020—while all gyms and fitness centers were shuttered completely. The putative class pled inverse condemnation, a direct taking under Article X, Section 2 of the Michigan Constitution, and a direct action under the Fifth Amendment. **Appendix #4-5 (¶¶29-41).** The State immediately moved for summary disposition in lieu of an answer without attaching any evidence (other than courtesy copies of other decisions) to its motion. **Appendix #8-42**. No affidavits were filed in support. Then, unexpectedly, the Governor lifted the closures and permitted gyms and fitness centers to reopen on September 8, 2020. **Appendix #87.** In total, this resulted in gyms and fitness centers being closed for approximately half a year. However, critically, the fact the regulation only turned out to be temporary does not excuse the required takings obligation—

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temporariness “bears only on the amount of compensation” required. *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2074 (2021).[3]

The Gym opposed the State’s pre-answer motion and submitted the Oslo Study (more on that herein). It also included a Rule 2.116(H) affidavit averring there has not been an opportunity to conduct fact discovery to fully analyze the *Penn Central* factors or other material factual issues presented in this matter. **Appendix #84-85.** On September 24, 2020, the Court of Claims correctly denied the State’s motion. **Appendix #93** The Court of Claims did not find that the State lost the case—it only denied the requested immediate dismissal (without prejudice) at the pre-discovery stage. In reviewing the government’s “after-the-fact internet materials,” the trial court concluded such did “not satisfy defendant’s burden as the moving party on a motion for summary disposition under MCR 2.116(C)(10)” when made at the pre-discovery, pre-answer stage. **Appendix #92.** The State immediately took an interlocutory appeal and the Court of Claims stayed the case (**Appendix #94**), where it has remained frozen for years.

In a surprise move, the Court of Appeals reversed and remanded “for entry of judgment in favor of the State.” See **Appendix #95-113**. The panel opined that “the primary question presented… is whether the business owner of private property is entitled to just compensation under either the state or federal Takings Clause when the government properly exercises its police power to protect the health, safety, and welfare of its citizens during a pandemic by temporarily closing the owner's business operations.” **Appendix #103.** With due respect and as will be argued herein, that is the wrong question

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[3] Moreover, “[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.” *Knick v Twp of Scott*, 139 S Ct 2162, 2170 (2019).

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at the case's current posture. The question should have been whether enough has been pled given that summary disposition is premature and without sufficient factual development. As a general rule, courts will not decide motions for summary disposition before the end of discovery on a disputed issue unless there is no reasonable chance that discovery will uncover factual support for the nonmoving party's position. E.g. *Dextrom v Wexford Cnty*, 287 Mich App 406, 431; 789 NW2d 211 (2010). Without any developed record, the Court of Appeals "reject[ed] the Gym's claim" (sic)—despite there actually being several made claims—"that its property was taken absent just compensation in violation of the Taking Clauses of the state and federal constitutions" and concluded that 1.) this case does not "involve a physical taking of" the Gym's "property;" 2.) "as a matter of law...[,] the Gym was not deprived of all economically productive or beneficial use of its property as a result of the Governor's EOs" and 3.) "as a matter of law...[,] there was no regulatory taking under *Penn Central* analysis." **Appendix #109, 111.** The putative class asserts these conclusions were in error and deprived them the opportunity to seek (and ultimately receive) the "just compensation" both our state and federal Constitutions mandate. The Court should grant this *Application* and correct the Court of Appeals' errors.

STANDARD OF REVIEW

This Court has discretion on whether to grant leave on this *Application* or take other action on the same. MCR 7.303(B)(1); MCR 7.305(H)(1). Questions of constitutional law and grants of summary disposition are both reviewed by this Court de novo. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

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ARGUMENT

This case, at least initially, should be understood easily. A valid public purpose has been fully acknowledged via the pleadings. This lawsuit acknowledges, for the purpose of this suit, that the State has and had a valid health, safety, and general welfare purpose for the taking of the gyms and fitness centers' business to combat this COVID-19 emergency. The legal wrong is not the regulation or executive order which _takes_ property; the wrong is simply _not first paying_ just compensation for a taking. See *Knick v Twp of Scott*, 139 S Ct 2162 (2019). Even if a government action or law advances the public welfare, it is still unlawful when it amounts to a condemnation of property for a public purpose *without compensation*. *Troy Campus v City of Troy*, 132 Mich App 441, 451; 349 NW2d 177 (1984). And in the regulatory context, a regulation that "goes too far" is also a taking. *Pennsylvania Coal Co v Mahon*, 260 US 393, 41 (1922) ("[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

The Gym has pled inverse condemnation, a direct taking under Article X, Section 2 of the Michigan Constitution, and a direct action under the Fifth Amendment. The case should not have been dismissed.

I. About Takings Generally

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. 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. These Takings provisions

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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 County of LA*, 482 US 304, 315 (1987). "A taking of private property for a public use without the commencement of condemnation proceedings is known as an inverse condemnation." *Tamulion v State Waterway Comm'n*, 50 Mich App 60, 66; 212 NW2d 828 (1973).

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, Ky*, 289 F3d 417, 425 (CA 6, 2002). "'Taking' is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property." *Hart v City of Detroit*, 416 Mich 488, 500; 331 NW2d 438 (1982). 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 (including COVID), the Constitution "require[s] compensation." *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992).

The failure to pay "just compensation" is generally what violates the Takings provisions of our constitutions. "Just compensation" means the full monetary equivalent of the property taken. *Almota Farmers Elevator & Whse Co v United States*, 409 US 470, 473 (1973). The owner of taken property is to be put in the same position monetarily as it would have occupied if his property had not been taken. *Id.* at 473-474. A victim of such a taking, i.e. an inverse condemnation, is entitled under <u>*both*</u> the Michigan and United

States Constitutions to just compensation for the value of the property taken. *Tamulion*, 50 Mich App at 66.

In the traditional circumstance, the federal and state takings clauses provide just compensation for "direct appropriations" of property. *Lucas*, 505 US at 1014. But the constitutional provisions protect from far more than simple physical invasion. Following *Mahon* in 1922, a violation of the takings clause is also found for what has become known as a "regulatory taking," i.e. "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 US at 41.

There are two (2) top-level categories in Takings analysis (given the unchallenged legitimate interest being advanced by the taking by the State[4]). First, there is a "direct appropriation" taking. The classic example is a government physically seizing land to build a new road. Plaintiff is not making this type of claim. The second top-level category is a "regulatory taking." Under this second type, there are three (3) subtypes of regulatory takings. The first is a regulation that causes someone to suffer a permanent physical invasion of his or her property. *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 (1982) (state regulation requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking); *Cedar Point Nursery*, 141 S Ct at 2074. The second subtype consists of regulations that completely deprive an owner of "all economically beneficial use" of her property. *Lucas*, 505 US at 1019 (when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered

[4] If a government takes property without a valid public purpose, it is also a taking. See *Wayne Cnty v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). That is not this case.

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a taking.). The third is a middle-of-the-road *Penn Central* regulatory taking. The *Penn Central* test serves as the principal guidepost for resolving regulatory takings claims that do not fall within the prior two subtypes. *Lingle v Chevron USA Inc*, 544 US 528, 539 (2005). The *Penn Central* "balancing" test is an "ad hoc factual inquiry" focusing on (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 case asserts the latter two sub-theories of regulatory takings.[5]

II. The State Confuses the Meaning of "Police Power"

Before analyzing the various takings theories, the State's primary defensive theme is premised on its alleged "police powers." State governments undoubtedly have broad general authority—known generically as its "police power"—to take actions that protect the public health, welfare, and safety. Unquestionably, seizing private property from private citizens for a public purpose is one type of exercise of that police power. However, and critical to this case, the state and federal Constitutions place a constitutional 'condition' on the government's exercise of this particular type of police power (i.e. taking private property for the common good). If the State is pressing private property into public service, it must pay just compensation to the former private owner. US Const. amend V; Const 1963, art X, § 2. In a takings lawsuit, the wrong is not the actual taking of the private

[5] This takings case argues first that the executive orders were, in effect, the State assuming control and possession of each fitness center and locking the doors—the deprivation of "all economically beneficial use" for the benefit of the public. Secondly, the Executive Orders were a regulatory taking which went "too far" under the *Penn Central* test. Under either theory, it is undisputed that the Government could take the businesses and their operations; the issue instead is the failure to pay or secure just compensation from those takings.

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property, this is allowed; it is the failure to pay just compensation. The just compensation obligation is designed to remedy an insidious harm reigned upon property owners by those elected to public positions who wield public power provided by the electorate's majority—

> The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially.
>
> Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed.
>
> In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

French Inv Co v City of NY, 39 NY2d 587, 596-597 (1976). Takings obligations prevent the real harm of "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).

Where the State gets quickly confused is whether a challenged action is something the government *may* do—i.e. an exercise of the police power for the health, safety, and welfare of the public—with that it must *pay for* when done. Of course it can take action to deal with public harms. See *LIFFT, Inc v Whitmer*, 843 Fed App'x 707 (CA 6, 2021). Protecting public health is a valid exercise of police power and the government can seize private property in furtherance of that interest. However, the proper separate question under the takings provisions is whether the "magnitude or character of the burden" of the

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exercise of such police powers against private property of a particular property owner "goes too far," *Mahon*, 260 US at 415, and therefore requires payment in the form of just compensation. The State has been surprised to learn that all takings (for public purposes) are rightful and proper exercises of police power; it is just that the exercise of a taking of private property under the police power (i.e. taking private property for a public purpose) constitutionally requires just compensation. E.g. *Baker v City of McKinney*, 2022 U.S. Dist. LEXIS 102950 (ED Tex, 2022) (rejecting that "destruction to private property resulting from the exercise of valid police power cannot constitute a Fifth Amendment taking under any circumstance"); *Loretto,* 458 US at 425-426. The US Supreme Court has already confirmed the method of calculation in these circumstances—"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).

In its confusion, the State incorrectly argues that when it took access and control over the fitness centers' business enterprise it "really" was not "taking" it but instead only exercising "police power." The confusion is somewhat understandable because the difference between the two is subtle—

> The exercise of the police power by destruction of property which itself is a public nuisance or the prohibition of its use in a particular way, whereby its value be depreciated, is very different from taking property without due process of law. In the one case, the nuisance is only abated; in the other, unoffending property is taken from an innocent owner.

Mugler v Kansas, 123 US 623, 669 (1887). The gyms and fitness owners' businesses were "unoffending," meaning they were not nuisances like a brothel or a drug house. After all, "a taking occurs whenever a public entity substantially deprives a private party of the

beneficial use of his property for a public purpose." *Fountain v Metro Atlanta Rapid Transit Auth'y*, 678 F2d 1038, 1043 (CA 11, 1982).

Key takings jurisprudence bears that out. The best example comes from *Loretto*. There, New York law required certain property owners to permit the installation and maintenance of cable wires on a landlord's private property. 458 US at 419. The Supreme Court, in reviewing the case, confirmed it was "within the State's police power" to require the installation over objections. *Id.* at 425. However, in the exercise of that police power, New York effectuated a taking and just compensation was the constitutional obligation required as a consequence of exercising that particular type of police power. As such, the State simply slapping the "police powers" label on a set of circumstances does not excuse it from the just compensation obligation when a taking has occurred. So the question is not whether the action is within the State's police powers, but if the exercise of that police power caused an uncompensated taking in violation of the federal and Michigan Constitutions.

III. The Verified Complaint

As the case kick-off document, the Verified Complaint made allegations which, when established via discovery, would require and result in a constitutional obligation to pay just compensation. The Verified Complaint is pled in three counts—inverse condemnation, a direct taking under Article X, Section 2 of the Michigan Constitution, and a direct action under the Fifth Amendment. For each theory, the Gym expressly alleged that—

> Under the public purpose of preventing the spread of COVID-19, Defendant STATE OF MICHIGAN have taken Plaintiff's and the class members' constitutionally-protected property interests in the form of the on-going operations of their business as gymnasiums, fitness centers, recreation centers, sports

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facilities, exercise facilities, exercise studios, and like-kind businesses (in whatever legal form) and the resulting revenues and profits therefrom, and have appropriated or "took" said property interests for public use without the payment of just compensation and have failed to commence appropriate condemnation proceedings.

Appendix #4-5 (¶¶30, 34, 40). How did that occur? The State, in the form the Governor's Executive Orders, "halted all economic activity for the Class Members and made it impracticable to benefit from the property interests belonging to the Class Members for any economically beneficial purpose, and inflicted very nearly the same effect for constitutional purposes as appropriating or destroying the property as a whole." **Appendix #3 (¶17).** This is more than enough to require an answer to be filed by the State and commence discovery. But, says the State, it was responding to the COVID emergency and it auto-excuses the government from paying just compensation. Such thinking is in error.

A. What Should Have Happened?

The Court may be now asking itself, what should have happened when the State needed to seize and halt the gyms and fitness centers' business operations for months on end in response to COVID-19? When the State needs to seize control of a business enterprise for a public purpose, it is supposed to immediately commence eminent domain proceedings. Michigan has such a law in place and ready for immediate application. MCL 213.1. When exercising its power of eminent domain, the State must pay the owner just compensation. *In re Acquisition of Land*, 121 Mich App 153, 158; 328 NW2d 602 (1982).

Examples can help confirm the same. The federal government needed to seize control of the business assets and operations of a laundry business for use in a war effort. *Kimball Laundry Co v United States*, 338 US 1 (1949). To seize that business' operations,

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the government correctly filed an action to "condemn"—a term of art—the plant and allow the government to take over thereafter running the plant in furtherance of its public purpose. All that remained was a determination as what constituted just compensation during the taking period.

In *General Motors*, the Second War Powers Act authorized the government to seize any real property, temporary use thereof, or other interest therein which shall be deemed necessary for the public purpose of military or other war purposes. The car manufacturer had a warehouse lease. The government needed to take it over for the war effort. And we must not forget, the Fifth Amendment "is addressed to every sort of interest the citizen may possess." *United States v General Motors Corp*, 323 US 373, 378 (1945). Like this case, "governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of <u>*all or most*</u> of his interest in the subject matter, to amount to a taking." *Id.* (emphasis added). The government was required to pay.

Michigan has developed its own state-law processes to correct takings undertaken without prior payment of just compensation. A claim of inverse condemnation is a recognized cause of action, often labelled as a "constitutional tort," against a governmental defendant to recover the value of property which has been taken by the governmental defendant when no formal exercise of the power of eminent domain had been commenced. *Acquisition of Land*, 121 Mich App at 158-159. This Court has equally recognized that a valid inverse condemnation claim exists under a second theory when a government effectively takes property by overburdening it with regulations. *K&K Constr Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998).

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IV. Plaintiff pled three takings-based claims.

This case correctly asserts various theories across the three takings-styled claims. The most commonly understood takings is a physical appropriation case, i.e. where the government's agents come to the property and physically seize it. The best example is taking land to build a highway. We do not have that style of case. Instead, The Gym asserted another broad-based takings-based framework—a "regulatory" taking.

A. Categorical Taking

Unquestionably, this is not a 'typical' physical appropriation takings case. Agents of the government did not enter onto and physically seize The Gym's property. Yet, with the stroke of a pen, the State effectively took complete control of these business enterprises' properties and shuttered them for a clear public purpose—to preemptively prevent any possible spread of COVID, which did not exist in their facilities. However, both the Court of Appeals below and the State confuse physical appropriations takings with categorical takings. Just because the agents of the government do not transcend upon physical property does not mean a per se categorical takings has not occurred.

Recently, the federal Eighth Circuit Court of Appeals found a plausible taking under application of another state's COVID-19 policy—an eviction mortarium. *Hts Apts, LLC v Walz*, 30 F4th 720 (CA 8, 2022). In April 2022, a unanimous federal appellate panel ruled that a state eviction moratorium in Minnesota—enacted for the same public purpose of mitigating the COVID pandemic—qualifies as a taking of private property requiring compensation under the Fifth Amendment. Stated succinctly, the federal appellate court issued a decision that has a well-known refrain—

> The Takings Clause protects property owners from both physical and regulatory takings—the direct appropriation of property by governmental actors and

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> imposition of restrictions on the use of property that went too far. In either event, "the government must pay for what it takes.

Hts Apts, 30 F4th at 732-733. And despite the state eviction moratorium program also not having agents of the government transcending on the private apartment complexes, the *Hts Apts* panel nevertheless found that when a state regulation authorizes the government to assume control *by regulation*, it was a taking regardless if physically invaded or not. In this scenario, it is a regulation that goes too far under *Mahon*.

Hts Apts provides the persuasive and correct constitutional standard Michigan should recognize—when a state regulation totally bars private owners' legitimate[6] ongoing business use of private property for profitable access of third-party business invitees (i.e. paying renters), a taking has occurred. In such circumstance, the government has, for a public purpose, seized control of private property from its owners and the regulation goes too far not to trigger the requirement of just compensation.

The State's repeated argument that there was no physical invasion is a red-herring. The lack of physical invasion does not matter—both are still takings. As much as the State of Minnesota never physically entered the apartments of landlords in *Height Apts*, the State of Michigan never physically entered the business-premises of gyms and fitness centers. Yet Michigan's intermediate court concluded "as matter of law" there is no taking. The Court of Appeals' panel below clearly got it wrong. The applicable takings standard is clear—when the government assumes such broad-based and total control

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[6] To be clear, if a business enterprise was, for example, an illegal brothel, gambling house, or drug den, the halting of uses of such enterprises (and related property uses) by the government would be to preclude a nuisance and would not be a taking. Here, however, gyms and fitness centers are lawful and legitimate business enterprises.

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over private property (even without setting foot on it and even if only temporary), it is a taking under the Fifth and Fourteenth Amendments. See *Cedar Point Nursery, supra.*

So when the State, by Governor Whitmer, issued the executive orders to shut down gyms and fitness centers, it was a regulation resulting in a categorical appropriation (i.e. total control) of private property by fully and unconditionally controlling (i.e. banning in full) who could physically enter The Gym's private business property for normal fitness (profitable) uses. Minnesota decided that new tenants could not physically enter the apartments. Michigan decided that gym users could not physically enter the gyms. Both states then decided to preclude (the exercise of a property right) the lawful uses of business-property for a public purpose—to end the spread of COVID-19. That fact that the regulation was issued as a reaction to a pandemic is of no consequence for the takings analysis. As such, a per se categorical takings has been properly alleged and the lack of physical invasion by agents of the government is irrelevant. The Court of Appeals errored.

B. Deprived of All Economically Beneficial Use

If this Court disagrees, alternately the Gym argues that Michigan, through executive orders, deprived an owner of "all economically beneficial use" of property interests, i.e. the businesses, for the period of the regulation which turned out to last until September 2020—far longer than others. This is sometime called a "*Lucas*" taking after its namesake, *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992). Such is a regulatory taking because if uses of private property were subject to "unbridled, uncompensated qualification under the police power," government would "extend the qualification more and more until at last private property" right "disappeared." *Mahon*, 260

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US at 415. In *Lucas*, the government enacted a regulation that precluded the use of land on a barrier island from the prior lawful plan to erect single-family residences. The victim landowner argued the complete extinguishment of his property's value entitled him to compensation regardless of whether the government acted in furtherance of legitimate police power objectives. The Supreme Court agreed. Recognizing how incredibly close being denied economically viable use of property is to being the equivalent of a physical appropriation, 505 US at 1017, the Supreme Court explained "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

This Court has adopted and widened that thinking into Michigan's jurisprudence. A taking can "occur even *without a physical taking of property*, 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) (citing and quoting *Grand Trunk W R Co v Detroit*, 326 Mich 387, 392-393; 40 NW2d 195 (1949)); see also *Spanich v Livonia*, 355 Mich 252, 259-265; 94 NW2d 62 (1959). "*Any* injury to property…which deprives the owner of the ordinary use of its equivalent is a taking, and entitles him to compensation." *Peterman*, 446 Mich at 190.

For six months, The Gym and its like-kind business-classmates were fully deprived the ordinary use of their business enterprises and related property. Unlike most other businesses during the pandemic which were merely only partially slowed down (i.e. restaurants running at 50% seating capacity) to aid the public in the combat the virus, the State here took one hundred percent control of the enterprise from these legitimate gym

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and fitness businesses by fully shutting them down for half a year (when seemingly, per the Oslo Study, was unneeded). That is unquestionably a taking. *Lucas*, 505 US at 1019; *Peterman*, 446 Mich at 190. To hold otherwise, the courts are mandating that "some people alone" (like owners of gyms and fitness centers) are "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 US at 49.

C. *Penn Central*

Lastly, if this Court disagrees that the six-month total idling of the gyms and fitness centers is not the deprivation of all economically beneficial use under *Lucas*, the government still does not automatically prevail. The final regulatory-taking theory is a *Penn Central* case. The Supreme Court recognized in *Penn Central Transportation Co v City of New York* that a regulation can be so burdensome as to become a taking even if it does not take all economically beneficial use. 438 US 104, 124 (1978). The *Penn Central* theory balances a "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*, 137 S Ct at 1943. The first two factors—economic effects and investment-backed expectations—are "primary among those factors." *Lingle*, 544 US at 538-539. The weightiest overall concern is "the severity of the burden that government imposes upon private property rights." *Id.* at 539. Nevertheless, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540. This theory of takings is "fact intensive" and courts are supposed to be "reluctant to decide claims at the

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summary [disposition] stage, preferring to wait for a trial to fully develop the factual record." *Lemon Bay Cove, LLC v United States*, 147 Fed Cl 528, 534 (2020). This is because the trial court must "conduct a complex factual assessment to determine whether the compensation is owed to the property holder." *Id.*

Notwithstanding the admonishment of actually building a proper factual record, the Court of Appeals held "there was no regulatory taking under *Penn Central*" "as a matter of law." **Appendix #111**. How is that logically possible? According to the panel, "the first two factors—economic impact of the EOs and their interference with reasonable investment-backed expectations—weigh in favor of The Gym because its business was in fact shuttered under the EOs." That makes sense. Finding in favor of Plaintiff should have been especially easy given these are the "primary factors" according to *Lingle*. 544 US at 538-539. However, the panel did not give those two factors "all that much weight" in favor of The Gym "because the economic impact and the interference with business expectations arising from the closure orders were *short lived*." **Appendix #111.** In other words, there is no taking, in its view, because the total seizure and shutdown was temporary. *That* conclusion is in error under both ageless and recent Supreme Court precedent. The US Supreme Court has "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 *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*.").The fact the regulation only later turns out to be temporary does not excuse the required takings-based obligation—the fact of being

temporary "bears only on the amount of compensation" required and not on whether a taking occurred. *Cedar Point Nursery*, 141 S Ct at 2074; see also *US v Dow*, 357 US 17, 26 (1958). Temporary takings are not different in kind from permanent takings — a temporary taking simply occurs when what would otherwise be a permanent taking is temporally cut short. *Am Pelagic Fishing Co, LP v United States*, 379 F3d 1363 fn11 (CA Fed, 2004). In short, the Court of Appeals panel's conclusion of temporariness cannot negate or de-weight what are designated the two "primary" factors. As such, the COA panel errored.

Lastly, under *Penn Central*, the COA panel, balancing the third factor in the government's favor, found that the "character of the Governor's actions strongly favors the State" because of "the purpose of the EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders." **Appendix #112.** That conclusion is illogical. What the panel seems to be self-concluding is that because the State had 'a really good public purpose' that the character of the action of government renders its actions *not* a taking. That is logically backwards. 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.' If anything, the more benefits that 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 a simple rebalancing of the public and private property owners' interests. See *Armstrong*, 364 US at 49 (the takings provisions "bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

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So, what does the "government character" factor seek to actually analyze? It is unclear. After *Penn Central*, the Supreme Court and courts nation-wide have done relatively little to clarify what it meant by the character of the governmental action and the State here provided no evidence of its rationale for why it did what it did. The only thing the Supreme Court has explained in *Lingle* is that the character of the governmental action "may" be relevant whether a taking has occurred if amounting to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Lingle*, 544 US at 539. At minimum, halting all business operations for half a year is not adjusting the benefits and burdens of economic life to promote the common good—it was a total invasion of the gym and fitness owners' property rights.

Distinguishing between these dueling character descriptions is not facially apparent; an analogy will help explain. Imagine a building owner has a facility that can physically and comfortably hold 400 guests for wedding receptions—a lawful activity. A local fire marshal issues a regulation which limits the hosting occupancy of the building to 250 to ensure proper safety of guests in case of fire. Such a regulation undoubtedly affects property interests (i.e. right to not exclude). However, the character of the government's actions in the 250-person limit regulation is easily viewed as adjusting the benefits and burdens of economic life to promote the common good. The facility owner can still rent the building and still profit from wedding receptions, albeit in lesser and smaller ways. But let's assume that the same fire marshal had instead issued regulation which caps occupancy at zero persons, thus rendering the ongoing wedding reception business to be totally destroyed and idle. In that latter circumstance, the character of the

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government action is not adjusting the benefits and burdens but is instead halting the lawful business enterprise of a wedding reception facility. It is a regulation that "goes too far," even if undertaken for legitimate fire safety concerns.

Using the "400-users building" example, the State treats the full closure imposed on gyms and fitness centers for what turned out to be six months as like the "250-person" occupancy regulation. Being totally shuttered, The Gym, on the other hand, views the long-term closure as being like the "zero-person" occupancy regulation and not simple adjustments on the benefits and burdens of economic life to promote the common good.[7] If The Gym is right (which it asserts it is), such is a taking under the three factors of *Penn Central*, including the character of the government action, is akin to the zero-person regulation (which went too far).

As a final observation under Supreme Court precedent, this government-character factor also seems to be attempting to answer whether a government-imposed restriction is "not reasonably necessary to the effectuation of a substantial public purpose" or "perhaps if it has an unduly harsh impact upon the owner's use of the property." *Penn Central*, 438 US at 127. Being reviewed under this conceptualization (and viewing the facts in the light most favorable to The Gym), the character of the governmental action properly weighs heavily in favor of The Gym as being both. The total shutdown of gyms and fitness centers were not reasonably necessary to halt or retard the spread of COVID.

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[7] Leaving a small scrap of use is also not enough for the government to avoid the obligation of just compensation—"a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo v Rhode Island*, 533 US 606, 631 (2001). Stated another way, "at bottom what emerges is at least the basic notion that the government, under the guise of regulation, cannot take from a property owner the core economic value of the property, leaving the owner with a mere shell of shambled expectations." *Hendler v US*, 952 F2d 1364, 1374 (CA Fed, 1991).

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The Gym specifically put into the record the Oslo Study, which confirmed that shuttering gyms and fitness centers was expressly unneeded because with "good hygiene and social distancing measures, there was no increased COVID-19 spread at [fitness] training facilities." **Appendix #65.** And because forced total shut-downs of gyms and fitness centers were not necessary, the executive orders effectuating the six-month shutdown without eminent domain proceedings is an unduly harsh and unconstitutionally harsh impact upon the owner's use of the property as part of its business enterprise for the benefit of the public at large.

Interestingly, even the trial court was correctly unconvinced by the State's self-conclusory assertions. As the Court of Claims observed, the State has not "produced [] evidence in support of its initial decision to close fitness facilities, nor has it provided evidence that informed its decision to continue to prohibit use of the facilities, even in a reduced or limited capacity." **Appendix #92.** "Nor has [the State] produced evidence suggesting why other indoor activities were permitted to resume—such as casinos in August 2020—but gyms and fitness centers remained closed at that time." **Appendix #92.** It is impossible to accept that the Court of Appeals could properly divine a full and complete understanding of "the character of the governmental action" when it did not define what this factor was supposed to be analyzing and when the Court of Claims itself correctly notes that the State has produced nothing, explained nothing, and has no specifically-revealed evidence to treat gyms and fitness centers differently (yet did), especially given the lack of any evidence of individualized or localized COVID outbreak at any particular facility. Yes, the character of the governmental action was unquestionably a public purpose; that was expressly pled by the complaint. But the nature

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of government's action was a total seizure of lawful business enterprises and not abating an existing nuisance (like a brothel or crack house) for the benefit of the public at large and the great expense of the gyms and fitness centers. In short, the Court of Appeals panel was either confused or too quick-on-the-draw with this final factor.

Lastly, it is important to observe that never has a *Penn Central* taking been rendered in favor of the government where the government has taken the *entire operations* of a business for a public purpose. The Gym asserts the taking here is at one hundred percent (100%).[8] The Court of Appeals erred in dismissing the case on its selected but unsupported conclusion that the non-primary factor of the character of the governmental action overrode and overcame the primary two factors properly in The Gym's favor. All three factors, at least as this record stands, support an ultimate finding of a taking and the requirement of just compensation. Leave to secure this needed reversal is appropriate.

D. A *Peterman* Takings Claim

Pointedly, whether the *Hts Apts*, *Lucas* or *Penn Central* tests for regulatory takings inform our Michigan state constitutional jurisprudence is unclear. Nevertheless, this Court has confirmed its own standards that a taking can "occur even *without a physical taking of property*, where the effect of a governmental regulation is to prevent the use of much of plaintiffs' property for any profitable purpose." *Peterman*, 446 Mich at 190. That is

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[8] Under the guise of henny-penny-the-sky-is-falling, the State argues that Plaintiff essentially argues, as a novel theory, that the State cannot exercise its police power to protect the public health and safety without paying each and every property and business owner negatively affected by those regulations. That is not true. When regulations are bore equally across the spectrum (like the noise of train), that is a shared burden. When "too far" regulations uniquely injure a small subset (like smoke from a train tunnel), compensation is plausibly required. See *Richards v Washington Terminal Co*, 233 US 546, 554 (1914). Gyms and fitness centers have pled themselves to be akin to the latter.

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exactly what The Gym alleges happened here. The *Peterman* Court held in that case that the State's "unscientific construction of the boat launch unnecessarily caused the destruction of plaintiffs' beach" and compensation was due. Importantly, this Court rejected the State's similarly-made contention "that because it never actually invaded plaintiffs' property, its destruction is not embraced within the Taking Clause." *Id.* at 188-189. Instead, a taking is found "when the state has eliminated access to property" or "made the usual access to plaintiffs' land very difficult." *Id.* at 189. Where the State "set[s] into motion the destructive forces that caused the erosion and eventual destruction of the property," the State must pay just compensation.

So even if a taking has not been found to have existed under US Supreme Court precedent, *Peterman* provides the standards that Michigan law will find a taking, making the various takings claims against the State easily plausible. The State's unscientific approach to completely shuttering the gyms and fitness centers of this state (see **Appendix #64-83**) prevented the use of effectively all of The Gym's (and putative class members') fitness and gym lawful enterprises for any profitable purpose for approximately six months. The executive orders eliminated business-accessibility to the business enterprises or minimally made the usual access "very difficult." Thusly, under this Court's *Peterman* takings standards, valid claims have been pled and likely easily shown. And the amount of "fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use." *Pewee Coal*, 341 US at 117. Again, the dismissal was in error.

V. The State had other regulatory options

What could the State have alternatively done? Reviewing the facts in light most favorable to the putative class (as this Court must), the Oslo Study confirms that the State simply could have issued a simple set of regulations which required good hygiene

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practices and social distancing routines and such would have sufficed. Undertaking that would have likely only been "adjusting the benefits and burdens of economic life to promote the common good." Instead, the State shut the entire industry down completely, further, and longer than any other business class in Michigan. So the State went "too far" when it did not need to. While the State was allowed to do so under its police powers, the action triggers the "just compensation" takings provisions.

Importantly, this case involving fitness centers and gyms is unlike any other businesses or industries who also suffered from COVID-19. Other businesses were permitted to operate in some fashion even if only at reduced capacities or with alternative procedures while remaining open. Yet as observed by the Court of Claims, the State has "produced no evidence in support of its initial decision to close fitness facilities, nor has it provided evidence that informed its decision to continue to prohibit use of the facilities, even in a reduced or limited capacity[, n]or has [it] produced evidence suggesting why other indoor activities were permitted to resume—such as casinos in August 2020—but gyms and fitness centers remained closed at that time." **Appendix #92.** On the other hand, grocery stores merely had capacity rules and certain product limits[9], but were open. Restaurants, as another example, were permitted to provide take-out sales. Doctors would still see patients via teleconferencing. Regrettably, gyms and fitness centers were closed, fully and completely. That regulation went "too far."

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[9] See Jonathan Oosting, *What Michigan's New Coronavirus Stay-At-Home Executive Order Means*, THE BRIDGE MAGAZINE, April 10, 2020, available at https://www.bridgemi.com/michigan-government/what-michigans-new-coronavirus-stay-home-executive-order-means ("The new regulations required Home Depot to close its paint section, flooring section and outdoor gardening center by Friday morning.")

The State crassly suggested in the lower courts that gyms and fitness centers could have converted themselves into a different type of business, like online aerobic workout providers. That is not the same thing; gyms and fitness centers are not aerobic workout studios. Gyms and fitness centers' business is primarily based on providing specialized body toning, muscle building, and body fat burning equipment—i.e. ellipticals, dead weights, and treadmills. Offering exercises similar to a Suzanne Somers workout video as compared to the services that gyms and fitness centers provide are not the same or a like-kind business. That is like suggesting that fruit growers/framers become pie-makers because both businesses deal in fruit. In addition to being professionally insulting, it is also not apropos.

CONCLUSION

COVID-19 is and has been undoubtedly a serious public issue requiring serious public action. However, when the State seizes property to combat a common enemy and enacts heavy regulatory actions which effectively appropriates private property rights or ousts the owner from his domain (i.e. goes too far), just compensation is required. The question, at this stage of the case in the trial court, is whether plausible takings claims have been pled? The answer is yes. The putative class has pled three—inverse condemnation, a takings action pursuant to Article X, Section 2 of the Michigan Constitution, and a direct action under the Fifth Amendment. The State also failed to show the lack of a genuine issue of material fact or otherwise being immediately entitled to a dismissal-judgment as a matter of law on effectively no evidentiary record. The Court of Appeals errored in commanding entry of judgment in favor of the State as presented. This *Application* meets the several of the grounds to warrant this Court's attention for review.

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There is a significant public interest in having the State act in an unconstitutional manner and this case is one against the State. MCR 7.305(B)(2). The issue of takings during a pandemic involves a legal principle of major significance to the state's jurisprudence given that private business enterprises were forced to bear heavy public burdens which, in all fairness and justice, should be borne by the public as a whole. MCR 7.305(B)(3). The Court of Appeals decision is clearly erroneous and thereby causing material injustice due to the denial of constitutionally required just compensation. MCR 7.305(B)(5)(a). And finally, the conclusions made as a matter of law (which completely death-knells a case without a full and proper record) conflicts with both normal procedural directions (discovery required) and the US Supreme Court's merits precedents. MCR 7.305(B)(5)(a)-(b).

RELIEF REQUESTED

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

Date: June 27, 2022

RESPECTFULLY SUBMITTED:

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