STATE OF MICHIGAN
IN THE SUPREME COURT

THE GYM 24/7 FITNESS, LLC, and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

STATE OF MICHIGAN,
Defendant-Appellee.

Supreme Court No. 164557

Court of Appeals No. 355148

Court of Claims No. 20-000132-MM

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BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY

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IJ Statement of Interest[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy personal and real property. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v City of New London*, 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005), in which the US Supreme Court held that the US Constitution allows government to take private property and give it to others for purposes of "economic development," and *Norwood v Horney*, 110 Ohio St 3d 353; 2006-Ohio-3799; 853 NE2d 1115 (2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the US Constitution. IJ also filed an amicus brief in *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), in which this Court similarly held that "economic development" does not constitute a public use under the Michigan Constitution. IJ continues to litigate important statutory and constitutional questions in eminent domain cases around the country, both as amicus and as counsel for property owners.

This Court invited IJ to file an amicus brief in this case. See March 17, 2023 Order Requesting Briefing at 2.

[1] No party's counsel authored this brief in whole or in part. No one other than Amicus Institute for Justice contributed money for this brief's preparation or submission. *See* MCR 7.312 (H)(4).

Introduction

As the Court of Appeals observed, plaintiffs who have brought Takings Clause challenges to COVID-19 shutdown orders have been largely unsuccessful. Op. 15. The court below emphasizes that it is "join[ing] those courts" by rejecting the takings claim in this case. What the court below fails to note, however, is that while these cases are indeed uniform in their results, their reasoning varies widely, and errors are frequent. Some of those errors appear to have found their way into the decision below.

Amicus takes no position on whether the pandemic shutdown orders in these cases, or some subset of them, constitute takings under the US Constitution or the applicable state constitutions. Amicus does not even take a position on whether the shutdown orders in this particular case constituted uncompensated takings of private property. Amicus offers this brief merely to highlight several doctrinal errors in the decision below. Regardless of how this Court ultimately rules, these errors should be corrected to avoid lasting harm to private property rights in Michigan.

First, the Court of Appeals, in considering whether a temporary regulation could ever constitute a *per se* taking, reflexively followed federal precedent without considering whether the Michigan Constitution might be more protective of private property rights. Second, in applying the *Penn Central v New York City* balancing test, the Court of Appeals erroneously focused on the importance of the state's interest, rather than on the nature of the interference with private property rights. Whether a regulation is a valid exercise of the police power and whether the government is

responding to an emergency are simply not relevant to the takings analysis. And while it is true that the government may prohibit "nuisance" uses of property without paying compensation, that exception is very narrow, and its application turns on an analysis of state law, which the Court of Appeals did not do. Finally, the Court of Appeals erred in holding, as a matter of law, that the economic impact of the regulations was minimal because it was temporary. That is a factual question that is subject to the plaintiff's proof.

I. The Court Should Perform an Independent Takings Analysis Under the Michigan Constitution.

The Court of Appeals wrongly treated the Michigan Constitution as interchangeable with the federal constitution. Even though the Gym brought both federal and state claims, the court's decision was based entirely on *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, a federal case that held that a temporary regulation—even one that destroys a property's entire economic value—is not a *per se* taking. 535 US 302, 342; 122 S Ct 1465; 152 L Ed 2d 517 (2002). The Court of Appeals should have conducted an independent takings analysis under Michigan's Constitution, which provides more protection for private property rights than the federal constitution. This Court should reject *Tahoe-Sierra* and forge its own constitutional path.

a. Michigan's Constitution provides more protection for private property rights than the federal constitution.

The Michigan Constitution "has been interpreted to afford property owners greater protection than its federal counterpart," *Rafaeli, LLC v Oakland Co*, 505 Mich

429, 454; 952 NW2d 434 (2020), but the Court of Appeals failed to "interpret [Michigan's] own organic instrument of government." *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993). This Court is "obligated" to do so now. *Id.*

For 20 years, the Court has followed its own path to protect private property rights. In 2004, the Court held that the condemnation of property for "the construction of a 1,300-acre business and technology park . . . to reinvigorate the struggling economy of southeastern Michigan" was not a permissible "public use" under Article 10, § 2 (Michigan's Takings Clause). *Wayne Co v Hathcock*, 471 Mich 445, 450–451; 684 NW2d 765 (2004). The Court did not rely on federal law. Instead, it rigorously analyzed Michigan's constitutional history and caselaw to "determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Id.* at 468. The Court concluded that "no one sophisticated in the law at the 1963 Constitution's ratification would have understood 'public use' to permit the condemnation of defendants' properties for the construction of a business and technology park owned by private entities." *Id.* at 478. Likewise, the Court "rel[ied] on the understanding of the term[] by those sophisticated in the law at the time of the constitutional drafting and ratification" to interpret the term "just compensation" in Article 10, § 2. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374–375; 663 NW2d 436 (2003).

In 2005, the US Supreme Court considered a case like *Hathcock* and reached the opposite conclusion. In *Kelo v City of New London*, the US Supreme Court held that the government's condemnation and transfer of private property to a private entity to facilitate economic development was a permissible "public use" under the

Fifth Amendment's Takings Clause. 545 US 469, 490; 125 S Ct 2655; 162 L Ed 2d 439 (2005). Michigan—along with many other states across the country—immediately amended its Constitution to state that:

> "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.

Const 1963 art 10, § 2.

This Court's high regard for "the sacrosanct right of individuals to dominion over their private property" is clear. *Hathcock*, 471 Mich at 450. The Court was not bound by federal law in 2004, when it considered whether takings for economic development were a "public use" under the Michigan Constitution. And the people of Michigan were not bound by the federal constitution in 2006, when they amended their Constitution to ensure that *Kelo* would not happen in their state. This case is no different. The Court "must canvass the body of law so that [it] may ascertain the 'common understanding' of Article 10, § 2 and the property rights protected thereunder." *Rafaeli*, 505 Mich at 456. This Court's "holding [must] speak[] to Michigan's Takings Clause." *Id.* at 477.

b. The Court should reject *Tahoe-Sierra* because no one sophisticated in the law at the 1963 Constitution's ratification would have expected takings to be non-compensable merely because they were temporary.

The Court should seize the opportunity to decide an issue of first impression according to its own Constitution and reject *Tahoe-Sierra*. This Court has never considered "whether the temporary impairment of business operations can be a

categorical regulatory taking if there are no reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited." March 17, 2023 Order Requesting Briefing. The Court of Appeals mechanically applied *Tahoe-Sierra* to answer "no," but this Court should apply the Michigan Constitution and reach its own conclusion. A full analysis of the meaning of Michigan's Constitution in this context is beyond the scope of this brief,[2] but there are plenty of reasons not to follow *Tahoe-Sierra*. The case departed from a long history of federal jurisprudence in which temporary takings were compensable. Given this overwhelming precedent, no one "sophisticated in the law at the 1963 Constitution's ratification would have" expected takings to be non-compensable merely because they are temporary. *Hathcock*, 471 Mich at 478. *Tahoe-Sierra* is inconsistent with this Court's high regard for property rights, and the Court should not follow it.

In *Tahoe-Sierra*, a government agency prohibited all development on the plaintiffs' private land for years while creating guidelines to protect the clarity and beauty

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[2] The Court has considered the following factors "in determining whether a compelling reason exists to interpret the Michigan Constitution and the United States Constitution differently":

> 1) [T]he textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.

People v Goldston, 470 Mich 523, 534; 682 NW2d 479 (2004) (quoting *People v Collins*, 438 Mich 8, 31 n 39; 475 NW2d 684 (1991)).

of Lake Tahoe. 535 US at 306–307. The US Supreme Court held that a complete prohibition on development is not a *per se* taking when it is only temporary. *Id.* at 342. Instead, the balancing test from *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978), should determine whether there is a taking. *Id.* at 321. The Court reasoned that "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Tahoe-Sierra*, 535 US at 342.

The Court's decision in *Tahoe-Sierra* departed from precedent in which temporary takings were categorically compensable. In the World War II era, it was "solidly established" that "takings temporary in duration can be compensable." *Arkansas Game & Fish Comm v United States*, 568 US 23, 32–33; 133 S Ct 511; 184 L Ed 2d 417 (2012) (collecting cases). "In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings." *Id.* at 33 (citing *United States v Pewee Coal Co*, 341 US 114; 71 S Ct 670; 95 L Ed 809 (1951); *Kimball Laundry Co v United States*, 338 US 1; 69 S Ct 1434; 93 L Ed 1765 (1949); *United States v Gen Motors Corp*, 323 US 373; 65 S Ct 357; 89 L Ed 311 (1945)). And the rule was "not confined to instances in which the Government took outright physical possession of . . . property." *Arkansas Game & Fish Comm*, 568 US at 33. Someone "sophisticated in the law at the 1963 Constitution's ratification," *Hathcock*, 471 Mich at 478, would have been familiar with these cases. See *Continental Motors Corp v*

Muskegon Twp, 376 Mich 170, 182 & n 2; 135 NW2d 908 (1965) (ADAMS, J., dissenting) (discussing *Gen Motors Corp*, 323 US at 377)).

In 1987, the US Supreme Court held that "'temporary takings' which . . . deny a landowner all use of his property[] are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Church of Glendale v Los Angeles Co*, 482 US 304, 318; 107 S Ct 2378; 96 L Ed 2d 250 (1987). In *First English*, Los Angeles County prohibited a church from rebuilding on its property after a flood to "preserv[e] . . . the public health and safety" within an "interim flood protection area." *Id.* at 307. Even though the church could theoretically rebuild in the future, the Court held that the property owner was due compensation. *Id.* at 322. The Court pointed out that "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *Id.* at 321. A few years later, in *Lucas v South Carolina Coastal Council*, a beachfront management law prohibited the plaintiff from developing his land, rendering his parcels "valueless." 505 US 1003, 1007; 112 S Ct 2886; 120 L Ed 2d 798 (1992). The Court confirmed that "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 (emphasis in original).

In 2002, everything changed. In *Tahoe-Sierra*, the Court narrowly interpreted *First English* to hold that temporary takings require compensation, not that temporary moratoria on development are *per se* takings. *Tahoe-Sierra*, 535 US at 328–329.

And the Court limited *Lucas* to apply to permanent takings only. *Id.* at 329–330. This makes little sense. Economic harm is *never* temporary. The idea of a temporary taking is "illogical" since "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time." *Hendler v United States*, 952 F2d 1364, 1376–1377 (CA Fed, 1991). In dissent in *Tahoe-Sierra*, Justice Thomas correctly pointed out that "the logical assurance that a temporary restriction merely causes a diminution in value is cold comfort to the property owners in this case or any other." 535 US at 356 (cleaned up). Justice Thomas further stated,

> I would hold that regulations prohibiting all productive uses of property are subject to *Lucas*' *per se* rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the 'temporary' moratorium is lifted. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place.

Id.

When the people amended Michigan's Constitution in 2006, the meaning of "taken" did not change. And in 1963, a hypothetical Michigander would have known that property can be "taken" through regulation, see *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922), and that property can be "taken" temporarily, see cases collected above at pp. 7–8, but he would have had no notion that those two concepts could not be combined. Nonetheless, without undertaking any analysis of what the Michigan Constitution means, the Court of Appeals applied *Tahoe-Sierra* to hold that "the Gym was not deprived of *all* economically productive or beneficial use of its property as a result of the Governor's [executive orders]; there was no regulatory categorical taking of the Gym's property." Op. 15 (emphasis in

original). Just like in *Tahoe-Sierra*, this was "cold comfort" to the plaintiffs. Treating this type of temporary taking as a *per se* taking under the *Lucas* rule would better capture the impact on the Gym, which had no alternative way of operating during shutdowns. The developers in *Tahoe-Sierra* could resume plans for an undeveloped parcel once the moratorium was lifted, while during the pandemic, businesses had existing operations disrupted in ways that had long-term financial effects. The severity and potentially lasting consequences of the "temporary" shutdowns are very different than a temporal delay in development. The *Lucas* categorical takings approach is the more appropriate framework here.

Still, rejecting *Tahoe-Sierra* does not necessarily compel this Court to hold that there has been a taking here. As discussed in more detail below, *Lucas* acknowledged that just compensation is not owed to a property owner for an alleged taking that arises from a government action that does nothing more "than duplicate the result that could have been achieved in the courts . . . by the State under its . . . power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 505 US at 1029.

No matter what the ultimate outcome of this case may be, the Court's interpretation of Michigan's Takings Clause will shape property rights for years to come. The Court "may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *Sitz*, 443 Mich at 759. As Justice Rehnquist pointed out in *Tahoe-Sierra*, "as is the case with most governmental action that furthers the public

interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens." 535 US at 354 (REHNQUIST, J., dissenting).

II. Under *Penn Central* balancing the focus is on the nature of the interference with private property, not the importance of the government's interest.

Regardless of whether this Court is inclined to follow *Tahoe-Sierra* as a matter of Michigan constitutional law, the court below also erred in its regulatory takings analysis under *Penn Central*, 438 US at 124 (requiring courts to balance (1) the "economic impact of the regulation" on the property owner, (2) the regulation's interference with "investment-backed expectations," and "the character of the governmental action").

First, the court erred by asking whether the regulation at issue is a valid exercise of the state's police power, a question that has no bearing on whether the regulation constitutes an uncompensated taking. Next, the court read the "nuisance exception" to takings liability far too broadly, without reference to background principles of state property law. Third, the court erroneously treated emergencies as an exception to the Takings Clause. All three of these errors mistakenly treat the importance of the government's objectives as relevant to the takings analysis.

Finally, the court used the temporary nature of the regulations to discount the "economic impact" prong of *Penn Central* balancing, as a matter of law. But economic impact is a question of fact.

Although these errors should all be corrected, Amicus takes no position on how *Penn Central* balancing should turn out in this particular case, nor on whether the nuisance exception applies here.

a. Whether a regulation is within the state's police power is irrelevant to the just compensation analysis.

The Court of Appeals emphasizes that the shutdown orders at issue were a valid exercise of the State's police powers, Op. 9–11, and frames this case as "concern[ing] the interplay between the constitutional principles applicable to the taking of private property for public use and the principles applicable to the state's authority to exercise its police powers to protect the health, safety, and welfare of its citizens." Op. 1–2. Petitioners, for their part, do not dispute that the shutdown orders were a valid exercise of the state's police power. Yet that issue has no bearing on the actual question of just compensation in this case. Regardless of whether a particular governmental action is "within the State's police power . . . [i]t is ***a separate question*** . . . whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 425; 102 S Ct 3164; 73 L Ed 2d 868 (1982) (emphasis added); accord *Berman v Parker*, 348 US 26, 32; 75 S Ct 98; 99 L Ed 27 (1954) (recognizing that valid exercises of the police power can require compensation). In other words, there is no "interplay" between those two questions because they are "logically . . . distinct." *Lingle v Chevron USA Inc*, 544 US 528, 543; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

Indeed, for over 100 years, the US Supreme Court has explicitly recognized that the police power is not exempt from the Just Compensation Clause. See

Pennsylvania Coal Co, 260 US at 415 ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."). When regulation "goes too far," it is a taking. *Id.* That is because, if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared." *Lucas*, 505 US at 1014 (cleaned up); see also *Yawn v Dorchester Co*, 1 F4th 191, 192 (CA 4, 2021) (holding that exercises of the police power are not exempt from the Just Compensation Clause); *John Corp v City of Houston*, 214 F3d 573, 578–579 (CA 5, 2000) (same).

To be sure, some lower courts have erroneously held that the police power is exempt from the Just Compensation Clause. See, e.g., *Lech v Jackson*, 791 F App'x 711, 717 (CA 10, 2019) ("[W]hen the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking[.]"); *Bojicic v DeWine*, 569 F Supp 3d 669, 690 (ND Ohio, 2021) (dismissing pandemic-related takings claim on ground that the police power is exempt from the Just Compensation Clause), aff'd, 2022 WL 3585636 (CA 6, August 22, 2022) (affirming the result while holding "that the district court erred in its reasoning" regarding the police power). Setting aside that this approach cannot be reconciled with a century of clear Supreme Court precedent, it also misunderstands the nature of the Just Compensation Clause, which is that even when the government is acting for the best reasons, there are

things that the government may only do when it pays compensation. See *Lingle*, 544 US at 543 (just compensation claim "presupposes that the government has acted in pursuit of a valid public purpose").

By contrast, if a government action is *not* a valid exercise of the police power, then it is simply illegal, for the police power is "all the legislative powers which a state may exercise over its affairs." *Berman*, 348 US at 31, and the "limit of public encroachment upon private interests." *Goldblatt v Town of Hempstead*, 369 US 590, 594; 82 S Ct 987; 8 L Ed 2d 130 (1962). When the government exceeds the bounds of the police power, a plaintiff can obtain an injunction against such encroachment. Yet the Supreme Court has explained that the remedy for an uncompensated taking not an injunction but compensation. *Knick v Twp of Scott*, 139 S Ct 2162, 2179; 204 L Ed 2d 558 (2019) ("Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."). In other words, the entire premise of a just compensation claim is that the government is acting lawfully. If the government has acted unlawfully, then the plaintiff has a different claim. See *Lingle*, 544 US at 543 ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."); *AmeriSource Corp v United States*, 525 F3d 1149, 1154 (CA Fed, 2008) ("The limits [of the police power] . . . are largely imposed by the Due Process Clause."); *Hernandez v City of Lafayette*, 643 F2d

1188, 1200 n 26 (CA 5 Unit A, May 1981) ("[T]he landowner whose property is . . . 'taken' albeit not for 'public use' will nevertheless have a damage cause of action under § 1983 since such a 'taking' would constitute the deprivation of property without due process of law under the Fourteenth Amendment.").

In fairness to the Court of Appeals, it is not entirely clear what role its discussion of the police power served in its resolution of the case. The court may not have intended to endorse the broad argument that the police power is *exempt* from the Takings Clause; it may have intended to imply only that the validity of the government's objective weighed against a taking. Although such an argument does not go quite so far, it is nevertheless wrong. The Takings Clause is not concerned with the importance of the government's objectives; it is concerned with the nature of the interference with property rights. Once again, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co*, 260 US at 416; see also *Lingle*, 544 US at 543 (2005) ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."); *Armstrong v United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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.").

b. The "nuisance exception" to takings liability is extremely narrow.

In analyzing the "character of the government's action" prong of the *Penn Central* test, the Court of Appeals also misunderstands *Lucas v South Carolina Coastal Commission*, which articulated a "nuisance exception" to takings liability. See 505 US at 1029. The court below reads *Lucas* too broadly, as standing for the proposition that when the purpose of the government's regulation is to protect lives, there is no taking. Op. 18. That is a significant misreading of the case. Indeed, *Lucas* did not concern *Penn Central* balancing at all. Rather, the case articulated two *per se* rules–both quite narrow: (1) A regulation that deprives a real property owner of all economically beneficial uses of his property is a *per se* taking, 505 US at 1019, (2) *unless* the government demonstrates that under background principles of state property law, the owner had never had the right to use his property in the intended manner in the first place, *id.* at 1027–1030.

In *Lucas*, the petitioner owned beachfront properties on which he had planned to build single-family homes, as the owners of many adjacent lots had done. *Id.* at 1008. The South Carolina Coastal Commission, however, promulgated a regulation that prohibited further construction in that area. *Id.* at 1009. This made the properties effectively worthless. *Id.* The government argued that it was not required to pay compensation because its regulation merely prohibited a "noxious" use of the property. *Id.* at 1026. The Supreme Court rejected this argument, explaining that,

notwithstanding some language in the Court's early regulatory takings cases, there was no real "distinction between regulation that 'prevents harmful use' and that which 'confers benefits.'" *Id.* Preventing harm, the Court held, is not a justification for denying compensation.

The Court acknowledged, however, that there might be some situations in which the government might not owe compensation for a regulation that denies a property owner all economically beneficial use of his land. But such regulation must do "no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id.* at 1029. Because owners never had the right to use their property to create a nuisance, for instance, they cannot complain that a regulation that preemptively prohibits a nuisance has constituted a taking. Such uses were "*always* unlawful." *Id.* at 1030 (emphasis in original); see also *Murr v Wisconsin*, 582 US 383, 394; 137 S Ct 1933; 198 L Ed 2d 497 (2017) ("The complete deprivation of use [under *Lucas*] will not require compensation if the challenged limitations 'inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.'"). Under *Lucas*, the relevant question is whether the state or a private party would have been able to sue the petitioners and force them to close their businesses *even absent the shutdown orders* at issue in this case. If the answer is "no," then the nuisance exception does not apply. See, e.g., *Machipongo Land & Coal Co v Commonwealth*, 569 Pa 3, 44; 799

A2d 751 (2002) ("Therefore, we remand this case to the Commonwealth Court to consider evidence that the proposed use would constitute a nuisance."); *Mutschler v City of Phoenix*, 212 Ariz 160, 165; 129 P3d 71 (App, 2006) ("The relevant question is whether appellants could have been restrained from operating their business in a common-law action for public nuisance.").

Because this "nuisance exception" to the Just Compensation Clause is categorical, it is essential that it be confined to its narrow parameters.[3] That requires a careful look at the background principles of state property law. The Court of Appeals, however, did not conduct any analysis of the background principles of Michigan's property law. If it had, one of the first things it would have learned is that there are "many kinds of trades and occupations" that "tend to injure adjoining property" without being common-law nuisances. *Garfield Twp v Young*, 348 Mich 337, 341; 82 NW2d 876 (1957); see also *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 277–278; 761 NW2d 761 (2008) ("[T]he mere fact that a condition constitutes a violation of a local ordinance does not make that condition a public nuisance[.]"); *Bronson v Oscoda Twp*, 188 Mich App 679, 686; 470 NW2d 688 (1991) ("For these reasons, we cannot conclude that the pier, despite the fact that it may have caused or influenced the formation of sand bars, constitutes an unreasonable or significant interference with the public's right to use Lake Huron."). Moreover, "if a nuisance arises out of the

[3] Note that because this nuisance exception trumps categorical takings, it is theoretically possible that this Court could reject *Tahoe-Sierra* as a matter of state law, conclude that there is such a thing as a temporary *Lucas* taking, but still hold that there is no taking in this case if the nuisance exception is satisfied.

operation of a legitimate business, the nuisance should be abated in a way that does not completely destroy the business." *John R Sand & Gravel Co v United States*, 60 Fed Cl 230, 250 (2004) (collecting Michigan cases). In Michigan, the state cannot escape takings liability merely by arguing that it is mitigating some harmful use of property; nuisance is a higher bar, and the remedies must be tailored. Although Amicus expresses no view on whether the State can meet those standards in the present case, Amicus submits that those standards should not be diluted.

Granted, the Supreme Court in *Lucas* did not hold that the law of nuisance is the only background principle of property law that might limit an owner's use of his property. It noted that there may be other principles, and it did not purport to articulate a comprehensive list. 505 US at 1029. The key point, however, was that the nuisance exception to the Takings Clause only applies when the regulation at issue is "duplicat[ive]" of pre-existing state property law principles such that the prohibited use of property was always illegal. *Id.* at 1029–1030. It is not enough to say that the regulation promotes health, safety, or welfare. That is the test for what constitutes a valid police power regulation, and it is a far more relaxed standard. See *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 492 n 20; 107 S Ct 1232; 94 L Ed 2d 472 (1987) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself." (citation omitted)).

c. There is no "emergency" exception to takings liability.

The Court of Appeals' misunderstanding of *Lucas* appears to be grounded on a single footnote, in which the Supreme Court said that "[t]he principal [other

background justification for invading property rights] that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.* at 1029 n 16 (*citing Bowditch v City of Boston*, 101 US 16, 18–19; 25 L Ed 980 (1880)). The Court of Appeals reads this language to mean that when the state is protecting lives, its actions do not constitute a taking. Op. 18. This is wrong, for several reasons:

First, this language was clearly dicta, as the Supreme Court explicitly held in *Lucas* that it was *not* opining on the validity of any particular "background principle" that might limit takings liability. It held that those were questions "of state law to be dealt with on remand." 505 US at 1031. So, if there is an applicable exception in the present case, it must be grounded in Michigan law, not in the US Supreme Court's musings about how various states' laws might function. As noted above, the Court of Appeals did not analyze background principles of Michigan law to determine if such an exception applied.

Second, the Supreme Court's dicta was wrong in its assumption that there is any well established takings immunity when the government takes property for the purpose of protecting lives. Indeed, the weight of authority goes the other direction. The case the Court cited, *Bowditch v City of Boston*, concerned only statutory claims. 101 US at 17 ("The claim is founded upon certain statutes of the State of Massachusetts, and an ordinance of the city of Boston"). True, the case noted that "[a]t the common law every one had the right to destroy real and personal property, in cases

of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." *Id.* at 18. But the common law doctrine of necessity, to which the Court was referring, is an *individual immunity* for tort liability. Necessity does not absolve the government itself from takings liability when its own authorized agents destroy property. A New York court explained the distinction in 1837:

> [T]he individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defence of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; **and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle** (*Const. U. S. Art.* 5, of the Amendments).

City of New York v Lord, 17 Wend 285, 290–292 (NY, 1837) (emphasis added); see also *Mitchell v Harmony*, 54 US (13 How) 115, 134; 14 L Ed 75 (1851) ("Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.").

Similarly, the Supreme Court of Georgia explained that:

> [I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be *lawfully* taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss. If the public necessity exists, and of this the constituted authorities are to judge, no trespass or wrong has been committed.

Bishop v City of Macon, 7 Ga 200, 202 (1849). Also, it has been noted that to the extent that compensation has been denied in some firebreak cases, the destroyed homes would likely have been burned down anyway, so the property owner had been made no worse off. *Steele v City of Houston*, 603 SW2d 786, 792 (Tex, 1980) ("Destruction has been permitted in instances in which the building is adjacent to a burning building or in the line of fire and destined to destruction anyway"); *Bishop*, 7 Ga at 202 (same). [4]

Finally, the notion that the State should be relieved of the burden of providing just compensation simply because its objectives are important or because of an ongoing emergency is also belied by the history of the Just Compensation Clause. The earliest surviving commentary on the clause indicates that its specific purpose was "to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305–306 (1803). The Framers adopted the clause with great national emergencies foremost in their minds. See also *United States v Russell*, 80 US 623, 627; 20 L Ed 474 (1871) (requiring compensation for lawfully commandeered steamboats during the Civil War).

[4] In one other case where the Supreme Court made the same incorrect assumption about firebreak cases, the Court said that "[i]t may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go . . . [and] whether they do not stand as much upon tradition as upon principle." *Pennsylvania Coal Co*, 260 US at 415–416.

In short, the Court of Appeals misreads *Lucas* in the same way it misreads the police power cases–to imply that the government is absolved from takings liability when its actions are *really important*. But "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Lingle*, 544 US at 543. The government's interest in its regulations, i.e., whether the regulations are really important or just downright pointless, is simply not relevant. After all, "[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation." *Id.* Accordingly, the "touchstone" of the Supreme Court's regulatory takings jurisprudence is "the severity of the burden that government imposes on private property rights." *Id.*[5]

d. The economic impact of a regulation is an evidentiary question.

Finally, the opinion below erred in concluding, as a matter of law, that the first two *Penn Central* factors—the shutdown orders' economic impact and interference with distinct investment-backed expectations—should not receive "all that much weight because the economic impact and the interference with business expectations arising from the closure orders were short lived," and likely to be "recovered as soon as the temporary prohibition was lifted." Op. 16–17. This was error, as these factors

[5] Specifically with regard to the "character of the governmental action" prong of *Penn Central*, this means that courts should look to "the *magnitude or character of the burden*" and how the "burden is *distributed* among property owners," rather than the government's interest in the regulation. *Id.* at 542 (emphasis in original); see also *Pennsylvania Coal Co*, 260 US at 415 (noting that regulations that "secure[] an average reciprocity of advantage" are less likely to be takings).

cannot be weighed without findings of fact. *See Colony Cove Props, LLC v City of Carson*, 888 F3d 445, 452–454 (CA 9, 2018) (noting that "economic impact" and "investment-backed expectations" are questions of fact); *Cienega Gardens v United States*, 331 F3d 1319, 1341 (CA Fed, 2003) ("The fact-finding in that trial was sufficient in scope and depth to permit an economic impact analysis here[.]").

Moreover, it is far from obvious that a temporary shutdown must necessarily have a small economic impact. Indeed, a temporary shutdown can be worse than a permanent one because it leaves capital tied up. See, e.g., *Kimball Laundry Co*, 338 US at 14 ("The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property."). Even such a "temporary" taking can still have the "inevitable effect of depriving the owner of the going-concern value of his business." *Id.* at 13. Many businesses operate on razor-thin margins, and having lost customers for an undetermined period of time, it is not safe to assume that they will all return. A "temporary" loss of revenue can mean bankruptcy.

Conclusion

Regardless of how this Court rules in this case, it should correct the doctrinal errors discussed in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I electronically filed the foregoing Amicus Curiae Brief of the Institute for Justice in Support of Neither Party, which was served on all Parties by the MiFILE system of the Michigan Supreme Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 6,969 countable words and is set in 12-point, double-spaced, Century Schoolbook type.

Dated: April 28, 2023

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