

STATE OF MICHIGAN
IN THE SUPREME COURT

THE GYM 24/7 FITNESS, LLC, et al,
Plaintiffs-Appellees/Cross-Appellants,

Supreme Court No. 164557

v

Court of Appeals No. 355148

STATE OF MICHIGAN,

Court of Claims No. 20-000132-MM

Defendant-Appellant/Cross-Appellee.

THE STATE OF MICHIGAN'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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Dated: October 18, 2023

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Constitutional Provisions

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COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over this application. See MCR 7.305.

STATEMENT OF QUESTIONS PRESENTED

- I. A plaintiff cannot allege a taking if a government action seeks to abate a nuisance, or is necessary to mitigate an emergency, because no property right can supersede such an action. Here, Plaintiff's claim is premised on an alleged property right to continue operating its business irrespective of the State's efforts to rein in an existential emergency. Can Plaintiff plead a takings claim in this context?

The State of Michigan's answer:	No.
Gym 24/7's answer:	Yes.
The Court of Appeals' answer:	Did not answer.
Court of Claims' answer:	Did not answer.

- II. To qualify as a "categorical" taking, a government action must cause a plaintiff to lose *all* economic interest in a property, precluding any possible economic use in perpetuity. Here, Plaintiff was temporarily restricted from admitting the public onto its property to engage in fitness-related activities. Can this temporary impairment of a plaintiff's preferred business model comprise a categorical regulatory taking?

The State of Michigan's answer:	No.
Gym 24/7's answer:	Yes.
The Court of Appeals' answer:	No.
Court of Claims' answer:	Did not answer.

III. A state action constitutes a noncategorical taking when it disproportionately affects the plaintiff. Here, Plaintiff’s property was subject to restrictions that were applicable to all similarly situated places of public accommodation during the COVID-19 pandemic. Under the ad hoc, flexible takings inquiry guided by the *Penn Central* factors—which the Court of Appeals properly weighed despite its erroneous conclusions as to the first two factors—was Plaintiff’s property “taken” by the State’s proportionate restriction on use?

The State of Michigan’s answer:	No.
Gym 24/7’s answer:	Yes.
The Court of Appeals’ answer:	No.
Court of Claims’ answer:	Did not answer.

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

The Takings Clause of the Michigan Constitution, article 10, section 2, provides:

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

"Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

INTRODUCTION

One of government's core duties is to provide "security and protection" to the people. Const 1963, art 1, § 1. The orders challenged by Gym 24/7 were issued in accordance with that duty. They were designed to protect the lives of the people from a deadly pandemic and, relatedly, to mitigate the effects of the pandemic so that business as usual could resume. To address these historic challenges, Michigan's orders required a temporary limitation on public access to nearly all places of public accommodation, including the premises of fitness centers like Gym 24/7.

Gym 24/7 alleges that these orders effectuated a "taking" that either (1) completely eliminated the property's value or (2) regulated it in a manner that was so disproportionate to what others experienced during the pandemic that principles of "justice and fairness" require taxpayers to compensate it for its lost revenues.

All takings claims first require the plaintiff to establish the scope of the allegedly impaired property interest. No analysis—categorical or noncategorical—can occur prior to this exercise. Here, Gym 24/7 says it had a property right to continue operating its business more fully than the orders allowed, but there exists no property interest that supersedes the State's need to mitigate an emergency like the COVID-19 pandemic. Simply put, a property owner's "bundle" of rights has never included a strand permitting the owner to continue operating irrespective of state action to abate a nuisance-like condition or avert an acute and imminent danger to others' health. Thus, in addressing these unique harms, the State cannot "take" a property interest, because that property interest never existed in the first place. Many courts

nationwide have reached the same conclusion. No taking occurred. Regardless, even if one arrives at the next steps of a takings analysis, the same result applies.

Gym 24/7's first claim purports to describe a "categorical" regulatory taking, which occurs when the State does not physically enter the property, but its regulations nevertheless completely deprive an owner of *all* of their property's economic value. This claim is untenable for two separate reasons. First, a temporary regulation cannot be a categorical taking, because the property holds value attributable to the period following the regulation. Second, even if the regulation *was* permanent, property has value independent of its owner's preferred use. Unless the regulation eliminates *all* economic value, to *everyone*, it is not a categorical taking. As is plain from the regulation's terms, that did not occur here.

Gym 24/7's second claim asserts a "noncategorical" regulatory taking, which is analyzed under the *Penn Central* test. This ad hoc test is guided by three "particularly significant" factors, but its true north star is the proportionality of the burden imposed on the particular plaintiff: If the plaintiff was not one of only "a few" entities on whom the weight of the regulation was "disproportionately concentrated," then justice and fairness do not demand just compensation. *Penn Central Transportation Co v City of New York*, 438 US 104, 123–124 (1978).

All three *Penn Central* factors demonstrate that no taking occurred. The *first* factor—the economic burden imposed by the regulation—reflects that the regulation imposed on all similar places of public accommodation a burden similar to Gym 24/7's, and also that the losses alleged by Gym 24/7 are not the sort that indicate a

taking has occurred. The *second* factor—Gym 24/7’s distinct investment-backed expectations—addresses the State’s response to the pandemic, not the predictability of the pandemic itself. Gym 24/7 could not have held a reasonable expectation that the State would remain idle in the face of such a threat or that its business would somehow remain exempt from the limitations designed to safeguard the public health; to have done so would have been contrary to the expectations of the citizenry expressed in the Michigan Constitution and would have rendered our State a national outlier. Finally, the *third* factor—the character of the State’s action—confirms that no taking occurred. The historic demands of the pandemic speak for themselves, and the nature of the threat addressed by the regulation is critical in a takings analysis. Moreover, it is relevant that the regulations were broadly applicable, reflected a reciprocity of advantage, and their temporary application precluded only one category of use, i.e., physical access by the public for a certain commercial activity—not all use, not access by the owners, and not marketability of the property.

Thus, no matter the analytical path taken, the same result holds: Gym 24/7’s claims fail as a matter of law because the challenged restrictions lie well outside the sort of state action that can beget a compensable taking. No factual development could change this outcome. The Takings Clause was not designed to put the State and its taxpayers to the choice of letting a deadly virus ravage its populace or incurring devastating financial liability in its efforts to prevent it. This Court should deny leave or affirm.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The facts surrounding the COVID-19 pandemic are well-established. SARS-CoV-2 is similar to other coronaviruses (a family of viruses that cause respiratory illnesses), but the strain is novel. Within months of its emergence, it was widely known and accepted that COVID-19 could (and did) cause severe illness and death. When COVID-19 hit the United States in early 2020, there was no immunity built up in the population, no available vaccine, and few treatments to combat the disease itself. It was highly contagious, spreading easily from person to person through coughing, sneezing, talking, and breathing.¹ Given the virus's ease of transmission, novel nature, and potentially fatal consequences, the Centers for Disease Control and Prevention (CDC) have indicated that the best way to prevent illness is to avoid contact with others.²

The State of Michigan responds to the COVID-19 pandemic.

On March 10, 2020, in anticipation of the pandemic spreading in Michigan, Governor Whitmer declared a state of emergency and, soon thereafter, began to issue substantive executive orders to stem the tide of COVID-19 infections.³ These

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

² (See Def's MSD, pp 3–4 & n 3, citing CDC, *COVID-19 Frequently Asked Questions* <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed August 13, 2020).)

³ E.O. 2020-4. All relevant executive orders can be found at: <https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-orders>.

included caps on large assemblies,⁴ closures of premises of certain places of public accommodation,⁵ and various iterations of the Stay Home, Stay Safe Order, which was frequently adjusted in order to remain responsive to the ever-evolving challenges presented by the pandemic.⁶

As with other businesses, government buildings, and places of accommodation statewide, the Governor ordered fitness centers temporarily closed to public access to slow the spread of the virus.⁷ At no time did these restrictions purport to prevent use of the affected properties for any other permitted activities, nor did they preclude employees or others from accessing the properties. As conditions improved in the ensuing weeks, certain lower-risk in-person business activities were permitted to resume with significant mitigation measures in place, while other restrictions, including those on public access to fitness centers and similar establishments, remained in place.⁸

⁴ See, e.g., E.O. 2020-5.

⁵ See, e.g., E.O. 2020-9.

⁶ See E.O. 2020-21, 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92. Concurrent with the Governor's actions to combat the pandemic, Michigan's Department of Health and Human Services (DHHS) began issuing emergency orders under Michigan's Public Health Code, MCL 333.1101 *et seq.* See generally <https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-directives-content/rescinded-mdhhs-epidemic-orders>. Among them were orders reinforcing the Governor's executive orders at issue here, having essentially the same scope, albeit supported by independent legal authority. Gym 24/7 has not raised any challenges to any DHHS order.

⁷ See generally E.O. 2020-21, 2020-42, 2020-59, and 2020-70.

⁸ See E.O. 2020-92 (issued May 18, 2020); E.O. 2020-96 (issued May 21, 2020); and E.O. 2020-110 (issued June 1, 2020).

The executive order effective at the time of the Complaint was E.O. 2020-110, issued June 1, 2020, which ordered the continued closure of public access to places of public accommodation that “present[ed] a heightened risk of infection” due to “close contact and shared surfaces.”⁹ These included movie theaters and performance venues, facilities offering non-essential personal care services, casinos and racetracks, bowling alleys, and, pertinent here, “[i]ndoor gymnasiums, fitness centers, recreation centers, sports facilities, exercise facilities, exercise studios, and the like.”¹⁰ Because they could be performed without such heightened risk of spreading the virus, fitness centers were permitted to offer, on their premises or otherwise, outdoor fitness classes under certain circumstances.¹¹

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

⁹ See E.O. 2020-110, § 12.

¹⁰ *Id.*

¹¹ *Id.* § 14(1).

On September 3, 2020, the Governor issued E.O. 2020-176, which allowed fitness facilities across Michigan, including Gym 24/7's, to reopen for public access, effective September 9, 2020.¹²

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

On July 13, 2020, Gym 24/7 filed its verified putative class action complaint in the Court of Claims asserting takings claims under the federal and state constitutions, as well as an inverse condemnation claim. Gym 24/7 alleged that the State's efforts to control the pandemic effectuated a compensable "taking" of its property interests in the form of its lost "revenues and profits." (Compl ¶¶ 34, 40.)

Notably, Gym 24/7 expressly "accepts as fact" that the Governor's COVID-19 orders were "for the public purpose of protecting Michigan's public health, safety and welfare." (*Id.* ¶¶ 9, 15.) It also asserts that its suit "does not seek to contest whether Governor Whitmer's decision to issue the Executive orders that have perpetually closed [fitness facilities] since March 10, 2020 were prudent or were not within her authority to issue." (*Id.* ¶ 14.) Rather, Gym 24/7 takes the position that, "[n]otwithstanding their legitimate public purpose," the Governor's orders "made it impracticable" for Gym 24/7 to benefit from its property, requiring the State to

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

provide compensation to Gym 24/7 arising from “diminution of value in [its] property interests.” (*Id.* ¶¶ 17–18.)

The Court of Claims denies the State’s motion for summary disposition.

The State filed a motion for summary disposition in lieu of an answer making three primary arguments: (1) the Governor’s orders, as temporary exercises of the State’s police power to protect the public health from an imminent and deadly threat, were not subject to takings or inverse condemnation theories as a matter of law; notwithstanding, (2) Gym 24/7 failed to state an inverse condemnation claim; and (3) Gym 24/7 failed to state a regulatory takings claim.

The Court of Claims denied the State’s motion. As an initial matter, although the State premised its motion on both MCR 2.116(C)(8) and (C)(10), the court indicated that it would review the motion under only MCR 2.116(C)(10) because the State included within its brief references to “various internet materials.”¹³ (9/24/20 Op & Order, p 2.) The court then explained it was not satisfied the State had provided adequate proofs documenting the basis for its decision-making with respect to fitness facilities, that the State’s reference to publicly available materials relevant to these matters was insufficient to carry its burden as the moving party, and that the State was required to provide additional documentary evidence to prove that its regulation of fitness facilities during the COVID-19 pandemic was not arbitrary and bore a substantial relation to public

¹³ As reflected in the footnotes above, these were publicly available resources such as CDC research papers and reference materials.

health. (*Id.* at 7.) Apart from this analysis, the Court of Claims did not substantively discuss or analyze the State’s arguments regarding the legal adequacy of Gym 24/7’s claims.

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

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

In a unanimous published decision, the Court of Appeals reversed, rejecting each of Gym 24/7’s claims. *Gym 24/7 Fitness, LLC v State*, 341 Mich App 238, 241 (2022). In its analysis, the court first surveyed the State’s authority to take action to mitigate life-threatening emergencies under its police power. *Id.* at 255–258, discussing *Jacobson v Commonwealth of Massachusetts*, 197 US 11 (1905), and *People ex rel Hill v Bd of Ed of City of Lansing*, 224 Mich 388 (1923). The court then noted “that to the best of [its] knowledge, every federal court and state appellate court that has addressed a takings claim stemming from the government’s closure of a business as a safeguard against the spread of COVID-19 has rejected the claim.” *Id.* at 263–264 (collecting cases).

Turning to Gym 24/7’s claims, the court first determined that Gym 24/7 had not pleaded a “physical taking” claim since there was no allegation “that the State physically acquired, took possession of, occupied, or appropriated the Gym’s private property.” *Id.* at 264.

Reviewing whether a regulatory taking occurred, the court recognized that a *categorical* regulatory taking “is limited to extraordinary circumstances in which no productive or economically beneficial use of land is allowed” and requires “a 100% complete elimination or obliteration of value.” *Id.* at 265 (cleaned up), citing *Tahoe-Sierra Pres Council Inc v Tahoe Reg’l Plan Agency*, 535 US 302 (2002). It also reasoned that a “temporary restriction that merely causes a diminution in value is not a taking of the whole.” *Id.* at 265–266. Therefore, Gym 24/7’s “temporary” closure and the fact that “[t]he property clearly still had value” each precluded a categorical taking. *Id.* at 266–267. As the court noted, “[t]he EOs did not preclude . . . those businesses from using their facilities to engage in other, lower-risk commercial activity, fitness-related or otherwise.” *Id.* at 267 n 16 (cleaned up).

After confirming that there had been no categorical taking, the Court of Appeals evaluated whether Gym 24/7 had pleaded a viable noncategorical regulatory taking claim. *Id.* at 267. Applying the *Penn Central* test, the court held that the third factor—the character of the government action—was “compelling” and “strongly favors the State, or perhaps actually demands that [it] find no taking.” *Id.* at 267. See also *id.* (measuring the first two factors against “one of the most threatening public-health crises of modern times,” quoting *In re Certified Questions*, 506 Mich 332, 337–338 (2020).) The court understood that government action taken “to forestall . . . grave threats to the lives . . . of others” does not entitle those affected to compensation. *Id.* (first ellipsis added), quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1017–1020 (1992). Stepping back from the

specific factors, the court emphasized that regulatory action that “restrains uses of property that are tantamount to public nuisances” is “part of the burden of common citizenship.” *Id.* at 269, quoting *Keystone Bituminous Coal Ass’n v DeBenedictis*, 480 US 470, 491–492 (1987).

Since each claim failed as a matter of law, the court reversed and remanded for entry of judgment in favor of the State. *Id.* at 271. Gym 24/7 then sought the application to this Court, giving rise to the questions addressed in this supplemental brief for an argument on Gym 24/7’s application.

STANDARD OF REVIEW

This Court reviews rulings on motions for summary disposition de novo. *Spiek v Michigan Dept of Transp*, 456 Mich 331, 337 (1998). Constitutional questions are likewise reviewed de novo. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 686 (2022).

ARGUMENT

I. The State’s efforts to respond to the historic threat posed by the pandemic did not “take” property interests such that liability for just compensation could arise.

All takings claims, regardless of the theory under which they are pursued—physical or regulatory, categorical or noncategorical—require courts to engage in a threshold inquiry: whether the plaintiff actually possesses the property interest they allege was “taken,” or if the alleged use was, instead, always subject to the challenged government regulation. See *Lucas*, 505 US at 1027 (describing this principle as a “logically antecedent inquiry”); *Rafaeli, LLC v Oakland Co*, 505 Mich

429, 455 (2020) (“In order to assert a takings claim of this nature, a claimant must first establish a vested property right under state law.” (citation omitted)); *Adams Outdoor Advertising v City of E Lansing*, 463 Mich 17, 24 (2000) (“[B]efore we apply these tests, there is a preliminary question: does the claimant possess the interest that he alleges is being taken by the regulation?”); *Murr v Wisconsin*, 582 US 383, 407 (2017) (Roberts, CJ, dissenting) (stating that “[s]tep one” entails “identifying the property interest at stake”). See also *Yee v City of Escondido, Cal*, 503 US 519, 535 (1992) (stating that categorical and noncategorical takings are “not separate claims,” but “are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking”).

This well-established threshold limitation on takings claims is particularly salient when the government takes action intended to mitigate a “harmful or noxious use” of property, which might be analogous to a public nuisance, or an emergent threat to health posed by the property’s use. *Lucas*, 505 US at 1022–1023; *id.* at 1020 n 9. See, e.g., *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2079 (2021); *Adams Outdoor Advertising*, 463 Mich at 24–25 (holding that, because “lessors never had an *absolute* right to display signs on the rooftops of their buildings,” they “had no right to prevent the imposition of regulations” affecting rooftop signage, which “did not effect a taking”); *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272 (2008) (“[B]ecause no individual has the right to use his or her property so as to create a nuisance, the State has not taken anything when it asserts its power to enjoin a nuisance-like activity.” (cleaned up)), citing *Keystone*

Bituminous Coal, 480 US at 491 n 20, 492 n 22. Indeed, as the U.S. Supreme Court explained in *Lucas*, even a regulation that deprives land of all economically beneficial use, in perpetuity, still does not require compensation if “the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” 505 U.S. at 1027. See also *Murr*, 582 US at 394 (“The complete deprivation of use 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.” (cleaned up)).

In clarifying this rule, *Lucas* was careful to acknowledge its limits: A state could not simply invoke “police power” as magic words to rebut any and all claims of takings, irrespective of the kind of problem the state was acting to address. 505 US at 1024 (noting the potential ability to creatively reframe *any* alleged taking as “harm-preventing” and, therefore, immune from takings liability).¹⁴ But *Lucas* did reaffirm that a state *can* act without providing compensation, if such action was part of the state’s “power to abate nuisances that affect the public generally, or otherwise.” *Id.* at 1029.

The most obvious and noncontroversial application of this principle applied to mitigations of “grave threats to the lives and property of others”—for example, state

¹⁴ This makes sense given how broadly the states’ “police power” has been defined. See, e.g., *Eubank v City of Richmond*, 226 US 137, 142 (1912) (stating that the police power “extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.” (citation omitted)).

action “to prevent the spreading of a fire,” *id.* at 1029 n 16 (cleaned up), or shutting down an otherwise-lawful nuclear power plant when it was discovered to sit astride an earthquake fault, *id.* at 1029. See also, e.g., *United States v Caltex*, 344 US 149, 154 (1952) (“[T]he common law ha[s] long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.”); *Miller v Schoene*, 276 US 272, 280 (1928) (owners of trees destroyed to prevent a disease from spreading not entitled to compensation); *Bowditch v City of Boston*, 101 US 16, 18 (1879) (“At 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.”). The principle has also featured in government action taken to meet the citizenry’s needs in times of war, which, as here, did not comprise a physical taking. See *United States v Central Eureka Mining Company*, 357 US 155, 168 (1958) (finding no taking implicated by a nearly-three-year-long government-ordered closure of non-essential gold mines to free up resources to support the war effort, as “wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands”).¹⁵

¹⁵ See also, e.g., *McCutchen v United States*, 145 Fed Cl 42, 51 (2019) (“[I]t is well established that there is no taking for ‘public use’ where the government . . . outlaws the use or possession of property that presents a danger to the public health and safety.”); *Nat’l Amusements Inc v Borough of Palmyra*, 716 F3d 57, 63 (CA 3, 2013) (holding that five-month closure of flea market to abate danger of

This power to address an “actual emergency with immediate and impending danger” without implicating takings liability has been described as the “doctrine of necessity.” *TrinCo Inv Co v United States*, 722 F3d 1375, 1379 (CA Fed, 2013). And much like the need “to prevent the spreading of a fire,” *Lucas*, 505 US at 1029 n 16, the need to prevent the spreading of a deadly virus—undisputedly “one of the most threatening public-health crises of modern times,” *In re Certified Questions*, 506 Mich at 337—is an emergency tailor-made for it.

These principles are readily apparent in Michigan state law. The prevention of the spread of disease, in particular, has long rested at the heart of the State’s police power, and an owner of property in fee simple has never had a right to operate a business on that property irrespective of the State’s efforts to mitigate such spread. *People ex rel Hill*, 224 Mich at 390 (recognizing “the right of the state, in the exercise of its police power and in the interest of the public health, to enact such laws, such rules and regulations, and will prevent the spread of this dread disease”). Long ago, this Court recognized that the State may protect its residents from harm and impose limitations on the use of property without subjecting itself to payment. See, e.g., *People v Eberle*, 167 Mich 477, 485 (1911) (affirming constitutionality of law prohibiting sale of alcohol, which rendered plaintiff’s inventory valueless, citing law’s purpose in addressing activities “injurious to the

unexploded munitions discovered on the property was not a taking); *Hendler v United States*, 38 Fed Cl 611, 615 (1997) (“[B]ecause a property owner does not have a right to use his property in a manner harmful to public health or safety, the government’s exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner’s property rights.”).

health, morals, or safety of the community”) (quotation omitted), affirmed *Eberle v People*, 232 US 700 (1914). See also *Allen v City of Detroit*, 167 Mich 464, 474 (1911), quoting *Commonwealth v Alger*, 61 Mass 53, 85 (1851); *Ypsilanti Charter Twp*, 281 Mich App at 276 (“A condition that is so threatening as to constitute an impending danger to the public welfare is a nuisance”); Cooley, *Constitutional Limitations, The Police Power of the States* (7th ed), pp 882–883 (“And, generally, it may be said that each State has complete authority to provide for the abatement of nuisances, whether they exist by the fault of the individuals or not . . .”).

Based on these principles, the challenged pandemic-era restrictions on Gym 24/7’s business use of its property did not effect a taking. This is true whether the restrictions are viewed as an effort to abate a nuisance or under the related doctrine of necessity. As Gym 24/7 concedes, (see Compl ¶¶ 14, 15, 17), “[t]he purpose of the EOs was to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders,” *Gym 24/7*, 341 Mich App at 268–269. The restrictions were implemented to protect the public from a grave and immediate threat to its health. This acute public interest in health and safety, and the manner used to effectuate that interest, rest outside the scope of takings as a matter of law.

Case law across the country—state and federal—supports this conclusion as it applies to COVID-19 orders in both categorical and non-categorical contexts. For federal case law, see, e.g., *TJM 64, Inc v Harris*, 526 F Supp 3d 331, 336 (WD Tenn, 2021); *Case v Ivey*, 542 F Supp 3d 1245, 1281–1283 (MD Ala, 2021), affirmed 2022 WL 2441578 (CA 5, July 5, 2022) (per curiam); *Underwood v City of Starkville*, 538

F Supp 3d 667, 678–681 (ND Miss, 2021) (ordinance closing fitness centers to the public did not effect a taking because “doctrine of necessity” applied rendering defendant “immune from liability”); *MetroFlex Oceanside LLC v Newsom*, 532 F Supp 3d 976, 982 (SD Cal, 2021); *McKinley v Grisham*, No. CV 20-01331 JHR/JFR, 2022 WL 2048593, at *6 (DNM, June 7, 2022) (“Defendants are immune from liability based on the doctrine of necessity because a prohibition upon the use of property to protect public health cannot be deemed a taking.”); *Our Wicked Lady LLC v Cuomo*, 2021 WL 915033, *6 (SD NY, March 9, 2021) (“Actions like those taken through these orders, which are undertaken to address a global pandemic, do not constitute a regulatory taking[.]”); *Alsop v Desantis*, 2020 WL 9071427, *3 (MD Fla, Nov 5, 2020) (takings claim unavailable where governor temporarily exercised police power to prohibit short-term vacation rentals).¹⁶ For state supreme court case law, see, e.g., *State v Wilson*, 489 P 3d 925, 936–937, 942 (NM, 2021) (concluding that, “[b]ased on clearly established background principles of state nuisance law, the public nuisance exception to the categorical rule in *Lucas* would apply”); *Friends of Danny DeVito v Wolf*, 227 A3d 872, 895–896 (Pa, 2020) (“The

¹⁶ For examples of recognition of this general principle in other contexts, see, e.g., *McCutchen v United States*, 145 Fed Cl 42, 51 (2019) (“[I]t is well established that there is no taking for ‘public use’ where the government . . . outlaws the use or possession of property that presents a danger to the public health and safety.”); *Nat’l Amusements Inc v Borough of Palmyra*, 716 F3d 57, 63 (CA 3, 2013) (holding that five-month closure of flea market in response to unexploded munitions discovered on the property was not a taking because closure abated the danger); *Hendler v United States*, 38 Fed Cl 611, 615 (1997) (“[B]ecause a property owner does not have a right to use his property in a manner harmful to public health or safety, the government’s exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner’s property rights.”).

Executive Order results in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to protect the lives, health, morals, comfort, and general welfare of the people[.]"); *Rockleigh Country Club, LLC v Hartford Ins Group*, No. A-2615-21, 2023 WL 2335707, at *4 (NJ Super Ct App Div, March 3, 2023). But see *City Bar, Inc. v Edwards*, 349 So 3d 22, 30 (La App 1 Cir Aug 30, 2022) (holding that, as a matter of state constitutional law, a taking intended to mitigate a threat to public health was potentially compensable).¹⁷

Gym 24/7 does not acknowledge this body of authority in either its application or its supplement. Instead, Gym 24/7 cites inapposite cases where the federal government was required to pay just compensation for its *physical* seizure of a private owner's property. (See Pl's Supp Br, pp 1, 3–4, citing *Cedar Point Nursery*, 141 S Ct 2063, *Knick v Twp of Scott*, 139 S Ct 2162 (2019), *United States v Pewee Coal Co*, 341 US 114 (1951), and *United States v General Motors Corp*, 323 US 373 (1945).) Notwithstanding Gym 24/7's rhetorical analogy to "the State assuming control and possession of each fitness center and locking the doors" (Pl's App, p 9 n 5), it has not alleged (nor could, it given the plain terms of the challenged

¹⁷ In *City Bar*, the court bypassed the different result suggested by other jurisprudence by noting that the article 1, § 4(B)(2)(c) of the Louisiana Constitution explicitly defined a "public purpose" triggering compensation to include "[t]he removal of a threat to public health or safety caused by the existing use or disuse of the property." 349 So 3d at 30.

restrictions) that the State appropriated its property, entered its property, or permitted third parties to do the same. See *Cedar Point Nursery*, 141 S Ct at 2072 (“The access regulation appropriates a right to invade the growers’ property and therefore constitutes a per se physical taking.”); *Knick*, 139 S Ct at 2168 (“The ordinance also authorized Township ‘code enforcement’ officers to ‘enter upon any property’ to determine the existence and location of a cemetery”); *Pewee Coal Co*, 341 US at 115–116 (“[T]he President . . . direct[ed] the Secretary of Interior to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened[.]” (cleaned up)); *General Motors Corp*, 323 US at 375 (“[T]he United States [in 1942] filed a petition in the District Court for an order condemning such temporary use and granting the Government the right of immediate possession, use, and improvement for military purposes.”). See also *Heights Apartments, LLC v Walz*, 30 F 4th 720 (CA 8, 2022) (permitting a takings claim to proceed where the state “forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation”). In fact, Gym 24/7 has waived a physical takings claim like those addressed in its case law. (Pl’s App, pp 8–9 & n 5.)

In sum, there is no legal support for the claim that a temporary limitation on places of public accommodation, whose sole purpose is to control a deadly pandemic, can give rise to a compensable takings claim under our state or federal constitution. Gym 24/7 cannot cite a single case that is not immediately distinguishable from the circumstances here. And for good reason. A state’s decision regarding how to

address a matter of necessity—as opposed to choosing between two “perfectly innocent and independently desirable” goals, *Lucas*, 505 US at 1025 (quotation omitted)—exists outside of the Takings Clause, which is not intended to impede the State’s ability to exercise its duty to protect citizens from imminent threats to their health or safety. A contrary rule would hamstring the government in the exercise of one of its most essential functions, turning every emergency, life-saving effort into a crippling budgetary decision. Long-settled jurisprudence duly forecloses this outcome, and *Gym 24/7*’s claims as a matter of law. As the Court of Appeals correctly recognized, no discovery is needed to reach this conclusion, nor could any discovery avoid it; dismissal is warranted.

II. A temporary restriction on the use of business property cannot constitute a categorical regulatory taking, and that the challenged restrictions here were not only temporary but partial in scope only further confirms that no such taking occurred as a matter of law.

For the reasons set forth above, a proper takings analysis will terminate before reaching the fork in the road that leads this Court to either categorical or noncategorical frameworks. Nevertheless, regarding categorical takings, this Court has asked the parties to brief “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.” (3/17/23 Order at 1.) The answer is no; a temporary restriction on use can never comprise a categorical taking. This is especially true when, as here, the restriction on one type of use left many property rights

unaffected, but that is not necessary to conclude that Gym 24/7 has not pleaded a categorical regulatory taking claim.

To begin, an impairment to business operations, known to be temporary, can never comprise a categorical regulatory taking. (Such a bright line is neither harsh nor unfair; in the case of a temporary regulation, it is still possible for a plaintiff to establish a taking, but courts must apply a noncategorical framework.) Exceptions to this rule have arisen exclusively where the impairment was permanent at the outset but later *rendered* temporary after the fact. E.g., *Lucas*, 505 US 1003.

Here, the impairment affirmatively was temporary, which is sufficient to determine that the categorical framework is inapplicable. (E.g., E.O. 2020-9 (entitled “Temporary restrictions on the use of places of public accommodation”).) Gym 24/7’s property also retained value during the relevant time. Gym 24/7 preferred to use its property as it had prior to the pandemic. But one’s preferred *use* of a property is a narrow stick in the bundle of property rights that comprises the property’s value. Simply put, a regulation must “*completely* deprive an owner of *all* economically beneficial use of her property” in order to be a “categorical” regulatory taking. *Cummins v Robinson Twp*, 283 Mich App 677, 707 (2009) (emphasis added), quoting *Lucas*, 505 US at 1019. See also *Lucas*, 505 US at 1017 (describing categorical regulatory taking as a framework reserved for an “extraordinary circumstance”). For the reasons that follow, Gym 24/7 has not alleged facts that are sufficient to support a categorical regulatory taking, and no factual development through discovery would or could change this conclusion.

A. The orders' inherently temporary nature is sufficient to preclude a categorical analysis, regardless of their scope.

The United States Supreme Court has expressly explored the question of what constitutes a “total” deprivation sufficient to establish a categorical claim. This case law establishes that, to qualify as a categorical claim, the impairment must both affect the entirety of the property’s value *and* do so permanently.

In its most recent seminal decision on the subject, *Tahoe-Sierra*, the Supreme Court held that a temporary moratorium on all economically viable use does not effect a categorical taking. 535 US at 321. In *Tahoe-Sierra*, the Court examined a California injunction that barred any construction on the properties at issue for 32 months, after which time the injunction was lifted and construction could resume. See *id.* at 312. The trial court had determined that, during the injunction, the property owners “had been temporarily deprived of all economically viable use of their land.” *Id.* at 316 (quotation omitted). The Court held that allegations of a temporary “taking”—even one that effected a moratorium on *all* use—should not be fitted into a categorical framework; compensation was still a possibility, but only under the *Penn Central* test, which the plaintiffs had forfeited. *Id.* at 330–331; *id.* at 321 (stating that “the answer to the abstract question whether a temporary moratorium effects a taking is neither ‘yes, always’ nor ‘no, never’; the answer depends upon” the *Penn Central* test.)

In particular, the Court reasoned that a fee simple interest in real property has two dimensions—physical and temporal—and both “must be considered.” *Id.* at 331–332. A temporary restriction on use, therefore, does not take the entire

“bundle of sticks”: “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” *Id.* Just like the parcels themselves may not be divided when evaluated, the Court in *Tahoe* ruled the same for the temporal segments:

[T]he District Court erred when it disaggregated petitioners’ property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court’s analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework. [*Tahoe-Sierra*, 535 US at 331.]

Our state appellate courts have ruled likewise. See *Cummins*, 283 Mich App at 717 (approvingly citing *Tahoe*); *K & K Constr, Inc v Dep’t of Environmental Quality*, 267 Mich App 523, 536 n 17 (2005) (same).

Tahoe-Sierra gave context to its holding by explaining the practical consequences of a rule like the one Gym 24/7 suggests. If a fee interest in property—which is defined in part by its duration—could be subdivided into a “temporal slice” less than the property owner’s interest, then “every delay would become a total ban,” and even normal permit-approval processes “would constitute categorical takings.” *Tahoe-Sierra*, 535 US at 331. See also *id.* at 323–325 (explaining that land-use regulations are “ubiquitous” and frequently impact property values in both obvious and “completely unanticipated” ways). Such a result “would transform government regulation into a luxury few governments could afford.” *Id.* at 324.

Gym 24/7 appears to recognize the inapplicability of a categorical framework to the temporary impairment it challenges, but it tries to salvage the claim by alleging that it suffered a permanent deprivation of its *revenues*.¹⁸ But, again, *Tahoe-Sierra* foreclosed this reframing: Such an argument would transfer any temporary interruption of a revenue-generating business concern into a *categorical, per se* taking. The added element of “revenue”—which might not have been as prominent in *Tahoe-Sierra*’s property-development context—is a red herring. The “property” concerned in a takings analysis is that to which the plaintiff has a definable right, and which can be measured by market value, irrespective of the “particular purposes” to which the owner might put his property. Accord *United States v Petty Motor Co*, 327 US 372, 376 (1946) (“Condemnation proceedings are in rem, and compensation is made for the value of the rights which are taken.” (citations omitted)); *id.* at 377–378. In other words, “lost profits” are not compensable, and it follows that they cannot define the character of the alleged taking. See *id.* at 377–378; *College Sav Bank v Florida Prepaid Postsecondary Ed Expense Bd*, 527 US 666, 675 (1999) (“[B]usiness in the sense of *the activity of doing business, or the activity of making a profit* is not property in the ordinary sense.”).

In the same vein, if Gym 24/7 intends on establishing permanency by insisting that the actual property “taken” was its revenues, its claim falls apart for

¹⁸ (See Pl’s BIO to Def’s 8/19/20 MSD, p 11 n 4) (conceding that *Tahoe-Sierra*’s result made sense because, there, “the property owner is *eventually* going to get *some* use or benefit from their property as originally intended,” but arguing that, “[i]n this case, however, the businesses’ total 100% losses are permanent and not recoverable”).

another reason. The state did not allegedly acquire those revenues, nor did it put them to “public use.” Cf. *Co of Wayne v Hathcock*, 471 Mich 445, 471–472 (2004) (discussing “public use” criterion of eminent domain power). At best, Gym 24/7 is alleging that the State took a slice of its *revenue-generating potential*, which state action was indisputably temporary.

Even if lost revenues are relevant, they do not translate to an elimination of the property’s total value. The property can still be used, and it can still be sold. (See Part II.B, *infra*.) Gym 24/7’s alleged loss of revenue, therefore, cannot transform a *temporary* restriction on one’s property rights into a permanent one.¹⁹

Gym 24/7 asks this Court to eschew *Tahoe-Sierra* for *Lucas*—specifically on the basis that the impairment in *Lucas* was *eventually* rescinded. *Tahoe-Sierra* itself explained why *Lucas* does not permit application of the categorical framework under the facts at bar.

In *Lucas*, the U.S. Supreme Court examined a South Carolina statute that created a “coastal-zone construction ban,” rendering the owner’s property “valueless,” i.e., it had “no economically viable use.” 505 US at 1020 & n 9. The Court referred to this as the “‘total taking’ inquiry.” *Id.* at 1030. And when it said total, it meant total: “[I]n at least some cases the landowner with 95% loss will get

¹⁹ For that matter, by reference to the time value of money, *any* restriction on economic use—including property development, as in *Tahoe-Sierra*—can be reframed as a permanent loss of dollars, even absent a revenue stream. If two plots of identical land are developed 32 months apart, the owner of the earlier-developed property will have 32 months of investment potential that was unavailable to the other property owner.

nothing, while the landowner with total loss will recover in full. . . . Takings law is full of these ‘all-or-nothing’ situations.” *Id.* at 1019 n 8. For that reason, it ruled 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.

Gym 24/7 invokes *Lucas* because the “total taking” there ultimately *became* temporary when the state elected to amend the relevant statute. But the amendment was not contemplated or anticipated during the time that the property had lost its value. *Id.* at 1030 n 17 (noting that a state “may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation,” but where it has “already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective”). See also *Tahoe-Sierra*, 535 US at 329 (“As the statute read at the time of the trial, it effected a taking that ‘was unconditional and permanent.’”), quoting *Lucas*, 505 US at 1012. South Carolina chose to amend the statute to permit use of the property only later, and its supreme court had passed on the opportunity to rule on ripeness grounds. *Id.*, citing *Lucas*, 505 US at 1012. The *Lucas* Court thus “decided the case on the permanent taking theory that both the trial court and the State Supreme Court had addressed.” *Id.*, citing *Lucas*, 505 US at 1012. See also *Lucas*, 505 US at 1032 (Kennedy, J, concurring) (noting the “unusual posture” of the case as it reached the Court).

Here, by contrast, the restrictions, by their plain terms, were expressly designed and stated to be temporary. (See, e.g., E.O. 2020-9 (describing “limited and temporary restrictions on the uses of places of public accommodation”).) See also *Gym 24/7*, 341 Mich App at 266 n 14 (“No such permanency existed in *Tahoe-Sierra Preservation Council* or in the instant case.”). Accordingly, *Lucas*’s categorical rule does not apply.

This distinction is not academic. It has real-world consequences for the property owner, which justify applying a “categorical” framework to permanent, total takings that *wind up* being only temporary, and reserving the ad hoc *Penn Central* framework for impairments *expressly stated* to be temporary. During the period in which both the owner and the marketplace believe the taking to be permanent, the property truly has no value. Informed, rational actors will not purchase, maintain, or invest in permanently taken property. And owners who believe that they have suffered a permanent taking may act in reliance in other ways, too. The owners might cancel contracts rather than modify them; sell personal property such as equipment rather than store it; default on a mortgage rather than stay current; let the property fall into disrepair or eschew improvements rather than make use of the downtime; and so on.

The challenged restrictions, meanwhile, did nothing to suggest such permanence. Rather, they instructed the marketplace at large (including *Gym 24/7*) that they would eventually expire. If *Gym 24/7* was inclined to seek modification of contracts, or sell its business or property, business partners and potential

purchasers would have the same general knowledge that the restrictions would expire. Contra *Lucas*, 505 US at 1020 (analyzing statute requiring property to be left in a state of nature). As a result, at all times the property held some non-zero value, precluding a categorical framework. The precise contours of the value of the property during the relevant period are not necessary to this conclusion and therefore require no factual development. Gym 24/7's attempts to reconstrue the temporary pandemic restrictions as "permanent" are legally off the mark. Cf. *Danforth v United States*, 308 US 271, 285 (1939) (holding that fluctuations in value, including those caused by government action, are "incidents of ownership" and "cannot be considered as a 'taking' in the constitutional sense").

B. Even if a temporary limitation on use could trigger a categorical analysis, Gym 24/7 has not pleaded a question of fact regarding a total elimination of value during that period.

Again, the U.S. Supreme Court has explained that one's property interests comprise both physical and temporal dimensions. Given that fact, even a total, unmitigated closure of a business cannot comprise a "categorical" taking if it is temporary. And although the temporary nature of the impairment is a significant reason that Gym 24/7's property retained value here, even looking only to Gym 24/7's "preferred use" reveals that the categorical framework is inappropriate. See *Lucas*, 505 US at 1019–1020 n 8. See also *Adams Outdoor Advertising*, 463 Mich at 26 ("Because this provision does not deprive the lessors of 'all economically beneficial or productive use of land,' it would not effect a categorical taking of the lessors' interests."); *K & K Constr*, 456 Mich at 587 ("While the commercial value of

the land may have been reduced by the restrictions placed on it by the [Act], it was not rendered worthless[.]”).

The Court of Appeals rightly concluded that Gym 24/7 never alleged a total impairment of value. 341 Mich App at 266–267. (See Compl ¶ 17 (alleging only that the orders “inflicted *very nearly* the same effect for constitutional purposes as appropriating or destroying the property as a whole” (emphasis added); *id.* ¶ 18 (alleging that “Class Members ... suffered substantial—and *perhaps* total—diminution of value” (emphasis added).) What is more, Gym 24/7’s categorical claim rests on a legal premise that is demonstrably incorrect: It states that “the executive orders were, in effect, the State assuming control and possession of each fitness center and locking the doors.” (Pl’s App, p 9 n 5.) In fact, the orders expressly did “not prohibit an employee, contractor, vendor, or supplier of a place of public accommodation from entering, exiting, using, or occupying that place of public accommodation in their professional capacity.” E.g., E.O. 2020-9. Viewed properly in terms of Gym 24/7’s bundle of property rights, the restrictions were *not* equivalent to “locking the doors.” E.g., *Nowlin v Pritzker*, 34 F4th 629, 635 (CA 7, 2022) (holding that COVID restrictions affecting “preferred or intended use” of a business, while leaving business owner “free to make other uses of their properties consistent with the closure orders,” do not affect regulatory taking); *Lingle*, 544 US at 539 (identifying ouster of the owner as a distinct, particularly onerous restriction).

The restrictions were, on their face, not only temporary, but still permitted Gym 24/7 to engage in a variety of other commercial activity, such as offering outdoor or remote fitness services (such as recorded or live classes or personal training via video chat), providing staff training, or selling consumer-goods inventory such as supplements or clothing. And that is to say nothing of the myriad other uses to which Gym 24/7 could have put its property, *Nowlin*, 34 F4th at 635, or—crucially—the non-zero value of the real or personal property at market, see *Lucas*, 505 US at 1027–1028 (distinguishing between regulations directly affecting “land” and those that affect only “the uses of . . . property”); *Kirby Forest Indus, Inc v United States*, 467 US 1, 15 (1984) (“[I]n the absence of an interference with an owner’s legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.”). The potential for revenue is but a small slice of the property’s “value,” and Gym 24/7’s focus on revenue precludes a categorical takings claim. See *Gym 24/7*, 341 Mich App at 267 n 16. This is not an issue that needs factual development; the indisputable fact is that the restrictions did nothing to prohibit the sale of the property, nor to instruct prospective purchasers that the property lacked any economic value. E.g., *Abshire v Newsom*, No. 21-16442, 2023 WL 3243999 (CA 9, May 4, 2023) (citing *Lucas* and observing that “Plaintiffs were free to sell their land or use it for other lawful purposes, and Plaintiffs do not claim that the property held no value in the real estate market because of the orders”).

In short, in line with courts' consistent answers to this question,²⁰ the Court of Appeals correctly held that Gym 24/7 failed to allege a categorical regulatory taking.

III. *Penn Central's* flexible, ad hoc test—which the Court of Appeals properly weighed despite its flawed analysis of the first two factors—instructs that Gym 24/7's property was not, as a matter of law, “taken” by the challenged restrictions.

Whereas a *categorical* regulatory takings claim is premised upon a complete and permanent loss of all economically beneficial use of one's property, a *noncategorical* takings claim is available to address whether a disproportionate impact requires that some lesser degree of “taking” for public use demands compensation. This latter inquiry necessarily entails an ad hoc test, the contours of

²⁰ See, e.g., *TJM 64*, 526 F Supp 3d at 337 (rejecting as legally insufficient restaurants' allegations “that the Closure Order took away all economically beneficial uses of their properties” given the plain terms of the order, which only limited the provision of “in-building services” while leaving “[o]ther business models” available); *Mission Fitness*, 2021 WL 1856552 at *9 (“Here, assuming plaintiffs have alleged a protected property interest, they have not alleged a complete loss of economic value. To the contrary, the Orders permit operating outdoors, among other things.”); *Case*, 542 F Supp 3d at 1281–1282 (plaintiffs' “per se regulatory takings claim fails because the closure of their business did not permanently deprive their property of all value” given that the order at issue only required “a temporary closure of [their] business”); *Northland Baptist Church*, 530 F Supp 3d at 815 (“Here, some E.Os. temporarily, but entirely, foreclosed some Business Plaintiffs from utilizing their properties as intended. But *Tahoe-Sierra* indicates that such actions do not constitute a categorical taking.”); *TJM 64, Inc v Harris*, 475 F Supp 3d 828, 838 (WD Tenn 2020) (“While it may not accord with Plaintiffs' pre-pandemic financial plans to operate their businesses in ways the Order allows, it does not follow that the Closure Order has necessarily stripped Plaintiffs' businesses of *all* their value.”). See also the state cases reaching the same conclusion: *Wilson*, 489 P 3d at 941 (noting *Tahoe-Sierra* and “the temporary nature of COVID-19-related use restrictions” in rejecting takings claim); *Friends of Danny DeVito*, 227 A3d at 895–896 (same).

which were set forth for the first time in *Penn Central*, 438 US 104. *Penn Central* highlighted three factors, examined in full below, which combine to help determine whether the regulation targeted the plaintiff disproportionately to the public at large (and which considers the reciprocal benefit the regulation was designed to confer to the public, potential plaintiffs included). Applied here, this test confirms that no compensable taking for public use occurred.

A. The *Penn Central* test is defined by its flexibility and is intended to determine when the effects of the State action are disproportionately concentrated on a few persons.

Even if Gym 24/7's claim somehow survives the threshold inquiry regarding the scope of their rights and the doctrine of necessity, (see Part I, *supra*), many of the same considerations are powerfully relevant to the ad hoc test for noncategorical regulatory takings summarized in *Penn Central*. The *Penn Central* Court prescribed an ad hoc inquiry shepherded by three "factors that have particular significance":

- (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." [438 US at 124.]

To begin, although the three familiar *Penn Central* factors have "particular significance," they represent not an exhaustive end in themselves, but a flexible means to evaluate the unified and determinative principle underlying them: that the Fifth Amendment 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.” *Id.* at 123–124 (emphasis added), quoting *Armstrong v United States*, 364 US 40, 49 (1960). See also *id.* (explaining that compensation is required only when economic injury is *disproportionately concentrated on a few persons*” (emphasis added)), citing *Goldblatt v Hempstead*, 369 US 590, 594 (1962); *Palazzolo v Rhode Island*, 533 US 606, 617–618 (2001) (stating that the three *Penn Central* factors “are informed by the purpose of the Takings Clause” articulated in *Armstrong*).

Gym 24/7 would have this Court place a thumb on the scales of this flexible test. In its order granting argument on the application, this Court cited *Lingle v Chevron USA Inc*, 544 US 528, 538–539 (2005), which catalogued the factors as follows:

Primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts 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—may be relevant in discerning whether a taking has occurred. [Cleaned up.]

Gym 24/7 seizes upon *Lingle*’s statement that the first two *Penn Central* factors are “primary,” (Pl’s Supp Br, p 12), perhaps perceiving that—if those factors are divorced from their context—elevating the first two factors in some unexplained manner will help its claim. For several reasons, however, *Lingle* cannot be read to elevate any particular factor or factors at the expense of *Penn Central*’s flexibility or the settled principles of takings jurisprudence that underlie it.

First, this statement was *obiter dictum*. *Lingle* expressly went no further than disavowing a separate, freestanding test for noncategorical takings—the so-called “‘substantially advances’ formula.” *Lingle*, 544 US at 545 (“emphasiz[ing]” that rejection of “substantially advances” formula did not “disturb any . . . prior holdings”).²¹ Its summarization of the *Penn Central* factors, including its statement of primacy, cited only *Penn Central* itself, *id.* at 538–539, which reflects no particular preference among or between the factors, see *Penn Central*, 438 US at 124. See also *Reiter v Sonotone Corp*, 442 US 330, 341 (1979) (“[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.”).

Indeed, the ostensible ranking of factors suggested by *Gym 24/7* cannot be found elsewhere in Supreme Court jurisprudence. And for good reason. There is no “set formula” for answering the overarching question regarding fairness, justice, and proportionality; rather, the answer “depends largely upon the particular circumstances in that case.” *Penn Central*, 438 US at 123–124 (cleaned up). “[T]he answer to this question generally resists *per se* rules and rigid formulas,” instead requiring a “flexible approach,” in which “[t]he factors to consider are wide ranging”—all in service of a singular, “ultimate question.” *Murr*, 582 US at 409 (Roberts, CJ, dissenting); *Tahoe-Sierra*, 535 U.S. at 326 n 23. In fact, “the type of taking alleged is . . . an often critical factor,” and a taking is least likely to “arise[]

²¹ Prior to its repudiation, the “substantially advances” formula permitted a plaintiff to maintain a takings claim by challenging whether a regulation substantially advanced a legitimate state interest. *Lingle*, 544 US at 531.

from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Keystone Bituminous Coal*, 480 US at 489 n 18, quoting *Penn Central*, 438 US at 124. These high-level classifications occur at the outset of a court’s inquiry, and they are no less important than the manner in which a restriction might treat an individual plaintiff. See also *id.* at 488 (“Many cases before and since *Pennsylvania Coal [Co v Mahon]*, 260 US 393 (1922),] have recognized that the nature of the State’s action is critical in takings analysis.”).

At best, *Lingle*’s statement that the first two factors are “primary” reflects only these factors’ direct relationship to economic burden and the overarching “disproportionality” inquiry, the latter of which necessarily will require some consideration of the economic burdens contemplated by a restriction on use. After all, at its most basic level, the *Penn Central* test 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,” 438 US at 123–124, and that unified question often will require examining the factors that are tailored to those very burdens. But that does not give those factors any particular overriding *weight*, nor does it diminish the potential impact of *all* circumstances relevant to a particular case.

Thus, when working through each of the three *Penn Central* factors, one must revisit the fundamental and controlling question the factors are intended to answer: Did the challenged restrictions single out Gym 24/7 to bear a

disproportionate burden? As the Court of Appeals duly concluded, the answer here, as a matter of law, is no.

B. The Court of Appeals properly concluded that no taking occurred under *Penn Central*.

The nature of the COVID-19 pandemic—the fear and death it wrought, the shared sacrifice it demanded, and the total disruption it caused in *all* corners of civic life—did not disproportionately affect Gym 24/7. And neither did the comprehensive, statewide efforts to mitigate the pandemic. The Court of Appeals correctly concluded as much in applying *Penn Central*. If the Court of Appeals erred at all, it did so by discussing two factors—economic burden and investment-backed expectations—in a relative vacuum, i.e., without explicitly placing them in the proper context of disproportionality. In fact, all three factors, and all other relevant considerations, show that no taking occurred as a matter of law. Ultimately, however, the Court of Appeals did conduct the proper analysis, returning to the principle that a burden is not disproportionate (and does not effect a taking) when considered in the context of a “reciprocity of advantage,” which, here, was acute. 341 Mich App at 269, quoting *Keystone Bituminous Coal*, 480 US at 491–492

To start, the nature of the emergency and the State’s form of response instructs that the character of the state action was a profoundly significant factor in these circumstances. At issue is a tailored, temporary, negative restriction on use that was imposed statewide and was intended to protect the public health from a deadly pandemic that affected everyone, including Gym 24/7’s employees and

customers. And no business, Gym 24/7 included, had a distinct investment-backed expectation to continue operating free from such restrictions under those conditions. Although Gym 24/7 doubtless was economically impacted by the restrictions, their plain terms make clear that the burden was not disproportionate, and Gym 24/7 has not plausibly alleged any lasting economic impact to its property interest beyond the speculative revenues affected by all aspects of the pandemic and the efforts to control the same. These considerations require no factual development here, and, when they are considered together, they confirm that emergency orders' burdens were not "disproportionately concentrated on a few persons," regardless of whether the numerator is limited to Gym 24/7 or expanded to include the putative class.

The Court of Appeals correctly reached this conclusion under *Penn Central*, and while its analysis may have afforded more weight to certain of Gym 24/7's arguments than warranted, that did not undermine the ultimate integrity of its disposition: that Gym 24/7's claims should be dismissed as a matter of law.

- 1. Gym 24/7 was not singled out by the executive orders, and, regardless, *Penn Central's* economic-impact analysis affords little if any weight to Gym 24/7's alleged reduced revenues.**

The first of the three *Penn Central* factors looks to the "economic impact of the regulation on the claimant." *Penn Central*, 438 US at 124. The Court of Appeals held that this factor favored Gym 24/7. 341 Mich App at 268. Respectfully, however, this factor weighs against finding a taking when viewed properly through the lens of "disproportionate burden" articulated in *Penn Central*. *Yee*, 503 US at

522–523, citing *Penn Central*, 438 US at 123–125. It is not the mere fact of a burden that is relevant; rather, it is that burden’s proportionality.

Here, the alleged economic impact of the restrictions comprised revenue losses that might have followed from closure to the public. (E.g., Compl ¶¶ 34, 40; Pl’s App, pp 16, 17.) The restrictions exposed all similar places of public accommodation to this impact. (See, e.g., E.O. 2020-110 (June 1, 2020) (closing myriad places of public accommodation “to ingress, egress, use, and occupancy by members of the public”).) Other places of public accommodation were burdened according to the risk they were assessed to present, as were all other businesses and individuals more broadly. When the scope of the executive orders is properly considered, this factor weighs against a taking.

Michigan cases applying the *Penn Central* factors have used this same metric, i.e., whether the government unfairly “single[d] plaintiffs out to bear the burden for the public good” and have rejected claims where the action “is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.” *Cummins*, 283 Mich App at 720. See, e.g., *Adams Outdoor Advertising*, 463 Mich at 26 (billboard code); *Schmude Oil, Inc v Dep’t of Env’t Quality*, 306 Mich App 35, 53 (2014); *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 147 (2014) (rezoning); *Dorman v Twp of Clinton*, 269 Mich App 638, 647 (2006); *Michigan Soft Drink Ass’n v Dep’t of Treasury*, 206 Mich App 392, 407 (1994); *Cryderman v City of Birmingham*, 171 Mich App 15, 28 (1988); *Blue Water Isles Co v Dep’t of Natural Resources*, 171 Mich App 526, 536

(1988). When a court reached the opposite conclusion, it was because the State action effectively targeted a single business. See, e.g., *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 131 (2004) (“Essentially, the city wanted plaintiff’s property without having to pay for it through the institution of formal condemnation proceedings”).

In that vein, it is also relevant that the regulations were intended to preserve the lives of Gym 24/7’s *own customer base and staff*, among others, and, as an ancillary benefit, to hasten the return of normal market activity statewide—part of which depended on consumers’ willingness to venture back into public. When a use restriction contemplates a “reciprocity of advantage” flowing back to the plaintiff themselves, the economic impact is all the more proportionate. See *Tahoe-Sierra*, 535 US at 341 (identifying “reciprocity of advantage” of moratorium on development between plaintiffs and the community); *Keystone Bituminous Coal*, 480 US at 491 (“While each of us is burdened somewhat by such [use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others”). E.g., *Pennsylvania Coal*, 260 US at 415 (explaining that, under *Plymouth Coal Co v Pennsylvania*, 232 US 531 (1914), statute requiring coal mine to leave pillar of coal along border with a neighboring coal mine was not a taking because statute “secured an average reciprocity of advantage that has been recognized as a justification of various laws”). The gravity of the threat addressed by the restrictions is difficult to overstate, but suffice it to say they were intended to protect the very lives—and way of life—that supported businesses like Gym 24/7’s.

Furthermore, in seeking to establish that its losses were permanent, rather than temporary restrictions on use, Gym 24/7 clarifies that the taken “property” was its revenues. Beyond conclusory allegations of harm, the Complaint alleged no lasting economic impact on its real or personal property, or on Gym 24/7’s business as a going concern. A loss of profits, by itself, is at best “a slender reed upon which to rest a takings claim.” *Andrus v Allard*, 444 US 51, 66 (1979). See *Tahoe-Sierra*, 535 US at 332; *Petty Motor Co*, 327 US at 377 (“[E]vidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings” (citations omitted)); *College Sav Bank* 527 US at 675; *Stand for Something Group Live, LLC v Abbott*, No. 13-21-00017-CV, 2022 WL 11485464, at *6 (Tex App, Oct 20, 2022), review den (June 23, 2023) (“We do not usually consider the loss of anticipated profits in analyzing [the first *Penn Central*] factor.”). Even to the extent one has a property interest in speculative revenues, “[t]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.” *Andrus*, 444 US at 66. See *Penn Central*, 438 US at 130 (holding that “the submission that appellants may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable”).

Courts’ unwillingness to give credence to speculative lost revenues is consistent with the proper focus on the *entire scope* of one’s property interests in takings jurisprudence; in the appropriate proportionality inquiry, it is important to

remember that Gym 24/7 does not allege—nor could it, given the orders’ plain language—that the use restrictions at issue here purported to affect its other, more concrete property interests.

Accordingly, any disruption to Gym 24/7’s business operations attributable to the restrictions was, first and foremost, broadly proportionate to the burdens imposed on society as a whole. Like the pandemic itself, the State’s response thereto was statewide and comprehensive; its burdens, and its intended benefits, were directed at everyone in Michigan, individuals and businesses alike. Even if this proportionality inquiry is narrowed to focus on only places of public accommodation, fitness centers were not burdened disproportionately under the plain terms of the orders. Further, Gym 24/7 did not allege that the orders purported to permanently diminish its real property rights or the value of its real or personal property. The restrictions were a temporary disruption of commercial use, and they were only partial in their treatment of commercial activity, permitting other uses even during their limited effective period. At most, this disruption allegedly affected Gym 24/7’s speculative revenues for a temporary period—but under the orders’ plain terms, all similar places of public accommodation were affected similarly, and, notwithstanding, revenues are given at most very little weight as a matter of law in the *Penn Central* analysis.²² Viewed properly, this factor suggests that no taking occurred.

²² And all that is to say nothing of the fact that it would be impossible to disentangle the portion of revenues lost solely as a result of the restrictions from the portion lost as a result of consumers’ own unwillingness to engage in business as usual. See

2. Investors in Gym 24/7 or in fitness centers generally had no reason to believe that they would be immune from emergency limitations to protect the public.

The second *Penn Central* factor instructs courts to consider “the extent to which the regulation has interfered with distinct investment-backed expectations.” *Penn Central*, 438 US at 124. “A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need.” *Ruckelshaus v Monsanto Co*, 467 US 986, 1005 (1984) (cleaned up). A “key factor” in this inquiry is “notice of the applicable regulatory regime.” *K & K Constr*, 267 Mich App at 555.

The “applicable” regulatory regime here must be viewed in the context of (i.e., as “applicable” to) the deadly COVID-19 pandemic. To understand how this factor works in that context, it helps to separate the pandemic *itself* from the State’s *response thereto*. This factor examines only the latter. Although few people might have particularly anticipated the onset of the historic, globe-spanning COVID-19 pandemic, once that threat to public health emerged, no one could have a reasonable, distinct expectation that the State would remain idle. E.g., *Underwood*, 538 F Supp 3d at 680 (holding that plaintiff failed to support this factor by alluding exclusively to “pre-pandemic circumstances”). As a federal district court stated in rejecting the same basic claim against Governor Whitmer advanced by other places of public accommodation:

Underwood v City of Starkville, Mississippi, 538 F Supp 3d 667, 680 (ND Miss 2021).

Although Plaintiffs understandably expected to conduct business as usual when 2020 began, *the pandemic forced everyone to adjust their expectations*. Plaintiffs cannot plausibly contend that they expected to continue operating normally when doing so posed an obvious risk of spreading a contagious and dangerous virus. [*Skatmore, Inc v Whitmer*, 2021 WL 3930808, at *4 (WD Mich Sept 2, 2021) (emphasis added), *aff'd* 40 F 4th 727 (CA 6, 2022).]

Would Gym 24/7 have been justified in making investments premised on the State remaining idle in the face of an existential, emergent threat to public health? As explained in Part I, *supra*, the answer is no. See *Withey v Bloem*, 163 Mich 419, 423 (1910). The pervasive nature of similar state action across the country confirms that, starting within the context of a pandemic viral outbreak, a given business would not have been reasonable in making investments premised on the State failing to respond to the pandemic as it did. *Oregon Restaurant & Lodging Ass'n v Brown*, ___ F Supp 3d ___, No. 3:20-cv-02017-YY, 2020 WL 6905319, at *6 (D Oregon, Nov 24, 2020) (“There is no reasonable, investment-backed expectation that the state would not act in the face of a historic public health crisis.”). See also *Keystone Bituminous Coal*, 480 US at 491–492 (“[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.” (citation and quotation omitted)). Expecting the sort of immunity from lifesaving public-health measures, as urged by Gym 24/7, is inconsistent with the principles of justice, fairness, and proportionality that guide the *Penn Central* test. *Keystone Bituminous Coal*, 480 US at 491–492 (“While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed

on others. These restrictions are properly treated as part of the burden of common citizenship.” (citation and quotation omitted)).

To date, Gym 24/7 has alleged nothing in particular—let alone “distinct”—with respect to its investment-backed expectations. Its failure is understandable when framed properly in terms of the pandemic. And, looking outward to the rest of Michigan’s economy at the relevant time, Gym 24/7 fails to allege the sort of “expectation” that is in any way unique. Furthermore, the temporary and limited nature of the restrictions at issue, along with the context from which they arose, belies any notion that Gym 24/7’s investment-backed expectations for its property were unreasonably disrupted. This factor too suggests no taking occurred.

3. The character of the governmental action here confirms there was no taking as a matter of law.

The third *Penn Central* factor weighs “the character of the governmental action.” *Penn Central*, 438 US at 124. “[T]he nature of the State’s action is *critical* in takings analysis.” *Keystone Bituminous Coal*, 480 US at 488–490 (emphasis added) (collecting cases affirming the “important role” the nature of the government action plays in the analysis). See also *Tahoe-Sierra*, 535 US at 320 (highlighting “the importance of the public interest served by the regulation” as part of a noncategorical inquiry); *Lucas*, 505 US at 1015 (confirming that noncategorical takings claims include analysis of “how weighty the public purpose” is). The Court of Appeals correctly considered the background informing this factor, emphasizing its role in the ultimate proportionality inquiry. *Gym 24/7*, 341 Mich App at 268–269.

The executive orders were intended “to forestall the spread of COVID-19 that had hospitalized and killed thousands of Michiganders.” *Id.* This proper purpose lies at the heart of the State’s traditional police power to protect the public health. (See Part I, *supra.*) For that reason, “[u]nsurprisingly, courts across the country agree that the final *Penn Central* factor, the character of the disputed government action during the COVID-19 pandemic, weighs heavily in Defendants’ favor.” *Daugherty Speedway, Inc v Freeland*, 520 F Supp 3d 1070, 1078 (ND Ind, Feb 17, 2021) (collecting cases). (See also Def’s BIO to App, p 22 & n 18 (collecting cases)).

Citing *Lingle*, 544 US at 543, Amicus Institute for Justice suggests that the nature of the threat itself plays no role in this factor (or, by extension, the *Penn Central* inquiry at large). (IFJ Amicus Br, p 23.) This interpretation of *Lingle* is well off the mark. As set forth above, *Lingle* explained that its holding was limited to a rejection of “a stand-alone regulatory takings test” that asks “whether a regulation of private property is *effective* in achieving some legitimate public purpose.” *Lingle*, 544 US at 540, 542. A challenge to a regulation’s efficacy or arbitrariness invokes the Due Process Clause, not the Takings Clause, and thus a plaintiff cannot premise a takings claim upon it. *Id.* at 540.²³ Nothing about this clarification suggested that

²³ This correct understanding of *Lingle* dispenses with Gym 24/7’s claim that discovery is needed to reveal that the “total shuttering of the gyms and fitness centers was unnecessary.” (Pl’s Supp Br, p 12.) In addition, Gym 24/7 repeatedly has conceded that the executive orders were proper; their ultimate efficacy is not before this Court. Notably, however, Gym 24/7 leverages the orders’ significant *public* benefit to its own end, stating that it has “acknowledged” the orders’ “clear public purpose” and the “really good reason” for their issuance. (Pl’s Supp Br, p 13.) But it improperly ignores that it, and its customers, are part of that same benefitting public, as well as the fact that the orders’ burdens were likewise broad.

the nature of the purpose the regulation was designed to serve (regardless of how effectively it may have done so) was now irrelevant to a takings inquiry, contrary to the heaps of longstanding jurisprudence holding otherwise. E.g., *id.* at 545 (stressing that its ruling did not “disturb any of [the Court’s] prior holdings”).

Here, the *Penn Central* test’s overarching focus on the proportionality of the burden not only permits, but in this context requires, consideration of the character of the executive orders vis-à-vis the threat they addressed. *Tahoe-Sierra*, 535 US at 327 n 23 (“The Takings Clause requires careful examination and weighing of all the relevant circumstances[.]”), quoting *Palazzolo*, 533 US at 636 (O’Conner, J, concurring). The U.S. Supreme Court has confirmed this even after *Lingle*. E.g., *Murr*, 582 US at 405 (holding that third *Penn Central* factor weighed against a taking when the governmental action was “enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land”). A contrary rule would put too much focus on “burden,” which cannot be fully understood without the corresponding “benefit.” In addition to the direct, immediate benefit of saving lives, the executive orders also were intended to shorten the pandemic’s duration and bring consumers back to the very market in which Gym 24/7 operates.

Regardless, even if the *distribution* of the burden is the third factor’s only input, it still weighs heavily against finding a taking. The executive orders placed similar burdens on similar places of public accommodation, and significant burdens on all places of public accommodation—and indeed, on all businesses and individuals statewide. The idea that the State’s orders purported to disproportionately affect

Gym 24/7—or fitness centers generally—is belied by those orders’ plain terms. In fact, by styling this lawsuit as a class action, Gym 24/7 has effectively acknowledged that it was not “unfairly singled out . . . to bear a burden that should be borne by the public as a whole.” *Yee*, 503 US at 523. As if to punctuate that fact, Gym 24/7 has moved the Court of Claims to permit it to amend its complaint to expand the putative class, from gyms and fitness centers in 17 certain counties to those located statewide. See also MRE 201.

Even if the Court of Claims were inclined to permit such an expansion, the putative statewide class of gyms and fitness centers would exclude *thousands* of businesses that were subject to the same sort of restrictions as Gym 24/7, such as movie theaters and performance venues, facilities offering non-essential personal care services, casinos and racetracks, and bowling alleys—to say nothing of those businesses that bore proportionate burdens that, while not identical, are nevertheless relevant, or individuals who bore proportional economic burdens.

Attempts to define an accurate (if legally improper) “class” of entities burdened by the State’s COVID-19 emergency orders will thus encompass more and more businesses and other entities, until one reaches the correct conclusion that the entire territory was affected. Class actions and takings claims already are like oil and water; but a class action whose theory could be extended statewide is even less cognizable as a takings claim. The character of the order that included Gym 24/7 and the putative class members was therefore not disproportionate. See also *Blackburn v*

Dare Co, 58 F4th 807, 814–815 (2023) (noting putative class action’s incompatibility with a showing of disproportionate burden).

All other considerations informing the “character” of the executive orders weigh against finding a taking, too. The executive orders were temporary in nature, both by their plain terms and their actual operation, and their negative restrictions on places of public accommodation were calculated to mitigate the spread of a deadly pandemic. And, again, similar restrictions were in place all across the State and, indeed, the country. *McKinley v Grisham*, No. CV 20-01331 JHR/JFR, 2022 WL 2048593, at *7 (DNM, June 7, 2022) (“Rather than affirmative exploitation, physical invasion or permanent appropriation of plaintiffs’ assets, the public health orders were negative limitations setting occupancy limits, etc.; their negative character also weighs in favor of the Defendants.”). Finally, the State’s orders’ emergency character instructs that they should not be considered a taking, insofar as a contrary holding would put the State to the choice of either letting a deadly virus ravage its populace, on the one hand, or go bankrupt in its efforts to mitigate the same, on the other. Never before has the law imagined that the State would be obligated to pay just compensation to temporarily regulate property in an emergency to protect the public health. That rule would be untenable. *Respublica v Sparhawk*, 1 US 357, 361–362 (1788) (“If the Appellant is entitled to relief, . . . every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified. What nation could sustain the enormous load of debt which so ruinous a doctrine would create!”); *Tahoe-Sierra*,

535 US at 340 (disavowing a “perverse system of incentives” that acknowledge “well-reasoned decisions” facilitated by permitting delay “while, at the same time, holding that those planners must compensate landowners for the delay”).

For these reasons, the character of the challenged COVID-19 regulations proves that neither Gym 24/7’s property, nor its revenues, were taken for public use. To make its case for disproportionality, Gym 24/7’s complaint cherry-picks regulations that affected a narrow class of businesses, but even the regulation’s line-item that applied to the putative class also applied to thousands of other businesses. The historic threat—and the historic response that threat required—was felt by individuals and businesses of all stripes statewide. As a matter of law, no noncategorical taking occurred under *Penn Central*.

C. Further factual development could not change that Gym 24/7’s claims fail as a matter of law under *Penn Central*.

Finally, Gym 24/7 urges that the record is insufficient to permit dismissal under *Penn Central*. (E.g., Pl’s Supp Br, p 1.)

This argument is founded on a misunderstanding of the nature of the *Penn Central* test, the COVID-19 pandemic and the statewide orders it prompted, and litigation generally. Just as every lawsuit contains a factual component, it is true that an ad hoc, fact-based inquiry such as the *Penn Central* test must be answered with facts; but that does not mean that articulating a fact question makes that question relevant to the ultimate issue or forecloses judgment as a matter of law. Judgment on the pleadings is routine—and desirable—when the allegations in the

complaint cannot support a viable claim for relief. *Spiek*, 456 Mich at 337. Takings claims, including those advanced under *Penn Central*, are no exception.²⁴

Numerous courts nationwide have recognized as much in the context of this pandemic, routinely dismissing takings challenges to COVID-19 business restrictions as a matter of law.²⁵ Such is the case here too—twice over, in fact.

²⁴ E.g., *74 Pinehurst LLC v New York*, 59 F4th 557 (CA 2, 2023); *Britton v Keller*, 851 F. App'x 821, 825 (CA 10, 2021) (“Ms. Britton argues the district court erred in performing a *Penn Central* analysis on a motion to dismiss. In her view, because the *Penn Central* analysis is fact specific, a district court must wait for the factual development that occurs in discovery before undertaking it. Ms. Britton is incorrect.”), citing *Taylor v United States*, 959 F3d 1081, 1087 (Fed Cir 2020) (concluding, in reviewing a motion to dismiss a takings claim, that “the [plaintiffs] regulatory-taking claim cannot pass muster under [the *Penn Central*] standards, even without further factual inquiry”); *Britton*, 851 F. App'x at 827 n 4 (collecting cases); *Hotel & Motel Ass'n of Oakland v City of Oakland*, 344 F3d 959, 966 (CA 9, 2003) (stressing that “individualized scrutiny of such claims does not foreclose resolution on a motion to dismiss”); *Rogin v Bensalem Twp*, 616 F2d 680 (CA 3, 1980).

²⁵ For federal examples, see, e.g., *Abshire v Newsom*, 2023 WL 3243999 (CA 9, May 4, 2023) (Mem); *Nowlin*, 34 F 4th 629; *Bojicic v DeWine*, 2022 WL 3585636 (CA 6, Aug 22, 2022); *Best Supplement Guide, LLC v Newsom*, 2022 WL 2703404 (CA 9, July 12, 2022) (Mem); *Everest Foods Inc v Cuomo*, 585 F Supp 3d 425 (SDNY 2022); *Tuck's Rest & Bar v Newsom*, 2022 WL 5063861 (ED Cal Oct 4, 2022); *Tatoma, Inc v Newsom*, 2022 WL 686965 (SD Cal Mar 8, 2022); *TJM 64, Inc v Harris*, 526 F Supp 3d 331 (WD Tenn 2021); *Madsen v City of Lincoln*, 574 F Supp 3d 683 (D Neb 2021); *Underwood*, 538 F Supp 3d 667; *Culinary Studios, Inc v Newsom*, 517 F Supp 3d 1042 (ED Cal 2021); *Metroflex Oceanside LLC v Newsom*, 532 F Supp 3d 976 (SD Cal 2021); *Mission Fitness Ctr, LLC v Newsom*, 2021 WL 1856552 (CD Cal, May 10, 2021); *Amato v Elicker*, 534 F Supp 3d 196, 212–214 (D Conn, April 15, 2021); *Northland Baptist Church of St. Paul v Walz*, 530 F Supp 3d 790 (D Minn, March 30, 2021), aff'd sub nom *Glow In One Mini Golf, LLC v Walz*, 37 F 4th 1365 (CA 8, 2022); *Daugherty Speedway*, 520 F Supp 3d 1070; *Peinhopf v Guerrero*, 2021 WL 2417150 (D Guam, June 14, 2021); *Our Wicked Lady LLC v Cuomo*, 2021 WL 2413347 (SDNY, June 11, 2021); *Lebanon Valley Auto Racing Corp v Cuomo*, 478 F Supp 3d 389 (ND NY, 2020). For state examples, see, e.g., *Galovelho LLC v Abbott*, 2023 WL 5542621 (Tex App Aug 29, 2023); *640 Tenth, LP v Newsom*, 78 Cal App 5th 840 (2022); *Orlando Bar Grp, LLC v DeSantis*, 339 So 3d 487 (Fla Dist Ct App,

First, there is the legal principle that state regulatory action intended to abate a nuisance on a plaintiff's property or avert acute and imminent danger—here, the spread of a deadly global pandemic—cannot comprise a taking. This conclusion would hold true even if the alleged “taking” was categorical, i.e., permanent and total. E.g., *Lucas*, 505 US at 1029 (“Nor [is compensation owing to] the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.”). No discovery regarding Gym 24/7’s lost revenues, workforce, investments, goodwill, or overhead can avoid the same conclusion; even if the effect on its business is assumed to be both permanent and total, Gym 24/7 would still not be able to state a compensable takings claim as a matter of law.

Notwithstanding that threshold principle, the ad hoc *Penn Central* inquiry can and must be resolved on the pleadings here, too. That is because, in working through that inquiry here, a finding of no takings liability as a matter of law flows inexorably from the purpose and design of the challenged statewide orders, which are apparent from the orders’ plain terms. Further exploration of Gym 24/7’s individualized experience under the orders would not change that outcome or render Gym 24/7’s claims any more legally viable. E.g., *Penn Central*, 438 US 137 (rejecting property owner’s untenable, “exaggerate[d]” claim regarding what the challenged law plainly did not prohibit); *Adams Outdoor Advertising*, 463 Mich at

2022); *Stand for Something Grp Live, LLC v Abbott*, 2022 WL 11485464 (Tex App Oct 20, 2022); *JWC Fitness, LLC v Murphy*, 469 NJ Super 414 (2021). But see *City Bar*, 349 So 3d at 33.

24–25 (applying *Penn Central* test to grant summary disposition based in part on simple observation that “any economic effect would be limited because the rooftop is only a small portion of the lessors’ property,” without discussing particulars of plaintiff’s finances); *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 47 (1985) (evaluating economic-impact factor by reference to law’s characterization, design, and purpose vis-à-vis plaintiffs).

Most obviously, the third *Penn Central* factor—the character of the challenged orders—can be examined by reference to the plain terms of the orders themselves. And as courts have overwhelmingly recognized, that character weighs, at the least, very heavily against the existence of takings liability here. But the same is true of the first and second factors, i.e., the orders’ economic impact and effect on investment-backed expectations; their proper consideration likewise shows that Gym 24/7 has failed to state a claim as a matter of law, and no further factual development could change that.

As discussed, Gym 24/7’s alleged economic harm, to the extent it can be discerned from its sparse allegations, is at best scarcely cognizable under *Penn Central*. And by their plain terms, the restrictions were imposed on a temporary and statewide basis, with the same type of restrictions imposed on other places of public accommodation (along with broadly similar burdens on other businesses and individuals throughout the State as well). These facts are enough in themselves to make clear that the economic impact at issue does not support a finding of takings liability under *Penn Central*, regardless of the specific extent of losses that Gym

24/7 might eventually be able to show. E.g., *Penn Central*, 438 US at 133–135 (“It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a ‘taking.’ Legislation designed to promote the general welfare commonly burdens some more than others. . . . Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.”). Likewise, Gym 24/7’s alleged “expectation”—that the State would remain idle in the face of a grave threat such as COVID-19—is not, as a matter of law, the sort that would suggest a taking had occurred; whether a given business invested \$1,000 or \$100,000 is of no moment to that conclusion.

Accordingly, no fact question regarding Gym 24/7’s business could render Gym 24/7’s claims viable under a proper application of *Penn Central* to this case, which is dominated by the distributed, statewide burden demanded by the historic threat posed by COVID-19 and the corresponding reciprocity of advantage it was designed to afford Michiganders at large, Gym 24/7 included. The business-specific factfinding Gym 24/7 urges cannot overcome this or cure the fatal legal deficiencies of its claims—nor, for that matter, is it even compatible with Gym 24/7’s own class-action framing of those claims.

Simply put, to determine whether a compensable taking occurred under a noncategorical regulatory takings theory, *Penn Central* instructs this Court to evaluate whether the plaintiff was unfairly singled out to bear the burden of a

policy that was enacted for the benefit of everyone in the State, such that the taxpayers should be called upon to shoulder that burden as a matter of justice and fairness. *Yee*, 503 US at 522–523. In this case, that answer is no, and it is readily apparent from the pleadings; “no factual development” would or could change it. *Spiet*, 456 Mich App at 337. No further discovery is required, and this issue was suitable for the Court of Appeals’ review and dismissal as a matter of law. This Court should deny leave or affirm.

CONCLUSION AND RELIEF REQUESTED

This Court should either deny leave to appeal or affirm the decision below.

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Dated: October 18, 2023

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the part of the document exempted, this **Supplemental Brief** contains no more than 16,000 words. This document contains 15,222 words.

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Dated: October 18, 2023