IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE COURT OF CLAIMS
JUDGE MICHAEL J. KELLY

THE GYM 24/7 FITNESS, LLC, and
All Others Similarly Situated,
Plaintiffs-Appellants,
vs.
STATE OF MICHIGAN
Defendant-Appellee.

MSC: 164557
COA: 355148
Ct of Claims: 20-000132-MM

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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INTRODUCTION

Pacific Legal Foundation (PLF)[1] respectfully submits this brief amicus curiae at the invitation of the Supreme Court of Michigan to address the certified questions:

> (1) whether the temporary impairment of business operations can be a categorical regulatory taking if there are no reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited *see Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); and
>
> (2) if not, whether the Court of Appeals properly weighed the factors from *Penn Central Transp. Co. v City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), in addressing plaintiff's claims involving a temporary prohibition of its normal business operations.

Gym 24/7 Fitness, LLC v. State, 986 N.W.2d 150, 150−51 (Mich. 2023).

With respect to the first question, a temporary taking of all economic use can, and should, be a categorical taking. Permanent takings are undisputedly so. And while temporary takings have not been afforded the same treatment (*see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002)), the only difference between a deprivation of all economic use that is "temporary" and a deprivation of all economic use that is "permanent" is the government's prediction about when it will take its thumb off the scale.

Yet regulations must be judged based upon the burden that they place on the property owner in the present, not the government's intent to stop acting unconstitutionally in the future. As Justice Brennan has said, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652–53 (1981) (Brennan, J., dissenting); *see* Michael M. Berger, *Whither Regulatory*

[1] Pursuant to MCR 7.212(H)(3), PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Takings?, 51 Urb. Law. 171, 186 (2021) ("the Constitution requires just compensation for *all* takings. Thus, the issue is *not* (or, at least, it should not be) whether property was taken temporarily, but whether it was taken at all. The words of the Fifth Amendment are clear and general: 'nor shall private property be taken for public use without just compensation.' There is no restriction regarding the type of property or duration of the taking").

When a government regulation forces a property owner to sacrifice all economic use in the name of the public good, without the payment of just compensation, what it *does* is categorically violate the Fifth Amendment's Takings Clause. The property can earn no income and its improvements depreciate with every passing day. But the owner has no respite. Rent, salaries, insurance, operating costs, and other expenses must be paid, despite the fact that the owner is precluded from earning the money to pay for them. It is all pain and no gain. Accordingly, when private property is compelled to serve the public interest, it is only fair and just that the public then pay for that service. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The label of "permanent" or "temporary" does not reflect what the regulation *does* but what the government *intends* for the future. Temporary or permanent, the regulation does the same thing—it compels the private property owner to sacrifice all economic use in the name of the public good. Nor is the government bound by its forecast. What is "permanent" can be amended, altered, or rescinded weeks later and what is "temporary" can last for years.

Therefore, an affirmative action by the government cannot be shielded from Takings liability based upon future intent or pliable labels. Once the government deprives a property owner

of all economic use and leaves the property idle in the name of the public good, the government's state of mind when that regulation was enacted (i.e., will this be temporary or permanent?) cannot be used as a sword to deny the property owner a categorical takings claim. If the government action would be a categorical taking were it designated by the government to be permanent, then it is also a categorical taking when the government only claims it to be temporary. Allowing the government's self-characterization of its future intent to be the determinant of whether or not the present action is constitutional yields far too much power to the government. *See First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.,* 482 U.S. 304, 321 (1987) ("where the government's activities have 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"); J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. 1, 51 (2002) ("the 'temporal whole' theory has little overt support in the Supreme Court's previous takings jurisprudence" and "tempts the government to abuse property rights by engaging in the successive enactment of one temporary moratorium after another, strategic planning behavior that the Court has rejected in a different context").

Considering the above, this Court should bypass the U.S. Supreme Court's decision in *Tahoe-Sierra* and instead determine whether a temporary taking of all economic use without the payment of just compensation violates the Michigan Constitution.

With respect to the second question, the lower court erred in its interpretation of *Penn Central*. And again, the main culprit was time.

Two of the three *Penn Central* factors (economic impact and reasonable investment backed expectations) weighed in the property owner's favor. But the court gave them little weight because

the government's regulation was only temporary. This is the failed legacy of *Tahoe-Sierra*. The singular act of labeling a regulation as "temporary," regardless of how long "temporary" lasts for, defeats both *Lucas* and *Penn Central* claims and leaves the property owner with no economic use and no legal recourse. This self-dealing, government descriptor should not be the determining factor as to whether a taking of all economic use is unconstitutional. But in this case, it was. And that is where the error lies.

The lower court also erred in weighing character in the government's favor based upon the public benefit of the Executive Order ("EO"). All valid government action supports the public health, safety, and welfare. But that does not insulate the government from liability when it forcibly takes property rights without the payment of just compensation.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in multiple landmark Supreme Court cases in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 143 S. Ct. 644 (2023); *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322 (2023); *Wilkins v. United States*, 143 S. Ct. 870 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825

(1987). PLF also frequently participates as amicus curiae in cases that pertain to important property rights issues.

ARGUMENT

I. The Temporary Taking of All Economic Use Is a Categorical Taking

At the beginning of the COVID-19 pandemic, the Governor issued an Executive Order closing all fitness centers to the public. The lower court held that this was not a temporary categorical taking in reliance upon the Supreme Court's decision in *Tahoe-Sierra*, 535 U.S. 302. *Gym 24/7 Fitness, LLC v. State*, 341 Mich. App. 238, 264, 989 N.W.2d 844, 860 (2022).

In *Tahoe-Sierra,* the property owners brought a facial challenge to a temporary moratorium that prohibited all use of the owner's property. They alleged that it was a categorical taking under *Lucas*, 505 U.S. at 1019 ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking"). But the Court rejected this approach and instead held that *Penn Central* applied. Adding a new twist to the transfer of rights, the Court held that this property right could only be considered as transferred to the government if the government had held and controlled the owner's right to use for some undetermined period of time. As the Court recited:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. *See* Restatement of Property §§ 7–9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. 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.

Tahoe-Sierra, 535 U.S. at 331–32. The Court gave no concrete guidance as to how long a taking of all economic use had to persist in order to be recognized as a Fifth Amendment violation. *Id.* at 341−342.

In arriving at this determination, the Court drew a sharp distinction between physical takings and noninvasive takings. *Id.* at 323. And it discounted the temporary takings case of *First English*, 482 U.S. at 318, describing the holding as about remedies, not liability.[2] *Id.* at 328.

However, for the reasons discussed herein, this Court should not follow *Tahoe-Sierra*. When the right to use is taken in totality, the element of time only measures the duration of that unconstitutional deprivation. It is not a means by which the government can claim that the taking never happened at all.

This Court should therefore eschew *Tahoe-Sierra* and determine whether the Michigan Constitution allows for a temporary, categorical taking of all economic use. "Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain." *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 454, 952 N.W.2d 434, 449–50 (2020). In this endeavor, Michigan is unbound by the U.S. Supreme Court's interpretation of the U.S. Constitution. *Harvey v. State, Dep't of Mgmt. & Budget, Bureau of Ret. Servs.,* 469 Mich. 1, 6 n.3, 664 N.W.2d 767, 770 (2003) (even to the extent that the Michigan Constitution is coextensive with the U.S. Constitution, "we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution").

[2]The Court's interpretation of *First English* was a disservice. *First English* determined whether a remedy was required, which is just a different way of saying whether the government was liable for a taking. As the Court held, "these cases reflect the fact that temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318–19 (cleaned up).

A. The Taking Occurs When the Property Right Transfers

It may seem obvious, but the Takings Clause is about the transfer of property rights. Property rights include the right to possess, the right to use, and the right to dispose of. *United States v. Gen. Motors Corp*, 323 U.S. 373, 377–78 (1945). When a regulation takes a fundamental property right and transfers ownership and control to the government, without just compensation, an unconstitutional taking has occurred. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (The "touchstone" of the takings inquiry is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."); *Gen. Motors Corp.*, 323 U.S. at 378 ("When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership.").

And so, one of the key determinants in takings cases is figuring out when that fundamental property right transfers. With respect to the owner's right to use, it occurs, inter alia, when the government takes away all economic use:

> the Fifth Amendment is violated when land-use regulation … denies an owner economically viable use of his land. We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. "For what is the land but the profits thereof?" Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life, in a manner that secures an average reciprocity of advantage to everyone concerned.

Lucas, 505 U.S. at 1016–18 (cleaned up).

In this determination, time has no place. Either the government regulation has deprived the property owner of all economically viable use of its land, or it hasn't.[3] There is no magical constitutional stopwatch that transforms the taking of all economic use into something different and lesser, until the stopwatch hits some future unknown timestamp. From the perspective of the owner who is forced to carry this public burden, the fundamental property right that was taken on Day 1 is exactly the same as the fundamental right that was taken on Day 1,000. On Day 1, the property has no economic use and earns no income, but the owner still must shoulder the full burden of the property's liabilities and expenses. And on Day 1,000, the property has no economic use and earns no income, but the owner still must shoulder the full burden of the property's liabilities and expenses. Time simply reflects the duration of the taking.

Obviously, *Tahoe-Sierra* held differently. The interjecting of time into the transfer of property rights was largely sourced from a 1936 treatise, the Restatement of Property §§ 7–9 (1936) (*Tahoe-Sierra*, 535 U.S at 331−32), which one could argue was overruled by the Court's 1945 decision in *General Motors*. *Cf. Gen. Motors Corp.*, 323 U.S. at 377−78. Nonetheless, the unintended effect of *Tahoe-Sierra* was to render all temporary takings constitutional, suspending liability based upon the government's promise to restore the right to use in the future. The owner's complete deprivation of economic use was consigned to the shadows as a constitutionally nonexistent action, until some undefined number of days had passed and the government's taking could be deemed to have actually taken place after all.

[3] The taking of all economic use is the regulatory equivalent of a physical taking. *Lucas*, 505 U.S. at 1017. Therefore, as physical takings are easy to prove, so, too, should be categorical regulatory takings. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 437–38 (1982) ("whether a permanent physical occupation has occurred presents relatively few problems of proof.… Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance").

Two examples, one actual and one hypothetical, illustrate that time is irrelevant in determining whether a taking of all economic use has occurred.

Starting first with the actual—*Lucas,* an originator of categorical takings claims, was not a permanent taking. *Lucas*, 505 U.S. at 1003. Between the initial filing of the case and the Supreme Court's decision, South Carolina amended its law to allow Lucas (and other owners) to apply for a special permit and build on his property. *Id.* at 1010–11.

The Court was aware of this change but remained steadfast in holding that it was a categorical taking. That it was only temporary simply meant that the owner's claim was limited to the time period of the deprivation. *See also id.* at 1011–12 (in the context of ripeness, noting that Lucas's pre-amendment takings claim was ripe, while any post-amendment claim was not).

As Justice Kennedy explained, "the potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past." *Id.* at 1032−33 (Kennedy, J., concurring); *id.* at 1041−42 (Blackmun, J., dissenting) ("The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. The Court, however, will not be denied: It determines that petitioner's 'temporary takings' claim for the period from July 1, 1988, to June 25, 1990, is ripe.") (citation omitted).

Therefore, *Lucas* and the instant case are both temporary takings. Regardless of whether the government decided to return the owner's property right *ante* or *post* the enactment of the regulation, that period of time when the owner had no economic use still stands. *See* Michael M. Berger, *Whither Regulatory Takings?*, 51 Urb. Law. at 188 (*Lucas* allows for temporary takings

and was in line with *First English*. "And remember that the taking in *Lucas* lasted for only two years. That did not preclude a finding of a taking."); *see also First English*, 482 U.S. at 319 (leaseholds can have a substantial value and "the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. … Where this burden results from governmental action that amounted to a taking" just compensation is required).

The facts of *Lucas* naturally lead to a hypothetical. Assume that there are two takings. In the first, the government "permanently" decides to take the entirety of a property owner's use but changes its mind after three months and rescinds the law. In the second, the government "temporarily" decides to take the entirety of a property owner's use, but that deprivation lasts for many years. Why should the three-month deprivation be a categorical taking, but the many years of deprivation not be?

Such was the untenable result pointed out by Chief Justice Rehnquist in his *Tahoe-Sierra* dissent:

> A distinction between 'temporary' and 'permanent' prohibitions is tenuous. The 'temporary' prohibition in this case that the Court finds is not a taking lasted almost six years. The 'permanent' prohibition that the Court held to be a taking in *Lucas* lasted less than two years.... Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning.

Tahoe-Sierra, 535 U.S. at 346–47 (Rehnquist, J., dissenting); *see* Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. at 49.

The false distinction between "permanent" and "temporary" was also captured in *San Diego Gas*, 450 U.S. 621. While the 5-4 majority dismissed the case on ripeness grounds, had it been ripe, the decision would have been far different. Chief Justice Rehnquist would have joined the dissent, turning the dissenting opinion into the majority. *Id.* at 633–34 (Rehnquist, J.,

dissenting). And the dissent would have found a categorical taking of the owner's right to use, with no consideration of the element of time.

Without reciting all of the facts of *San Diego Gas*, it is enough to note that the City's re-zoning, coupled with its designation of the owner's land as "open space," was alleged to have deprived the owner of all economic use. *Id.* at 624−26. But whether the open space designation was permanent or temporary had no role in determining whether there was a categorical taking. After all, the government is always free to change its mind. "Just as the government may cancel condemnation proceedings before passage of title, or abandon property it has temporarily occupied or invaded, it must have the same power to rescind a regulatory taking." *Id.* at 658 (Brennan, J., dissenting) (citations omitted).

This mutability does not transform a taking of all economic use into something other than categorical. As Justice Brennan stated, "The fact that a regulatory taking may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *Id.* at 657 (Brennan, J., dissenting). Accordingly, "[the duration] does not prejudice the property owner. It merely results in an alteration of the property interest taken—from full ownership to one of temporary use and occupation ... [O]nce a court finds a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.* at 658 (Brennan, J., dissenting); *see First English,* 482 U.S. at 321 ("[W]here the government's activities have 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*

Cedar Point, 141 S. Ct. at 2074 (holding that the regulation was a categorical taking despite the fact that it did not allow physical access "24 hours a day, 365 days a year … There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.").

But the *Tahoe-Sierra* majority allowed the label to obscure the act, permitting the government to insulate itself from constitutional scrutiny based on nothing more than nomenclature. Again, as Chief Justice Rehnquist noted:

> Land-use regulations are not irrevocable. And the government can even abandon condemned land. Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development.

535 U.S. at 347 (citation omitted).

The government should not escape Fifth Amendment liability based upon how it unilaterally chooses to characterize a regulation that deprives an owner of all economic use. Nor should it escape liability based on when the government thinks it will return the property owner's rights in the future. Courts would have little pause in designating the taking of all economic use as a *Lucas* taking but for the government's self-designation of the ban as only temporary. But under the Constitution, property rights "cannot be so easily manipulated." *Cedar Point*, 141 S. Ct. at 2076. "A State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a limited duration]. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

B. The Possibility of Future Economic Use Does Not Negate the Taking of All Current Economic Use

As a companion argument to its discussion of time, *Tahoe-Sierra* said that "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." *Tahoe-Sierra*, 535 US at 331–32.

But the government is the one that took the economic use away. The prospect of getting back what the government has already taken, once the government ceases its unconstitutional conduct, does not waive the unconstitutional conduct that has already occurred. As Justice Scalia pointed out, the "malefactor [should not get] the benefit of its malefaction."[4] *Palazzolo*, 533 U.S. at 636−37 (2001) (Scalia, J., concurring).

An analogous issue presented in *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015). Therein, the government took title to the owner's personal property (i.e., raisins) but would sometimes sell that property and then give the proceeds back to the owner. The government contended that this economic interest in the future eliminated the complete taking in the present. *Id.* at 363. The Court disagreed. As it held, "the fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends

[4] In the context of a *Penn Central* case regarding an owner's reasonable investment backed expectations, Justice Scalia said:

> there is nothing to be said for giving [a windfall] instead to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage of fairness and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully*—indeed *unconstitutionally.* Justice O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the unjust profit *to the thief.*

Palazzolo, 533 U.S. at 636–37 (Scalia, J., concurring).

on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here." *Id.* at 363

Temporary takings of all economic use are not much different. The property is worthless for the duration of the taking; the taker decides when to give the property rights back, at the taker's sole discretion; and, what the owner gets back could be worthless, as continuing liabilities, a changed market, and/or deep financial woes caused by any or all of the above, all can destroy a property's residual value, both independently and together.

Nor are property rights defined by reference to their value. It is not as though a physical thing becomes "property" when it hits a certain value, but below that point, it is something other than property. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 169–70 (1998) ("We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value. … While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property"); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015) (residual value not attributable to economic use does not defeat a categorical *Lucas* claim).

Accordingly, *Tahoe-Sierra* erred when it determined that the right to use cannot be categorically taken simply because the missing value associated with the right to use will eventually be restored.

C. Zoning Delays are Different than Direct Government Action

A driving force of the *Tahoe-Sierra* decision was the Court's desire to protect normal zoning delays from takings claims. Said the Court, "land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few

governments could afford." *Tahoe-Sierra,* 535 U.S. at 324. A categorical rule for temporary deprivations of use,

> would apply to numerous normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like … as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in [*Pennsylvania Coal Co. v.*] *Mahon,* "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U.S. [393,] 413, 43 S.Ct. 158 [(1922)]. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

Id. at 334–35. Thus,

> [t]he interest in facilitating informed decision making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

Id. at 339.

This rationale is inapplicable to the case at hand. A government regulation that closes a public business—one that is both permitted under the zoning and beneficial to the public health (were it not for COVID-19)—is far different than considering whether a certain use is contrary to the locale's comprehensive general zoning plan.

But even if that was not the case, the government does not need the extra layer of protection that the Court had afforded to it. Many of the government actions that *Tahoe-Sierra* feared could be swept up in takings claims are already protected by the principle of background law. *Cedar Point*, 141 S. Ct. at 2079. And with regard to normal zoning delays, a delay in deciding will often

mean that the takings case is not ripe for adjudication. *See Pakdel*, 141 S. Ct. at 2230 (finality requires that "there is no question about how the regulations at issue apply to the particular land in question" (cleaned up)). Certainly there are exceptions, for example, if the government's delay is in bad faith or an attempt to stall a decision that will result in a denial of use. But in holding that a temporary taking of all economic use was not a categorical taking in an effort to shield normal zoning delays, *Tahoe-Sierra* was misguided and concerned itself with many claims that may not have been actionable in the first place. The phrase "today the Court launches a missile to kill a mouse," seems apt. *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

Moratoriums, though, are different. Prior to a moratorium, the property owner's use was consistent with zoning and allowed as a matter of right. A moratorium works a change in property rights and takes away a use that was previously permitted. And when it also results in a complete deprivation of all economic use, that government action should not be subject to *Tahoe-Sierra*'s lesser formulation of constitutional scrutiny. As discussed in depth above, the only difference between a moratorium and a permanent deprivation of use is the government's subjective intention about how long that deprivation of use shall last. But what the government thinks the future may hold cannot define the scope of which acts are constitutional and which are not.

The government is also in complete control of the regulations that it issues. It can decide when to impose a moratorium, for how long, and what uses to preclude. Or it can decide not to impose a moratorium at all. Should the government affirmatively choose, in its sole discretion, to prohibit all economic use the government must then pay for what it takes, even if it was only taken on a temporary basis.

D. Under the Michigan Constitution, This Court Should Hold that a Temporary Taking of All Economic Use Is a Categorical Taking

The Michigan Constitution's Takings Clause is broader than its Fifth Amendment counterpart. *Cf., e.g.*, U.S. Const. amend. V; Mich. Const. art. 10, § 2 (West); and *Kelo v. New London*, 545 U.S. 469 (2005) (the use of eminent domain to transfer title to a private entity for the sake of economic development is a public use under the Fifth Amendment) and *Wayne Co. v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004) (holding that a similar taking and transfer was not a permissible public use under Michigan's Takings Clause). While Michigan recognizes the validity of temporary takings (*see, e.g.*, *Electro-Tech, Inc. v. H.F. Campbell Co.*, 433 Mich. 57, 90, 445 N.W.2d 61, 76 (1989)), we are not aware of any Michigan case addressing this specific issue. But as the Michigan Constitution was "adopted for the protection of and security to the rights of the individual as against the government," *Rafaeli, LLC*, 505 Mich. at 481, for the reasons set forth herein, this Court should hold that an uncompensated taking of all economic use, whether permanent or temporary, is a categorical taking contrary to the Michigan Constitution.

II. The Court of Appeals Did Not Properly Weigh the *Penn Central* Factors

Even if the EOs did not effect a categorical taking, the lower court misapplied *Penn Central*. It effectively transformed *Penn Central*'s multifactor inquiry into a single-part test that abrogated the Government's obligation to pay just compensation when it temporarily takes a property interest in the name of the public interest. This was in error.

Penn Central calls for an ad hoc determination based upon all relevant facts and circumstances. *Penn Central*, 438 U.S. at 124. To be sure, certain facts have "particular significance"—namely, the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment backed expectations, and the character of the regulatory action. *Id.* But these factors are "guideposts," not "mathematically precise variables." *Palazzolo*,

533 U.S. at 634 (O'Connor, J., concurring); *Tahoe-Sierra*, 535 U.S. at 326–27 (same). Every case is different and there is "no magic formula" that covers the "nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). If there is one guiding principle behind the *Penn Central* inquiry, it is that the government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

In this case, the Court of Appeals recognized that the first two factors of "particular significance"—economic impact and investment backed expectations—"weigh in favor of the Gym because its business was in fact shuttered under the EOs." *Gym 24/7 Fitness, LLC*, 341 Mich. App. at 267, 989 N.W.2d at 862.

But the court erred in interpreting the balance of *Penn Central*. First, it improperly discounted those factors "because the economic impact and the interference with business expectations arising from the closure orders were short lived." *Id.* Then, it compounded the error by its faulty interpretation of the "character" factor, which it deemed "compelling in that the aim of the EOs was to stop the spread of COVID-19." *Id.* This emphasis on the public purpose behind the Governor's EOs harkens back to the days when courts evaluated regulatory takings claims by conducting "a weighing of public and private interests" and determining whether the challenged action "substantially advance[s] legitimate governmental goals." *Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980). But the Supreme Court has since clarified that this sort of interest balancing "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle*, 544 U.S. at 542. This Court should not repeat the *Agins* mistake to deny the Gym the compensation to which it is entitled.

Therefore, a proper interpretation of *Penn Central* in this case would recognize that the EOs took the Gym's right to the economic use of its property for a substantial period of time—a right for which, in all fairness and justice, the public should pay.

A. The Temporary Nature of the EOs Is No Reason to Discount Two Primary *Penn Central* Factors

Because the EO was "short lived," the lower court discounted the regulation's severe economic impact and its destruction of the owner's reasonable investment-backed expectations. Thus, the "temporary" label defeated both the categorical takings claim and the *Penn Central* claim. That cannot be the rule.

Similar to the reasons set forth in Section I, *infra*, either economic impact and reasonable investment backed expectations have been substantially impaired, or they haven't. But time has nothing to do with it. Time measures the duration of that impact and the ultimate measure of damages, not whether a property right has been forcibly transferred to the government to start with.

As discussed above, in *First English*, 482 U.S. 304, the Supreme Court considered a church's claim that a county ordinance that prohibited the church from rebuilding structures destroyed by flood denied the church all use of the parcel. The question was whether the church's allegations would entitle it to just compensation for the period all use was prohibited, even if the ordinance were later abandoned and the taking rendered "temporary." *See id.* at 311–12, 317–18. The Court observed that, even then, prevailing authority established "that 'temporary' takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318. In both cases, the government has taken a property interest from the owner. *See id.* at 319 (citing *General Motors Corp.*, 323 U.S. 373, for the proposition that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than" six years, and that "[t]he value of a

leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed."). And when the government takes a property interest, even for a short time, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period." *Id.*, citing *United States v. Causby*, 328 U.S. 256, 261 (1946).

The temporary nature of a taking of course affects the amount of just compensation owed. But the temporary nature does not dictate the answer to the central question here—whether the deprivation of all economically viable use for the effective period of the EOs took the owner's property rights. *See Cedar Point*, 141 S. Ct. at 2074 ("The duration of an appropriation ... bears only on the amount of compensation."). This follows not only from *First English*, but from *Lucas* itself. *Lucas*' categorical rule exists alongside the one recognized in cases like *Cedar Point* and *Loretto* because like the physical invasions in those cases, the denial of *all* economically viable use of land protects a fundamental property right—the right to make productive use of property. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 834 n.2 (recognizing that "the right to build on one's own property" is indeed a right, not a government-granted privilege). That is why the Supreme Court recognized that a denial of economically viable use "is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017; s*ee Tahoe-Sierra*, 535 U.S. at 334 (noting that "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis," but that petitioners "expressly disavowed" a *Penn Central* theory).

A temporary taking is just that—temporary. Property owners should not be required to demonstrate the level of economic impact and effect on investment-backed expectations one might

expect if the taking were permanent. This would have the effect of double counting the temporary nature of the regulation against property owners. *See Cedar Point*, 141 S. Ct. at 2074; *First English*, 482 U.S. at 318. Instead, time simply limits the just compensation the owner can recover for the taking of its property. *See Cedar Point*, 141 S. Ct. at 2074. Accordingly, the Court of Appeals erred by failing to give the first two *Penn Central* factors due weight.

B. The Character of the EOs Is Independent of their Public Purpose

Protecting the public health, safety and welfare does not give the government license to take private property rights without paying for them. *Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613, 622 (1935) (police power is not unrestricted and "subordinate to constitutional limitations"). Consequently, the lower court erred when it weighed the character prong of *Penn Central* in favor of the government simply because its actions were for the benefit of the public. *Cf. Gym 24/7 Fitness, LLC*, 341 Mich. App. at 267, 989 N.W.2d at 862 ("the third factor—the character of the government's action—was compelling in that the aim of the EO's was to stop the spread of COVID-19"); *San Diego Gas*, 450 U.S. at 647 (Brennan, J., dissenting) (the denial of a takings claim based upon the lawful exercise of police power "flatly contradicts clear precedents of this Court"), citing cases.

In *Lingle*, the Court specifically held that whether the regulation substantially advances a legitimate state interest is irrelevant to the takings question:

> The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. … But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.
>
> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does

> it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Lingle, 544 U.S. at 542; *see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994); *see also E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting in part); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 529 (2009) (importing public purpose language into the character analysis allows the "very concerns that [*Lingle*] attempted to expunge from regulatory takings analysis ... back into that analysis via the *Penn Central* balancing test").

If the government lacked a public purpose, its actions would be a substantive due process violation, amongst others. *Lingle*, 544 U.S. at 542. But that is not the issue here. In a takings action, "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. ... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Considering the above, the lower court erred in rejecting the owner's *Penn Central* claim based upon the public interest that the government regulation served.

Instead, *Penn Central*'s "character" factor was intended to measure both the severity of the imposition on property rights and the justice of the distribution of this burden among property owners. *Lingle*, 544 U.S. at 539−540. In other words, the character inquiry measures what the regulation does, who it impacts, how it affects the owner's reasonable expectations of property,

and how the burden is distributed as between the individual owner and the public. *See S. Grande View Dev. Co. v. City of Alabaster*, 1 F.4th 1299, 1311 (11th Cir. 2021) (citing to *Lingle*, "'the character of the government' action is another way to examine the severity of the government interference with property rights"); *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 602 (2010), *aff'd in part, rev'd in part*, 667 F.3d 1239 (Fed. Cir. 2011) ("this court analyzed the character factor by considering the actual burden imposed on property rights, and how that regulatory burden was distributed among property owners"). Accordingly, even when the legislature has "acted for a public purpose," temporary takings can be contrary to the Fifth Amendment if "the expense was placed disproportionately on a few private property owners." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003).

Once refocused on property rights rather than public purpose, it is clear that the Court of Appeals erred by giving near dispositive weight to the Governor's legitimate public purpose, rather than considering the property owner's contentions that (1) the magnitude of the EOs was severe, as they deprived the owner of all viable economic use of its property while they were in force; and (2) fitness centers and the like should not, "in all fairness and justice," be forced to bear the disproportionate burden for the State's efforts to mitigate COVID-19, which should have instead been shared by the public as a whole. *San Diego Gas*, 450 U.S. at 656–57 (Brennan, J., dissenting) ("when one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. … If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it.").

C. The Court of Appeals Stretched the "Necessity" Doctrine Beyond any Reasonable Definition

To buttress its finding that the character factor weighed in favor of the State due to the substantial public purpose of the EOs, the Court of Appeals leaned heavily on its characterization of the EOs as a public necessity. But this exception has never been stretched so far as to apply to an order shutting down a business for six months. To do so would substantially curtail takings doctrine and limit the rights of property owners to recover just compensation when the State denies them use of their own property.

The Court of Appeals relied principally on *Lucas*' discussion of how background principles of state law might limit the reach of a takings claim. *Lucas* explained that a State may avoid paying just compensation for regulating away all economic use of an owner's land "only if ... the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Although some courts have described this as an "exception" to *Lucas*' categorical rule, *see Lost Tree Vill. Corp.*, 707 F.3d at 1292, it is merely a restatement of the basic principle that what is not owned in the first place cannot be taken. *See Cedar Point*, 141 S. Ct. at 2079 ("the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place"). Simply put, a background principle "must inhere in the title itself." *Lucas*, 505 U.S. at 1029. A regulation that is not a taking due to the operation of background principles merely prohibits something that the property owner never had the right to do under state law.

The most prominent example of a background principle is the common law of nuisance. *See id.*; *Cedar Point*, 141 S. Ct. at 2079. But the Court of Appeals did not find the continued operation of fitness centers to be a public nuisance—a result that would have been unprecedented in any event, as it doesn't appear that any Michigan statute or case contemplates that a business

carrying on its normal activities can be declared a public nuisance.[5] So the Court of Appeals leaned on *Lucas*' recognition that there might "otherwise" exist a background principle absolving the State of liability for "destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." 505 U.S. at 1029 & n.16 (citing *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880) and *United States v. Pacific R.R.*, 120 U.S. 227, 238–239 (1887)). But here, too, the Court of Appeals stretches the precedent too thin.

The existence of some background principle that permits interference with fundamental property rights in times of absolute necessity likely does exist. *See Cedar Point*, 141 S. Ct. at 2079 ("[B]ackground limitations also encompass traditional common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity."). But it does not stretch far enough to contemplate EOs shuttering a business for six months. *Bowditch* and *Pacific Railroad* both involved immediate threats to public safety—in *Bowditch*, a building was destroyed to help slow the spread of a fire, while *Pacific Railroad* recognized that the government could not be held liable for battlefield destruction that was a matter of military necessity. *See also United States v. Caltex*, 344 U.S. 149 (1952) (no taking where the United States destroyed oil companies' terminals before the Japanese invasion of the Philippines to prevent the enemy from using the facilities). Shutting down fitness centers to slow the spread

[5] MCL 600.3801 provides a list of public nuisances that may be abated—none of them remotely apply to the Gym or any fitness center conducting legal operations. At common law, this Court "has defined a public nuisance as involving 'not only a defect, but threatening or impending danger to the public. ...'" *Mich. ex rel. Wayne Cnty. Prosecutor v. Bennis*, 447 Mich. 719, 731, 527 N.W.2d 483, 490 (1994) (quoting *Kilts v. Kent Cnty. Bd. of Supervisors*, 162 Mich. 646, 651, 127 N.W. 821, 822 (1910)). To be a nuisance, "the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets." *Id.* at 731–32 (quoting *Garfield Twp. v. Young,* 348 Mich. 337, 342, 82 N.W.2d 876, 879 (1957)). But no case has ever found a place to be a public nuisance simply because it operated an otherwise lawful business.

of COVID-19 hardly rises to these levels—particularly when other businesses were allowed to remain open during the same period.

More recent cases also demonstrate the narrow scope of the necessity doctrine. In one, the property owner alleged that, in response to a wildfire, the U.S. Forest Service set intentional fires that burned substantial portions of the owner's property. *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1376–77 (Fed. Cir. 2013). The Federal Circuit reversed the dismissal of a takings claim based on necessity, holding that the Court of Federal Claims' "decision to extend the doctrine of necessity to automatically absolve the Government's action in any case involving fire control stretch[ed] the doctrine too far." *Id.* at 1378. Instead, "the doctrine of necessity may be applied only when there is an imminent danger and an actual emergency giving rise to actual necessity." *Id.* State courts have likewise rejected government invocations of necessity in various similar situations. *See Brewer v. State*, 341 P.3d 1107, 1118 (Alaska 2014) (following *TrinCo* in a factually analogous situation); *Steele v. City of Houston*, 603 S.W. 2d 786, 791–92 (Tex. 1980) (reversing lower courts and holding that necessity did not bar a takings claim where police officers burned down a home in an attempt to capture three escaped convicts); *House v. Los Angeles Cnty. Flood Control Dist.*, 153 P.2d 950, 953 (Cal. 1944) (Government can avoid liability "under the pressure of public necessity and to avert impending peril" such as "the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized," but government destruction of protective devices as part of a flood control program did "not appear to be one of such emergency character as would preclude the defendant district from being held liable for unnecessary damage" from flooding.). While courts have been willing to apply the doctrine when there is an immediate threat requiring quick government action to protect public safety, *see Customer Co. v. City of*

Sacramento, 895 P.2d 900, 910–11 (Cal. 1995) (holding public necessity precludes takings liability where police damaged business in the process of attempting to apprehend fleeing armed felony suspect, lest the law "deter law enforcement officers from acting swiftly and effectively to protect public safety in emergency situations"), no case comes close to what the EOs did here—shut down an otherwise lawful business for six months. The Court of Appeals' invocation of necessity in this case was unprecedented.

Particularly at this stage of the litigation—before the record has been fully developed—the Court of Appeals erred by affording dispositive weight to its conclusion that the Governor not only acted with a public purpose, but for a public necessity. At the very least, more factual development would be necessary to reach that conclusion. As Justice Gorsuch stated:

> Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. … To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.
>
> ***
>
> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70−71 (2020) (Gorsuch, J., concurring) (in the context of rejecting a COVID restriction on First Amendment grounds).

The Court of Appeals should not have dismissed the Gym's *Penn Central* claim on this ground. The judgment below should be reversed.

CONCLUSION

This Court should hold that a regulatory taking of all economic use, whether permanent or temporary, without the payment of just compensation, is violative of the Michigan Constitution; and, in the alternative, remand this matter to the lower court to redetermine whether the government's actions were a regulatory taking consistent with the evaluation required under *Penn Central* as set forth herein, together with such other and further relied as the court deems reasonable, proper and just.

DATED: August 14, 2023.

Respectfully submitted,

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JONATHAN HOUGHTON

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2023, I electronically filed the foregoing with the Michigan Supreme Court a by using the MiFile system. I certify that all parties have been served using the MiFile system.

/s/ Jonathan M. Houghton
JONATHAN HOUGHTON