**NO. 21-2985**

# UNITED STATES COURT OF APPEALS
# FOR THE
# SIXTH CIRCUIT

**SKATEMORE, INC., D/B/A ROLL HAVEN SKATING CENTER; SLIM'S REC, INC., D/B/A SPARTAN WEST BOWLING CENTER/BEAMERS RESTAURANT; MR. K ENTERPRISES, INC., D/B/A ROYAL SCOT GOLF & BOWL; M.B. AND D. LLC, D/B/A FREMONT LANES; AND R2M, LLC, D/B/A SPECTRUM LANES & WOODY'S PRESS BOX,**

*Plaintiffs-Appellants,*

**V.**

**GRETCHEN WHITMER, ROBERT GORDON, AND MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

*Defendants-Appellees,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE HALA Y. JARBOU
Civil Case No. 1:21-CV-00066

## PLAINTIFFS-APPELLANTS' PRINCIPAL BRIEF ON APPEAL

David A. Kallman (P34200)
Stephen P. Kallman (P75622)
KALLMAN LEGAL GROUP, PLLC
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 322-3207
Dave@kallmanlegal.com
Steve@kallmanlegal.com
*Counsel for Plaintiffs-Appellants*

Kyla L. Barranco (P81082)
Darrin F. Fowler (P53464)
Andrea Moua (P83126)
Assistant Attorneys General
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
BarrancoK@michigan.gov
FowlerD1@michigan.gov
MouaA@michigan.gov
*Counsel for Defendants-Appellees*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Skatemore, Inc., d/b/a Roll Haven Skating Center; Slim's Rec, Inc. d/b/a Spartan West Bowling Center/Beamers Restaurant; Mr. K Enterprises, Inc. d/b/a Royal Scot Golf & Bowl; M.B. and D., LLC, d/b/a Fremont Lanes; R2M, LLC, d/b/a Spectrum Lanes & Woody's Press Box (hereinafter "Plaintiffs") state the following:

None of the Plaintiffs are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

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## REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents important questions of first impression of constitutional law and its application to COVID-19 laws, policies, and procedures.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

# TABLE OF AUTHORITIES

**CASES:**

**CONSTITUTIONS:**

**STATUTES:**



**COURT RULES:**

## STATEMENT OF JURISDICTION

On January 20, 2021, Plaintiffs filed their initial Complaint against Defendants, alleging violations of: 1) the Takings Clause of the United States Constitution; 2) the Takings Clause of the Michigan Constitutions; and 3) 42 U.S.C. § 1983 (ECF No. 1, Page ID #1-14). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

On April 12, 2021, Defendants filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and (6) to dismiss Plaintiffs' Complaint. (ECF No. 14, Page ID #31-34 and ECF No. 15, Page ID #35-70). Plaintiffs filed their response to Defendants' Motion to Dismiss on May 24, 2021 (ECF No. 19, Page ID #78-119). Defendants filed their Reply Brief in support of their Motion to Dismiss on June 21, 2021 (ECF No. 27, Page ID #153-172). Because the United States Supreme Court issued opinions after the filing of briefs that affected the jurisprudence of this case, Plaintiffs filed a brief regarding supplemental Supreme Court authority on July 2, 2021 (ECF No. 29, Page ID #199-207).

Plaintiffs also filed a Motion to Amend Complaint on June 22, 2021 (ECF No. 28, Page ID #173-180). Defendants filed their response to the Motion to Amend Complaint on July 6, 2021 (ECF No. 30, Page ID #295-311).

The District Court then issued a final Opinion and Order granting Defendants' Motion to Dismiss based upon 11th Amendment immunity and Denied Plaintiffs'

Motion to Amend Complaint (ECF No. 36, Page ID #330-341, and ECF No. 37, Page ID #342). The District Court issued a Judgment dismissing Plaintiffs' Complaint without prejudice (ECF No. 38, Page ID #343).

Plaintiffs timely filed their Notice of Appeal of the District Court's final order on September 29, 2021 (ECF No. 39, Page ID #344-345). This Honorable Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES FOR REVIEW

I. Whether the District Court erred by granting Defendants' Motion to Dismiss based upon Eleventh Amendment Immunity?

II. Whether Plaintiffs' proper Takings Claims require reversal of the District Court's dismissal of the Complaint?

III. Whether the District Court erred by denying Plaintiffs' Motion to Amend Complaint?

## STATEMENT OF THE CASE AND FACTS

Plaintiffs brought this action under the Takings Clauses of the Fifth Amendment to the United States Constitution, Article X, § 2 of the Michigan Constitution of 1963, and 42 U.S.C. § 1983, challenging Defendants' acts, orders, policies, practices, customs, and procedures, which deprived Plaintiffs of their property without just compensation.

Defendant Gretchen Whitmer issued Executive Order (EO) 2020-9 on March 16, 2020. This Order required that Plaintiffs' completely close their businesses to the public. No exceptions existed permitting bowling or roller-skating business activity to occur. Defendant Whitmer then issued a series of EOs (2020-9, 2020-20, 2020-43, 2020-69, 2020-100, 2020-110, 2020-160, 2020-176, and 2020-183)[1] which extended the period that Plaintiffs' businesses had to stay completely closed to the public.

On October 2, 2020, the Michigan Supreme Court declared Defendants' EOs unconstitutional and unenforceable. Defendant Robert Gordon, through MDHHS, issued an Emergency Order pursuant to MCL 333.2253 on November 15, 2020, which again closed Plaintiffs' businesses from November 18, 2020, to December 21, 2020. It is undisputed that this government action shut down Plaintiffs' businesses

[1] Available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html

from March 16, 2020 to October 2, 2020, and from November 18, 2020 to December 21, 2020. The government provided no compensation to Plaintiffs for its unlawful actions in this case.

Defendants' unconstitutional conduct and EOs forcibly closed Plaintiffs' businesses and property for months, all with no just compensation paid. Plaintiffs brought this lawsuit to vindicate their rights and enforce the Takings Clauses of the Michigan and United States Constitutions.

## SUMMARY OF THE ARGUMENT

This case is about whether the Constitution requires Defendants to justly compensate Plaintiffs when taking Plaintiffs' private property. There are numerous reasons that Defendants are not entitled to Eleventh Amendment immunity, including that the Fifth Amendment Takings Clause is an exception to Eleventh Amendment immunity. In this case, Defendants took Plaintiffs' property pursuant to a state statute that was held unconstitutional by the Michigan Supreme Court. Defendants unconstitutionally acted, therefore, without any authority to do so. Under these circumstances, Defendants' conduct is not entitled to Eleventh Amendment immunity. Plaintiffs can, therefore, properly challenge Defendants' conduct in federal court.

This case is not a debate about the severity of COVID-19, its impact, or the merits of the policies implemented by the State of Michigan. Instead, this case

primarily focuses on whether Defendants can take private property from individuals and businesses and fail to provide just compensation. This case is distinct from many of the other takings cases brought across the country relating to COVID-19:

1. Unlike constitutionally enacted COVID-19 regulations in other states, Michigan's Supreme Court declared Defendant Whitmer's EOs unconstitutional. The State of Michigan, therefore, took Plaintiff's private property via unconstitutional state action. This unconstitutional exercise of government power by the State of Michigan greatly distinguishes the case at bar from the COVID-19 regulations in other states, promulgated pursuant to constitutional exercises of government power.
2. This case involves businesses that the State totally closed and wholly prohibited from engaging in any economic activity. While the State's COVID-19 policies severely limited most businesses in Michigan through capacity limitations, gathering restrictions, and other regulations, this case focuses on the few businesses forced by the State to fully close. For example, while restaurants in Michigan were prohibited from offering indoor dining, those restaurants could still provide food for take-out orders. Thus, restaurants in Michigan were never totally closed. As explained below, if Plaintiffs prevail in this case, it does not open the door to an unlimited number of additional lawsuits by every business in Michigan impacted by

the COVID-19 restrictions. Thus, while the constitutional import of this case is enormous, the scope of its impact concerning COVID-19 regulations generally is narrow.

3. The material facts in this case are not in dispute. Defendants undeniably issued numerous EOs and other health orders relating to COVID-19. Those orders indisputably required that Plaintiffs' totally close their businesses. Indeed, Defendant Whitmer's first EO on the issue (2020-9) stated that bowling alleys and roller-skating rinks "are closed to ingress, egress, use, and occupancy by members of the public." Plaintiffs had absolutely no ability to use their property for any economic purpose pursuant to Defendants' orders.

This case is significantly different than other takings cases brought around the country. The 11th Amendment and a state's police power are not absolute. When government totally and completely takes a person's private property through unlawful and unconstitutional means and methods, it must provide just compensation.

The District Court erred by holding that the 11th Amendment bars Plaintiffs' claims for all the reasons stated below.

## STANDARD OF REVIEW

The standard of appellate review of a District Court's dismissal of a claim under Fed. R. Civ. P. 12(b)(6) is *de novo*. *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009). "In doing so, [the Court] accepts as true all non-conclusory allegations in the complaint and determine[s] whether they state a plausible claim for relief." *Id*. "The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, *i.e.*, more that merely possible." *Fritz v. Charter Township of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. Fed. R. Civ. P. 12 (b)(6). When reviewing a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accept its factual allegations as true, and draw all reasonable inferences in favor of the plaintiffs. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED UPON ELEVENTH AMENDMENT IMMUNITY.

The 11th Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The United States Supreme Court has interpreted the 11th Amendment to often prohibit a citizen to sue his own state in federal court because of sovereign immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Exceptions to this rule exist. The most commonly cited exceptions derive from *Ex parte Young*, 209 U.S. 123 (1908) (The three usual exceptions to 11th Amendment sovereign immunity are (1) congressional abrogation, (2) express consent or waiver by the state, and (3) suits for equitable relief.) However, as further explained below, there are other ways for a state or its officials to be liable for their actions that do not run afoul of the 11th Amendment.

### A. HISTORY OF ELEVENTH AMENDMENT IMMUNITY.

One of the first cases to discuss the doctrine of sovereign immunity at length is *United States v. Lee*, 106 U.S. 196 (1882). The Supreme Court held:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of congress and approved by the president to be

> unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession?
>
> If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'Stop, here; I hold by order of the president, and the progress of justice must be stayed.'

*Id*. at 220-221 (emphasis added).

It is the primary role of the federal court to resolve disputes between parties, no matter their position or office. The Supreme Court continued to explain the principles and exceptions to 11th Amendment sovereign immunity in *Florida Department of State v. Treasure Salvors, Inc*., 458 U.S. 670; 102 S.Ct. 3304 (1982), holding:

> If conduct of a state officer taken pursuant to an **unconstitutional state statute** is deemed to be unauthorized and may be challenged in federal court, **conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity.**

*Id*. at 697 (emphasis added).

In this case, Defendants acted pursuant to a state statute held unconstitutional by the Michigan Supreme Court. Hence, Defendant's taking of private property was without any valid authority. It is, therefore, not entitled to Eleventh Amendment

immunity. "If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign." *Id*. Because Defendants acted in an unlawful and unconstitutional manner to take Plaintiffs' property, they cannot use the 11th Amendment to shield their unlawful taking. Plaintiffs can, therefore, properly challenge the government's conduct in federal court.

### B. THE FIFTH AMENDMENT IS AN EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY.

Whether the 5th Amendment Takings Clause is an exception to a state's 11th Amendment sovereign immunity, is a question of significant constitutional import, yet to be completely resolved by the U.S. Supreme Court:

> [T]the Supreme Court has never applied sovereign immunity in a Takings case against a state government and has questioned whether "sovereign immunity retains its vitality" in that context. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court clarified that the Fifth Amendment requires damages for a Taking; that opinion expressly disregarded California's argument that "principles of sovereign immunity" suggested otherwise. In *Palazzolo v. Rhode Island*, the state of Rhode Island asserted sovereign immunity as a defense against a Taking claim but the Court ignored that argument in its final decision against the state. Although sovereign immunity can be raised at any time, the Court has decided other Takings claims against state governments without addressing the issue.[2]

In one of the Supreme Court's most recent takings case, it held:

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[2] "Can State Governments Claim Sovereign Immunity In Takings Cases?" J.P. Burleigh, University of Cincinnati Law Review, January 15, 2020. https://uclawreview.org/2020/01/15/can-state-governments-claim-sovereign-immunity-in-takings-cases/

> A property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it . . . And the property owner may sue the government at that time in federal court for the deprivation of a right secured by the Constitution.

*Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162, 2170; __ U.S. __ (2019). While *Knick* only dealt with a local municipality, the Court's blanket statement provided no exceptions for the right of property owner to seek relief in federal court for a takings claim.

The Supreme Court recently issued an opinion involving 11th Amendment immunity issues on June 29, 2021. *Penneast Pipeline Co., LLC v. New Jersey*, 594 U.S. ___, No. 19-1039, slip. op. (2021) involved a pipeline company (acting as an arm of the federal government) who was utilizing 5th Amendment Takings Clause authority to take property to build energy infrastructure. *Penneast*, 594 U.S. ___, slip. op. at 4. While the facts in *Penneast* do not involve the same actions as Defendants in this case, the Supreme Court made conclusive holdings as to 5th Amendment Takings Clause jurisprudence which would apply in this case.

The Supreme Court held:

> Those vested with the [taking] power could either initiate legal proceedings to secure the right to build, or <u>they could take property up front and force the owner to seek recovery for **any loss of value**.</u>

*Id*. at 8 (emphasis added). In this case, Plaintiffs' property was taken "up front" and they are now seeking recovery for their "loss of value."

The Supreme Court addressed the issue of 11th Amendment Sovereign Immunity when the Court held:

> As a final point, the other dissent offers a different theory— that even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over a suit filed against a State by a diverse plaintiff. See post, at 3–4 (opinion of GORSUCH, J.). But under our precedents that no party asks us to reconsider here, we have understood the Eleventh Amendment to confer "a personal privilege which [a State] may waive at pleasure." *Clark v. Barnard*, 108 U. S. 436, 447 (1883); see, e.g., *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U. S. 613, 618–619 (2002); *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906). When "a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 238 (1985). **Such consent may, as here, be "'inherent in the constitutional plan.'"**

*Id*. at 20 (emphasis added). Because the 5th and 14th Amendments were ratified by the states on December 15, 1791, and July 28, 1868, respectively, both of these Amendments are "inherent in the constitutional plan." Thus, the states consented to the requirements, duties, limitations, and responsibilities of those amendments when they adopted them. The 5th Amendment explicitly requires for "just compensation" as the result of a taking, and the 5th Amendment applies to the states through the 14th Amendment pursuant to *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897).

Ratification is the clearest form of consent. When the states ratified the 5th and 14th Amendments, they consented to be governed under the explicit language of

those amendments. Because the 5th Amendment unambiguously provides for "just compensation" and the states ratified said language, the states have thus consented to a mechanism that is "inherent in the constitutional plan." Therefore, because the states consented to the ratification of the 5th and 14th Amendments, those states cannot claim sovereign immunity as a defense to a 5th Amendment takings claim.

Moreover, the 14th Amendment, which incorporated the 5th Amendment Takings Clause as applicable to the States, was adopted after the 11th Amendment. See *Chicago, Burlington & Quincy Railroad Co., supra*. Since Congress has the authority to abrogate a State's sovereign immunity, certainly a Constitutional Amendment must do so as well.

The 5th Amendment's explicit language provides a remedy for "just compensation." It would not make any logical sense for the 5th Amendment to apply to the states through incorporation by the 14th Amendment, but to then have the 11th Amendment nullify it completely by barring all "just compensation" from those same states. Instead, the 5th Amendment should be properly interpreted as an exception to the 11th Amendment by its explicit terms authorizing "just compensation."

To accept the assertion that the 11th Amendment bars compensation for a violation of the 5th Amendment would create a contradiction in our laws, undermine the protections guaranteed by the Bill of Rights, and produce illogical results. If the

11th Amendment bars compensation against a state, it would create the paradoxical scenario in which the court has the authority to hear a case for a violation of the 5th Amendment, and yet be unable to actually provide the explicit remedy prescribed by the 5th Amendment itself.

Consider the following: A state confiscates and completely destroys a private farm to build a state governmental complex without providing any compensation to the owner. The owner of the farm sues in Federal Court for a violation of the 5th Amendment Takings Clause. The Court hears the case and finds that the state did violate the farmer's 5th Amendment rights by taking his property without providing just compensation. It would be illogical for the Court to then rule that it was powerless to provide any injunctive relief because the farm has been destroyed and a governmental building now sits on the property, and it could not provide any damages because of the 11th Amendment. This sort of ruling would completely negate not only the Constitutional protections provided by the 5th Amendment, but would nullify the explicit language of the 5th Amendment that the farmer is entitled to "just compensation." Clearly this is an untenable approach and creates an impossible conflict within the law.

Further, such an interpretation does not nullify the meaning of the 11th Amendment. The 5th Amendment is the only amendment that specifically references the ability to obtain damages or "just compensation." Thus, a damage claim, for

example, for a 1st or 2nd Amendment claim against a state could still be barred by the 11th Amendment. However, a takings claim for "just compensation" would not. Plaintiffs believe that a proper review of 5th and 14th Amendment history and jurisprudence indicates that the 11th Amendment is not a bar to a 5th Amendment takings claim for "just compensation" against a state or state official.

To ensure that this case encompasses all claims against Defendants in all capacities, Plaintiffs requested leave to amend their Complaint to include Defendants in their individual capacities. Even assuming, *arguendo*, that the 11th Amendment does prohibit Plaintiffs' claims against Defendants in their official capacity, the 11th Amendment does not prohibit Plaintiffs' claims to proceed against Defendants in their individual and personal capacities. It has been long held that "[t]he Eleventh Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the state's citizens." *Johnson v. Lankford*, 245 U.S. 541, 546; 38 S.Ct. 203 (1918). For these reasons, the 11th Amendment does not bar Plaintiffs' request for relief.

### C. DEFENDANTS' EXECUTIVE ORDERS (EOS) AND INDIVIDUAL LIABILITY.

The Michigan Supreme Court held Defendant Whitmer's Executive Orders unconstitutional, and that she acted outside the scope of her statutory powers. *In re Certified Questions*, No. 161492, __ N.W.2d __, 2020, WL 5877599 (Mich. Oct. 2,

2020).

Every EO issued by Defendant Whitmer was illegally promulgated pursuant to the Emergency Powers of the Governor Act (EPGA) (MCL 10.31) and the Emergency Management Act (EMA) (MCL 30.401). The Michigan Supreme Court held:

> [W]e conclude that the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020.

*Id*. at 12. The Court further held:

> In our judgment, the EPGA is inoperative when we sever the power to "protect life and property" from the remainder of the EPGA; therefore, the EPGA is unconstitutional in its entirety.

*Id*. at 37. Therefore, the Supreme Court held that both Acts Defendant Whitmer utilized to issue her EOs were unconstitutionally or unlawfully implemented. Because Defendants acted outside their statutory authority and in an unconstitutional manner, they cannot assert the 11th Amendment as a defense.

State officials who act outside the scope of their authority or in an unconstitutional way are no longer acting on behalf of the "sovereign" or the state. Instead, those officials are acting in their individual capacity. The United States Supreme Court discussed the general rule of sovereign immunity and held that "[t]he Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*

*State School & Hosp. v. Halderman*, 465 U.S. 89, 102; 104 S.Ct. 900 (1984). The Court further held:

> The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct.

*Id*.

In this case, the Michigan Supreme Court has held that the State of Michigan "could not authorize the action" of Defendants. *Id*. Indeed, the Michigan Supreme Court held that Defendant Whitmer did not have the authority to issue the orders against Plaintiffs in the first place. See *In re Certified Questions, supra.* In other words, the Michigan Constitution and Michigan statutory law could not authorize the EOs that Defendants implemented. Therefore, Defendants must be "stripped of [their] official or representative character" and be subjected to the resulting consequences. *Pennhurst, 465* U.S. at 102.

The United States Supreme Court held:

> [I]t has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that, when a state officer acts under a state law in a manner violative of the Federal Constitution, he comes into conflict with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme

> authority of the United States.

*Scheuer v. Rhodes*, 416 U.S. 232, 237; 94 S.Ct. 1683 (1974) (reversed on other grounds) (emphasis added). This principle has been expanded to include the ability to seek damages against the governmental official in their individual capacity. The Court further held:

> [D]amages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. In some situations, a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.
>
> Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the named defendants for what they claim -- but have not yet established by proof -- was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment.

*Id*. at 238 (emphasis added) (internal citations omitted). Plaintiffs contend that the State's actions are not protected by 11th Amendment immunity and, in the alternative, Defendants are not shielded by the 11th Amendment from suit in their individual capacity.

## II. DEFENDANTS' ACTIONS WERE NOT A VALID EXERCISE OF THE STATE'S POLICE POWER.

The District Court improperly applied *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273 (1887) to support its holding. The relevant portion of *Mugler* states:

> A prohibition simply upon the use of property for purposes that are declared, **by valid legislation**, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

*Id*. at 668-669 (emphasis added). The key component that is often ignored is the requirement that the state's police power was exercised through "valid legislation." As outlined above, the Michigan Supreme Court already held that Defendants did not act pursuant to "valid legislation." Thus, Defendants actions were not a valid exercise of police power and are not shielded from a takings claim. Again, Defendants acted pursuant to the EMA and EPGA. The EPGA was held to be unconstitutional in its entirety, and the Michigan Supreme Court held that Defendants' use of the EMA was also done in an unlawful manner. This means that the entire basis for Defendants' actions lacked validity. Thus, those actions provide no protection from a takings clause claim.

In addition, while *Mugler* states that prohibitions on the "use of property" by "valid legislation" cannot be a taking, the actual mechanism utilized by Defendants to take Plaintiffs' property was not legislation. Plaintiffs' property was not taken by any COVID-19 legislation passed by the Michigan Legislature and enacted into law. Instead, Plaintiffs' property was taken by an illegal EO and unconstitutional executive fiat. Defendants' EOs were certainly not "valid legislation," and thus *Mugler* does not apply to Defendants' conduct.

The District Court incorrectly brushes this argument aside by finding that

Defendants orders were valid until the Michigan Supreme Court ruled, thus, Defendants' actions were protected by the 11th Amendment. The District Court cites no authority in support of this conclusion. Just because it took eight months for the judicial process to run its course and the Michigan Supreme Court to hold that Defendants actions were not valid does not absolve Defendants of all liability. The bottom line is that Michigan's highest Court held that Defendants' actions were not valid, thus, they are not deserving of any protection. *Id*.

The Court's rationale directly conflicts with Supreme Court precedent:

> **A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank.** The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

*Knick*, 139 S.Ct. at 2172 (emphasis added). Just because Defendants were forced by the Michigan Supreme Court to cease their unconstitutional actions, they still "robbed the bank" and just compensation is owed.

The Sixth Circuit has held that "[t]he police power of a state is subject to the constitutional limitation that it may not be exerted unreasonably, or arbitrarily." *Chesapeake & O. Ry. Co. v. Greenup County, Ky*., 175 F.2d 169, 175 (6th Cir. 1949). There is nothing more unreasonable than a state or state official acting in an unlawful

or unconstitutional way. Since Defendants utilized unlawful and unconstitutional means to accomplish their taking, they cannot claim the banner of "police power" to shield their actions.

The Supreme Court has also held:

> This court said it would be a very curious and unsatisfactory result, were it held that, 'if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.'

*Id*. at 667-668 (emphasis added).

The United States Supreme Court has also analyzed whether a state's police power is absolute. The Court held:

> The question is whether the police power can be stretched so far. Government 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. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, **in most if not in all cases**, there must be an exercise of eminent domain and compensation to sustain the act.

*Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413; 43 S.Ct. 158 (1922)

(emphasis added). The Supreme Court clearly held that there are limits to a state's exercise of its police power. If a state's actions diminish the value of a property interest to such a degree, then a requirement for compensation exists. In this case, Plaintiffs' property was taken between March 16, 2020, and October 2, 2020, and November 18, 2020, to December 21, 2020, because the State completely forbade any use of their property. Again, Defendants' EOs were as restrictive as possible because they ordered that Plaintiffs' businesses be "closed to ingress, egress, use, and occupancy by members of the public."

If a business cannot interact with the public, then it ceases to be a business. There cannot be a higher diminution of value to a business than a requirement that the business totally cease to operate. The Supreme Court further held:

> The 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. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. 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.
>
> **The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.**

*Id*. at 415 (emphasis added).

Defendants cannot merely place the label of "police power" on their actions to absolve them from any takings liability. Limits to Defendants' ability to utilize

their police power exist and, in this case, their regulations went "too far." Again, Plaintiffs are in a very different position than the majority of businesses in Michigan that were required to comply with the COVID-19 regulations. The State did not require most businesses to totally shut down, and allowed most businesses to operate at a reduced capacity. Contrastingly, the State required Plaintiffs to completely shut down and prohibited any operation of their business at any level for the majority of 2020, during one of the largest economic crises in American history.

The *Pennsylvania Coal* Court concluded with a warning that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id*. at 416.

Plaintiffs are entitled to just compensation based upon a full takings analysis, regardless of the source of power claimed by the state. The Sixth Circuit has stated:

> Appellants suggest that because [the government] was acting through its police power rather than through its eminent domain power, it was not required to seek compensation. **But this distinction is irrelevant**. Assuming [the government's] actions constituted a taking, appellant could seek compensation through inverse condemnation. See, e.g., *Fruman v. City of Detroit*, 1 F.Supp.2d 665, 676 (E.D. Mich. 1998)

*Eaton v. Charter Township of Emmett*, 317 Fed. Appx. 444, fn. 3 (6th Cir. 2008) (emphasis added).

This case is distinct from most of the other COVID-19 takings cases across the country. This is because Defendants utilized unlawful and unconstitutional

means (did not act pursuant to valid legislation and was unreasonable), and because of the severity of their orders. For all of these reasons, Defendants cannot claim "police power" as a universal panacea for their wrongful conduct.

## III. PLAINTIFFS' TAKINGS CLAIMS ARE PROPER.

### A. TYPES OF TAKINGS CLAIMS.

Plaintiffs brought this action pursuant to the United States and Michigan Constitutional Takings clauses. Chief Justice Roberts has clearly summarized a takings claim:

> A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.

*Knick*, 139 S.Ct. at 2167-2168. This is exactly what Plaintiffs allege in this case. Defendants took Plaintiffs' property without providing just compensation, and Plaintiffs now bring this § 1983 action to vindicate their rights. The Court further held:

> Compensation under the Takings Clause is a remedy for the "constitutional violation" that "the landowner has already suffered" at the time of the uncompensated taking. A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place.

> A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.
>
> In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. . . . The "general rule" is that plaintiffs may bring constitutional claims under § 1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available."

*Id*. at 2172-2173 (internal citations omitted). Regardless of what remedies may or may not be available in state court, it was proper for Plaintiffs to bring this § 1983 action in federal court once the taking occurred.

Two categories of takings exist: physical takings and regulatory takings. See *Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 737 (6th Cir. 1997). Plaintiffs' claims are primarily based upon the second type of taking, a regulatory taking. There are two types of regulatory takings: categorical (sometimes referred to as a "*per se*" taking) or non-categorical. A categorical taking occurs when a regulation "denies all economically beneficial or productive use" of the private property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015; 112 S.Ct. 2886 (1992). When a state commits a categorical taking, it has a duty to pay just compensation. That duty exists "without regard to the claimed public benefit or the economic impact on the owner." *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2427; __ U.S. __ (2015).

For non-categorical takings, the Supreme Court has recognized such a taking

can occur where a regulatory restriction "does not entirely deprive an owner of property rights," *Horne*, 135 S.Ct. at 2429, but nevertheless goes "too far." *Id*. at 2427. The *Horne* Court clarified that the test for what is "too far," requires an "*ad hoc* factual inquiry." *Id*. The three elements for a non-categorical inquiry were first established by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978). Those elements are (1) the character of the governmental action, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the economic impact of the regulation on the claimant. *Id*. at 124.

To be clear, Plaintiffs in this case claim a physical (*per se*) and categorical (*per se*) taking (both based upon governmental regulations), and, in the alternative, a non-categorical taking.

**i. Categorical (*per se*)/Physical (*per se*) Taking.**

Plaintiffs claim in this case that Defendants committed a physical and categorical taking of their property for the period of time they were shut down by Defendants' orders. Defendants' actions deprived Plaintiffs of "all economically beneficial or productive use" of their property. *Lucas*, 505 U.S. at 1015. As more fully explained below, Plaintiffs allege in this case that Defendants took their business enterprise property, personal property, and real property, and such a taking can be either temporary or permanent. In the end, both require just compensation be

paid. See, e.g. *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 26; 133 S.Ct. 511 (2012).

The language implemented in the orders by Defendants was sweeping, broad, and all encompassing. The orders required that Plaintiffs' businesses be "closed to ingress, egress, use, and occupancy by members of the public." Such language destroyed "all economically beneficial or productive use" of Plaintiffs' property. *Lucas*, *supra*. Indeed, the order specifically stated that the public could not "use" Plaintiffs' property.

Plaintiffs were forced to sit back and watch their businesses suffer millions of dollars in losses while most other businesses in the state were permitted to be open in at least some limited capacity. Since Plaintiffs were forced to completely shutter their businesses and not allow any "use" by the public, it destroyed "all economically beneficial or productive use" of Plaintiffs' property. This taking demands just compensation be paid.

The District Court erred by ignoring a very recent Supreme Court decision holding a regulation can constitute a *per se* physical taking under the 5th Amendment Takings Clause. In *Cedar Point Nursery v. Hassid*, 594 U.S. ___, No. 107, slip. Op. (2021), the State of California granted labor unions the right to access agricultural employers' property for up to three hours per day, 120 days per year. *Cedar Point Nursery*, 594 U.S. ___, slip. op. at 1. The Court held that such a regulation, regardless

of its temporary nature, of private property constituted a *per se* physical taking. *Id*. at 20. The Court began its analysis by holding:

> As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U. S. ___, ___ (2017) (slip op., at 8).

*Id*. at 5 (emphasis added). The Court held that *per se* takings are the "clearest sort of taking" and the Court assesses "them using a simple, *per se* rule: The government must pay for what it takes." *Id*. Again, government regulations that go "too far" can constitute a taking. The Supreme Court confirmed this analysis and held:

> When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. *Id*., at 321–322. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. See *Horne v. Department of Agriculture*, 576 U. S. 351, 360 (2015); Legal Tender Cases, 12 Wall. 457, 551 (1871). **In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), however, the Court established the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."**

*Id*. at 6 (emphasis added). The Court further held:

> To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. 438 U. S., at 124. Our cases have often described use restrictions that go "too far" as "regulatory takings." See,

> e.g., *Horne*, 576 U. S., at 360; *Yee v. Escondido*, 503 U. S. 519, 527 (1992). **But that label can mislead.** Government action that physically appropriates property is no less a physical taking because it arises from a regulation. That explains why we held that an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking.

*Id*. (emphasis added).

The District Court erred by misapplying the holding in *Cedar Point Nursery,* as it ruled that case only applied to "third parties physical access to their property." ECF No. 36, Page ID #339. The plain language of *Cedar Point Nursery*, however, clearly indicates otherwise. The Supreme Court held that a taking could occur when the state "restricted a property owner's ability to use his own property." *Cedar Point Nursery, supra*, at 7. Further, the example given by the Supreme Court to illustrate this point was the raisin growers case (*Horne v. Department of Agriculture*, 569 U.S. 513, 133 S.Ct. 2053 (2013), a case which had absolutely nothing to do with third party access to property. *Id*. at 6.

Just as the raisin growers were required to "set aside" their crops and not earn an income from those crops, Defendants in this case required Plaintiffs to "set aside" their businesses, completely shut them down, and restricted all physical public access to the property.

Further, the District Court erred because it believed that Plaintiffs were only alleging a regulatory taking, not a physical taking. ECF No. 36, Page ID #335. While

it is true that the State in this case did not physically take possession of Plaintiffs property with state officials being physically present on the premises, the regulations in this case amount to a physical taking. Again, the Supreme Court held that "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id*. Thus, regulations can give rise to a physical takings claim because Defendants physically appropriated Plaintiffs' property because they required Plaintiffs to "set aside" their entire business.

The District Court provided no analysis, discussion, or rebuttal to Plaintiffs' argument that they suffered a *per se* physical taking pursuant to *Cedar Point Nursery*. Instead, the District Court only analyzed the non-categorical test pursuant to *Penn Central*, supra, and failed to provide any substantive analysis as to whether a *per se* taking occurred.

Finally, the facts in this case are worse than those referenced by the Supreme Court. The raisin growers only had to physically "set aside" a portion of their crop but were otherwise still able to operate. In this case, Defendants required that Plaintiffs "set aside" their entire business and completely bear the losses of such a regulatory requirement. If the government has to pay just compensation for a physical taking that forces a business to "set aside" a portion of their crops, then certainly just compensation is owed for a physical taking when the government requires a business to "set aside" its entire operation.

The Court further held:

> The essential question is not, …, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—**or has instead restricted a property owner's ability to use his own property**. See *Tahoe-Sierra*, 535 U. S., at 321–323. **Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.**

*Cedar Point Nursery, supra* at 6-7 (emphasis added). In this case, Defendants physically took Plaintiffs' property because they "restricted a property owner's ability to use his own property." By the plain language of Defendants' orders, Plaintiffs could not use their own property. Indeed, the orders required that Plaintiffs' businesses be "closed to ingress, egress, use, and occupancy by members of the public." Because such a taking amounts to a *per se* physical taking, *Penn Central* "has no place" and "the government must pay for what it takes." *Id*. at 5 and 7.

The Supreme Court further explained that physical takings are not limited to condemnation proceedings:

> We have recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." *Dow*, 357 U. S., at 21; see also *United States v. Clarke*, 445 U. S. 253, 256–257, and n. 3 (1980). In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. See *Dow*, 357 U. S., at 21. Yet we recognize a physical taking all the same. See *id*., at 22. Any other result would allow the government to

> appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome.

*Id*. at 14 (emphasis added). In this case, Defendants' orders had the same effect as a condemnation proceeding, because it was a requirement that Plaintiffs completely close their businesses and be "closed to ingress, egress, use, and occupancy by members of the public." As the Supreme Court described, Defendants did all of this "without authority of a court order." Instead, it was accomplished solely through unconstitutional executive fiat. The same standard from the Supreme Court applies in this case and such a forced closure is "a physical taking all the same." *Id*.

The District Court clearly erred when it held that Defendants actions could not be a categorical or physical taking because they were temporary (and not permanent). The Supreme Court addressed this issue and held that takings are compensable, even if they are temporary:

> To begin with, **we have held that a physical appropriation is a taking whether it is permanent or temporary**. Our cases establish that "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Tahoe-Sierra*, 535 U. S., at 322 (citing *General Motors Corp*., 323 U. S. 373; *United States v. Petty Motor Co*., 327 U.S. 372 (1946)). The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U. S., at 436–437—**bears only on the amount of compensation**.

*Id*. at 11 (emphasis added). Thus, the proper analysis in this case is to analyze the approximately eight months that Defendants completely barred Plaintiffs from operating their businesses. It is irrelevant that Defendants' unconstitutional orders

are no longer in effect, either through a Supreme Court opinion or voluntary rescission. What matters is that Defendants' forced closure of Plaintiffs' businesses amounted to a taking.

It is important to note that Defendants in this case make a markedly similar argument to that of the dissent in *Cedar Point Nursery* because the dissent argued that what occurred in this case was temporary, and the state believes it had a good reason to do it: COVID-19. However, the Supreme Court held otherwise:

> According to the dissent, this kind of latitude toward temporary invasions is a practical necessity for governing in our complex modern world. See post, at 11–12. With respect, our own understanding of the role of property rights in our constitutional order is markedly different.

*Id*. at 16. The Court further held:

> With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained. See supra, at 5.
>
> In the end, the dissent's permissive approach to property rights hearkens back to views expressed (in dissent) for decades. See, e.g., *Nollan*, 483 U. S., at 864 (Brennan, J., dissenting) ("[The Court's] reasoning is hardly suited to the complex reality of natural resource protection in the 20thcentury."); *Loretto*, 458 U. S., at 455 (Blackmun, J., dissenting) ("[T]oday's decision . . . represents an archaic judicial response to a modern social problem."); *Causby*, 328 U. S., at 275 (Black, J., dissenting) ("Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."). As for today's considered dissent, it concludes with "Better the devil we know . . . ," post, at 16, but its objections, to borrow from then-Justice Rehnquist's invocation of Wordsworth, "bear[] the sound of 'Old, unhappy, far-off things, and battles long ago,'"

*Id*.

The District Court erred by essentially adopting the position and rationale of the dissent in *Cedar Point Nursery*. The District Court clearly believes that the process, means, and methods implemented by Defendants to combat COVID-19 were justified and cannot be hindered by Plaintiffs' appeal for the protection of unalienable and constitutionally protected private property rights.

However, as the majority in *Cedar Point Nursery* clearly held, these modern problems, such as COVID-19, should "only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty." *Id*. Again, Plaintiffs are not attempting to minimize COVID-19 or its effects on our nation. It is a serious problem that required attention by every country in the world. Pandemics, however, are not an exception to our Constitution and the "government must pay for what it takes." *Id*. at 5.

**ii. Non-Categorical.**

In the alternative, Plaintiffs allege that Defendants' actions and orders amounted to a non-categorical taking. The Supreme Court's relatively recent decision in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 125 S.Ct. 2074 (2005), provides a clear summary of the requirements of a non-categorical regulatory taking:

> [R]egulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for

> evaluating regulatory takings claims, but identified "several factors that have particular significance." *Id*., at 124, 98 S.Ct. 2646. **Primary among those factors are** "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid*. 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. *Ibid*.

*Id*. at 538-539 (emphasis added).

*a. Economic Impact of the Regulation*

The first primary element regarding the economic impact of the regulation weighs heavily in Plaintiffs' favor. There cannot be a higher economic impact than forcing a business to totally close to the public. There cannot be a higher economic impact than the government, by executive decree, ordering that a business is no longer permitted to operate or earn an income. Plaintiffs' businesses would normally generate a total annual income of over 12 million dollars combined. Instead of being able to operate, even at a reduced capacity like the majority of other businesses in the state, Plaintiffs were forced to totally close for nearly eight months.

Moreover, this type of shutdown is even worse for Plaintiffs because there was no time to prepare for Defendants' orders. Defendant Whitmer issued the first EO shutting down Plaintiffs' businesses (2020-9) on March 16, 2020, and she required that the order take effect that same day at 3:00 p.m. This provided no time

for Plaintiffs to prepare in any fashion for an indefinite shut down. Needless to say, forcibly and completely shutting down an entire business and banning the public from its property, is catastrophic and caused Plaintiffs to lose millions of dollars from the use of their business enterprises, real property, and personal property. There was no leniency or exceptions in Defendants' orders. It required that Plaintiffs' businesses be "closed to ingress, egress, use, and occupancy by members of the public." The economic impact element weighs heavily in favor of Plaintiffs.

*b. Extent of Interference with Investment-Backed Expectations*

The second primary element of the analysis is the "extent to which the regulation has interfered with distinct investment-backed expectations." Again, this element weighs heavily in favor of Plaintiffs. Plaintiffs' entire business enterprises, real property, and personal property, were established and run for the purpose of operating a bowling alley or roller-skating rink. It goes without saying that the Plaintiff business owners who heavily invested in growing the business enterprises, purchased the real and personal property, and operated their businesses, have an expectation that they would receive a return on those investments.

Moreover, a typical investment-backed expectation for investing in a bowling alley is the expectation that the bowling alley will be permitted to operate. To be sure, no reasonable person could have foreseen or had any expectation that Defendants, through executive fiat, would ban all bowling and roller skating in the

entire state.

It is also patently clear that Defendants' orders, which completely banned the business of bowling alleys, would interfere with the investment-backed expectations of that business to the highest degree possible. There is nothing more extreme than a forced total closure. This second primary element also weighs heavily in favor of Plaintiffs. *Lingle* plainly holds that these first two elements are "primary" and of the most importance in a non-categorical regulatory takings analysis. *Id*.

Finally, Plaintiffs had a clear expectation that the Governor would act lawfully and in a constitutional manner that would not fully deprive them of their business and property. Plaintiffs also had an expectation that their business and property could not be taken by Defendants without just compensation being paid. The District Court erred when it held:

> 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.

ECF No. 36, Page ID #337.

It is true that Plaintiffs could have expected to have some level of regulation on their business because of COVID-19. However, Plaintiffs could not have expected that Defendants would act in an unlawful and unconstitutional manner. Moreover they could not have expected that they would be regulated to such an

extent that they would face complete shut down of their businesses for months at a time. This is especially so when most other businesses in the state were permitted to continue to operate in at least some limited capacity. Plaintiffs did not expect to operate "normally" after the pandemic began, but they also did not expect to be forcibly and completely shut down to the extent that a taking occurred. It is reasonable for Plaintiffs to expect these public officials to act lawfully and constitutionally. They did not in this case.

*c. Character of Governmental Action*

The final, and less important, consideration a court must analyze is the "character of the governmental action." *Id*. *Lingle* makes clear that this element's analysis is about the method through which the government conducted the regulatory taking, i.e. whether it was a physical taking or through other means like instituting a new governmental program. This case is not about simply the state instituting a new program that might increase the cost of doing business. This case is not about the state merely increasing the cost or resources required of Plaintiffs to do business. This case is about the extreme step Defendants took to order the complete and total shutdown of Plaintiffs' businesses for nearly eight months.

The character of Defendants' actions was the complete and total control of Plaintiffs ability to do business and, in this case, the complete prohibition of conducting any business whatsoever. While this factor is of less importance than

the first two, it still weighs in favor of Plaintiffs. Thus, all three elements weigh in Plaintiffs' favor, and Defendants' conduct has amounted to a taking requiring just compensation.

**iii. Defendants' Motivation or Rationale for the Orders are Irrelevant.**

Defendants' motivation or rationale for their conduct is irrelevant to the analysis as to whether a regulatory taking occurred. The analysis is, instead, a review of what actions the government took, and what effect those actions had against a person or business' private property. The *Lingle* Court further held:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking."

*Id*. at 543 (emphasis added). Again, the issue in this case is not whether COVID-19 is a threat or whether the state's policies were warranted or even successful. Instead, the inquiry in this case is whether Defendants' actions went so far as to amount to a taking requiring compensation. Plaintiffs contend that it does.

**B. THE TAKEN PROPERTY.**

The inevitable question in any takings claim is to determine what "property" the government has taken. In this case, Plaintiffs are alleging two primary forms of

property that Defendants took from Plaintiffs. The first is Plaintiffs' business enterprise and the second is Plaintiffs' real and personal property.

**i. Business Enterprise.**

Defendants' orders required Plaintiffs' entire business enterprises be totally closed. In essence, the state took over Plaintiffs' businesses and required that they be "closed to ingress, egress, use, and occupancy by members of the public." The United States Supreme Court has held that such an invasion into a private business enterprise can amount to a taking.

In *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114, 71 S.Ct. 670 (1951), the President issued an Executive Order directing the Secretary of the Interior to take control of all coal mines to ensure that they were used for the public good. *Id*. at 116. The government did not send its own agents to run the mine and instead told all of the current owners and employees that they had to follow what the government ordered "as a public duty." *Id*. The Court held that the Executive Order was "in as complete a sense as if the Government held full title and ownership." *Id*.

The Supreme Court also stated that it did not matter that the taking was temporary in nature and compensation was owed to the business. The Court held:

> Having taken Pewee's property, the United States became liable under the Constitution to pay just compensation. Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use.

*Id*. at 117. Plaintiffs' businesses suffered severe losses, millions of dollars, because

of Defendants ordering them to be totally closed to the public. The Court concluded:

> Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control. By doing so, it became the proprietor and, in the absence of contrary arrangements, was entitled to the benefits and subject to the liabilities which that status involves.

*Id*. at 118-119. This means that because the State took control of Plaintiffs' businesses, ordered them to be shuttered, denied all public access, and prevented the property to be used for any purpose, the state is responsible for the losses and liabilities that occurred. Therefore, the first type of property that Plaintiffs allege Defendants took was their business enterprises, and Plaintiffs should be compensated for the "reasonable value of the property's use." *Id*. at 117.

**ii. Real and Personal Property.**

Defendants' actions and orders have also deprived Plaintiffs of their real and personal property. This requires compensation pursuant to the Michigan and United States Constitutions. The United States Supreme Court held:

> We think, in short, that there are good reasons for our frequently expressed belief 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.**

*Lucas*, 505 U.S. at 1019 (emphasis added). This is exactly what occurred in this case. Defendants ordered that Plaintiffs' businesses and land be "closed to ingress, egress, use, and occupancy by members of the public." This is likely the most extreme and

explicit language to use in order to require Plaintiffs to leave their "property idle." Moreover, this also required Plaintiffs to "sacrifice all economically beneficial uses in the name of the common good." Plaintiffs could not use their property for any economical use under Defendants' orders. Indeed, the entire reason for the orders was to ostensibly stop the spread of COVID-19, and Plaintiffs were being required to close for the "common good."

It should also be noted that bowling alleys and roller-skating rinks are not easily converted into some other business use. For example, bowling lanes are unique and require specific machinery and equipment to be used. They also require very specific wood lanes, ball returns, electrical equipment for keeping score, etc. It would be all but impossible to temporarily convert a bowling alley into some other business use, especially without any fair warning or notice of a complete shutdown order.

Further, Defendants' orders, because of their extremely broad language, prevented all economic activity from occurring at a bowling alley because the order required that bowling alleys be "closed to ingress, egress, use, and occupancy by members of the public." This meant that bowling alleys could not even be permitted to be open in some limited capacity to sell merchandise, bowling equipment, or other items to the public. Defendants' orders were clear: Plaintiffs' businesses had to be totally and completely closed to the public. Because of this absolute closure

requirement, Defendants' actions rise to the level of a taking.

The takings clauses also apply to personal property. The United States Supreme Court held:

> There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." Nor is there any dispute that, in the case of real property, such an appropriation is a per se taking that requires just compensation. Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

*Horne*, 135 S.Ct. at 2425-2426 (internal citations omitted). In this case Defendants' actions and orders deprived Plaintiffs of the use of both the real property and buildings, and all the personal property inside of those buildings. Indeed, bowling is a unique business and specific personal property must be used for the businesses, such as bowling balls, bowling shoes, bowling pins, etc. Since Defendants ordered that every bowling business everywhere in the state be "closed to ingress, egress, use, and occupancy by members of the public," they effectively destroyed all value and use of Plaintiffs personal property.

As outlined in the Complaint, Plaintiffs had annual revenues of over 12 million dollars per year (ECF No. 1, pgs. 3-4 of Complaint). As a direct and sole result of Defendants' unlawful orders and takings, Defendants took Plaintiffs' business enterprise property, real property, and personal property. For these reasons, Defendants have unlawfully taken Plaintiffs' property without providing just

compensation.

## IV. TEMPORARY TAKINGS ARE COMPENSABLE.

As previously discussed, both temporary and permanent takings are compensable under a takings claim. The United States Supreme Court has repeatedly affirmed this principle:

> The question presented is whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary. **Ordinarily, this Court's decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking.**

*Arkansas Game and Fish Commission*, 568 U.S. at 26 (emphasis added). Certainly if Defendants had issued the exact same orders that Plaintiffs businesses must be closed to the public, but instead made it a permanent closure, they would have a valid takings claim. Thus, an order requiring a business to be 100% closed permanently is of the same character as an order that requires a business to be 100% closed for a temporary period of time. The Court further held:

> Furthermore, our decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when "[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime." In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings. Notably in relation to the question before us, the takings claims approved in these cases were not confined to instances in which the Government took outright physical possession of the property involved. A temporary takings claim could be

> maintained as well when government action occurring outside the property gave rise to "a direct and immediate interference with the enjoyment and use of the land."

*Id*. at 32-33 (emphasis added) (internal citations omitted).

State action can amount to a taking whether it is permanent or temporary. Moreover, such state action can amount to a taking no matter if it is a physical invasion or other government action that interferes with the use and enjoyment of the property. The Court concluded by holding:

> Ever since, **we have rejected the argument that government action must be permanent to qualify as a taking.** Once the government's actions have worked a taking 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."

*Id*. at 33. This means that Defendants have a duty to provide compensation for the period that they forced Plaintiffs to totally close their businesses. Further, the Supreme Court has held that accounting for profit and loss can be utilized when determining compensation for a temporary taking. The Court held:

> This is conceptually distinct from the Government's obligation to pay fair compensation for property taken, although, in cases raising the issue, the Government's profit and loss experience may well be one factor involved in computing reasonable compensation for a temporary taking.

*Pewee Coal Co*., 341 U.S. at 117-118.

The Sixth Circuit has held:

> A temporary deprivation of property, however, can be a taking and "should be analyzed according to the same framework applied to permanent irreversible 'takings.'"

*Hamilton Bank of Johnson City v. Williamson County Regional Planning Com'n*, 729 F.2d 402, 407 (6th Cir. 1984) (emphasis added) (reversed on other grounds).

Plaintiffs are claiming that their property was taken by Defendants for nearly eight months without just compensation. The deprivation of Plaintiffs' property should be analyzed for a taking pursuant to the same framework as if Defendants had taken Plaintiffs' property permanently. Thus, it is irrelevant that Defendants' orders have since been rescinded or outlawed. Plaintiffs are seeking just compensation for the nearly eight months that Defendants acted unlawfully and unconstitutionally.

## V. MICHIGAN TAKINGS CLAIM.

The District Court improperly dismissed Plaintiffs' Michigan Constitutional claims. Michigan courts have largely interpreted the Michigan Constitution along the same lines as the United States Constitution regarding takings jurisprudence. See, e.g. *Adams Outdoor Advertising v. City of East Lansing*, 463 Mich. 17, 614 N.W.2d 634 (2000). In addition to all the above legal arguments regarding a taking, the Michigan Constitution would support Plaintiffs' regulatory takings claim (sometimes referred to as an "inverse condemnation claim"). The Michigan Supreme Court held:

> Further, Michigan law also recognizes a cause of action for inverse condemnation in cases, like this one, without a physical taking of property, where it is alleged that the effect of a governmental regulation is "to prevent the use of much of plaintiff's property ... for any profitable

purpose."

*Electro-Tech, Inc. v. H.F. Campbell Co*., 433 Mich. 57, 89; 445 N.W.2d 61 (1989).

In addition, the Michigan Constitution provides no defense to state officials who claim the banner of "police power" as a shield to takings claim liability. The Michigan Supreme Court held:

> As this Court has explained, speaking through Chief Justice Riley in *Electro-Tech, Inc. v. H.F. Campbell Co*., 433 Mich. 57, 68, 445 N.W.2d 61 (1989), "a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, see, e.g. *Berman v Parker*, 348 U.S. 26; 75 S.Ct. 98; 99 L Ed 27 (1954) (Fifth Amendment taking), or where a governmental entity exercises its police power through regulation which restricts the use of property. . .

*Bevan v. Brandon Tp*., 438 Mich. 385, 390; 475 N.W.2d 37 (1991) (emphasis added).

Finally, Michigan courts have recognized that temporary takings must be compensated:

> In cases involving a temporary taking, the best approach is a flexible approach that will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability.

*Miller Bros. v. Department of Natural Resources*, 203 Mich. App. 674, 687; 513 N.W.2d 217 (1994). This is all Plaintiffs request in this case: just compensation for losses actually suffered as a result of Defendants' actions.

Based upon all the above arguments regarding Plaintiffs' taking claims, Plaintiffs have properly pled takings claims pursuant to the Michigan Constitution.

## VI. THE DISTRICT COURT ERRED BY DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT.

The Sixth Circuit Court of Appeals has held:

> **[T]he usual practice is to grant plaintiffs leave to amend the complaint. Generally, leave to amend is "freely given when justice so requires."** *Morse*, 290 F.3d at 799 (6th Cir.2002) (quoting Fed.R.Civ.P. 15(a)). However, the Supreme Court has instructed that leave to amend is properly denied where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc."

*PR Diamonds, Inc. v. Chandler*, 91 Fed. Appx. 418, 443 (6th Cir. 2004) (emphasis added).

None of the reasons stated in *Chandler* to deny a request to amend apply to this case and the District Court erred by holding that any amendment would be futile. The primary reason Plaintiffs request to amend is to add Gretchen Whitmer and Robert Gordon as parties in their individual capacities and to clarify issues regarding the facts of this case. Plaintiffs were not attempting to add or delete any counts in the Complaint. As outlined in Plaintiffs' response to Defendants' Motion to Dismiss, a key component to Plaintiffs' claim is the opportunity to pursue damages against Defendants in their individual capacities for their unlawful and unconstitutional actions "under color of state law." 42 U.S.C. § 1983.

It is likely that qualified immunity will arise as an issue if Defendants are sued in their individual capacities. It would be best to address these issues while this case

is in its infancy and to address the entirety of all parties' arguments. It would likely be more work for Defendants to have to respond to a separate lawsuit against Defendants in their individual capacities, than it would be to handle all issues in this case.

In addition, Plaintiffs requested leave to amend their Complaint to clarify the damages and relief sought. When evaluating a takings claim, the United States Supreme Court held:

> The value of property, generally speaking, is determined by its productiveness -- the profits which its use brings to the owner.

*Monongahela Navigation Company v. United States*, 148 U.S. 312, 328; 13 S.Ct. 622 (1893).

The Supreme Court has also held:

> The value compensable under the Fifth Amendment therefore is only that value which is capable of transfer from owner to owner, and thus of exchange for some equivalent. Its measure is the amount of that equivalent. But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. . . . **These considerations have special relevance where "property" is "taken" not in fee, but for an indeterminate period.**

*Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6; 69 S.Ct. 1434 (1949) (emphasis added).

The Court further held:

> Since petitioner has been fully compensated for the value of its physical property, and separate value that its trade routes may have must

> therefore result from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment. The product of such contributions is an intangible which may be compendiously designated as "going concern value," but this is a portmanteau phrase that needs unpacking.
>
> . . .
>
> Assuming, then, that petitioner's business may have going concern value as defined above, the question arises whether the intangible character of such value alone precludes compensation for it. The answer is not far to seek. The value of all property, as we have already observed, is dependent upon and inseparable from individual needs and attitudes, and these, obviously, are intangible. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future.

*Id*. at 9-10.

The Supreme Court has clearly stated that the analysis must be based upon what Defendants took from Plaintiffs. The Court further held:

> If such a deprivation has occurred, the going concern value of the business is at the Government's disposal, **whether or not it chooses to avail itself of it**. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice Holmes, "**the question is, What has the owner lost? not, What has the taker gained**."

*Id*. at 13 (emphasis added).

Finally, the Supreme Court concluded that the temporary taking of a business and property substantially increases the government's obligation. The Court held:

> But, when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going concern value upon the assumption that an even more

> remote possibility -- the temporary transfer of going concern value -- might have been realized. The temporary interruption, as opposed to the final severance of occupancy, **so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him.** It is a difference in degree wide enough to require a difference in result.

*Id*. at 15 (emphasis added). Defendants in this case temporarily took Plaintiffs' businesses and property and forced them to be completely closed for over eight months. Such a drastic use of government power amounts to a taking and must be compensated. Plaintiffs properly requested Leave to Amend their Complaint to further address these issues.

It would be the best use of the parties' and the Court's resources to address all these issues in one case regarding all parties in all capacities. The District Court erred by denying Plaintiffs' Motion to Amend Complaint.

## CONCLUSION

Based on the foregoing, Plaintiffs request that this Honorable Court reverse the rulings of the District Court, find that the 11th Amendment does not bar Plaintiffs' claims, find that Plaintiffs properly stated a takings claim, permit Plaintiffs to amend their Complaint, and remand this matter back to the District Court for further proceedings.

Respectfully submitted,

**KALLMAN LEGAL GROUP, PLLC**

DATED: November 24, 2021.

/s/ David A. Kallman

By: David A. Kallman (P34200)
By: Stephen P. Kallman (P75622)
5600 W. Mount Hope Hwy.
Lansing, MI 48917
517-322-3207
dave@kallmanlegal.com
steve@kallmanlegal.com
*Attorneys for Plaintiffs-Appellants*

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,778 words, excluding those sections identified in Fed. R. App. P. 32(f).

Respectfully submitted,

**KALLMAN LEGAL GROUP, PLLC**

DATED: November 24, 2021.

/s/ David A. Kallman
David A. Kallman (P34200)
*Attorneys for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

**KALLMAN LEGAL GROUP, PLLC**

DATED: November 24, 2021.

/s/ David A. Kallman
David A. Kallman (P34200)
*Attorneys for Plaintiffs-Appellants*

## ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

| Record No. | Page ID# Range | Description |
|---|---|---|
| ECF No. 1 | 1-14 | Complaint |
| ECF No. 14 | 31-34 | Defendants' Motion to Dismiss |
| ECF No. 15 | 35-70 | Defendants' Brief in Support of Motion to Dismiss |
| ECF No. 19 | 78-119 | Plaintiffs' Answer to Defendants' Motion to Dismiss |
| ECF No. 27 | 153-172 | Defendants' Reply Brief in Support of of Motion to Dismiss |
| ECF No. 28 | 173-180 | Plaintiffs' Motion to Amend Complaint |
| ECF No. 29 | 199-207 | Plaintiffs' Supplemental Supreme Court Authority Decided After the Filing of Briefs Regarding Defendants' Motion to Dismiss |
| ECF No. 30 | 295-311 | Defendants' Answer to Plaintiffs' Motion to Amend Complaint |
| ECF No. 36 | 330-341 | Opinion Regarding Plaintiffs' Motion to Amend Complaint and Defendants' Motion to Dismiss |
| ECF No. 37 | 342 | Order Regarding Plaintiffs' Motion to Amend Complaint and Defendants' Motion to Dismiss |
| ECF No. 38 | 343 | Judgment |
| ECF No. 39 | 344-345 | Plaintiffs' Notice of Appeal |