No. 21-2985

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SKATEMORE, INC., a Michigan corporation, d/b/a Roll Haven Skating Center, et al.

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, et al.,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Hala Y. Jarbou

RESPONSE BRIEF FOR DEFENDANTS-APPELLEES

Daniel J. Ping (P81482)
Darrin F. Fowler (P53464)
Kyla Barranco (P81082)
Assistant Attorneys General
Michigan Dep't of Attorney General
Attorneys for Defendants Gordon, MDHHS, and Whitmer
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
PingD@michigan.gov
FowlerD1@michigan.gov
BarrancoK@michigan.gov

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants agree with Plaintiffs that oral argument will aid this Court in the resolution of this case.

STATEMENT OF ISSUES PRESENTED

1. Whether Defendants are entitled to immunity from Plaintiffs' suit in federal court pursuant to the Eleventh Amendment.

2.A. Whether Plaintiffs have alleged a cognizable takings claim when that claim is premised upon Defendants' exercise of the State's police power to protect the public health and safety.

2.B. Assuming a Fifth Amendment takings claim could lie against Defendants' exercise of the State's police power here, whether Plaintiffs have adequately stated such a claim.

3. Whether Plaintiffs should be permitted to amend their complaint where such an amendment would be futile for several reasons.

INTRODUCTION

Plaintiffs are five businesses alleging that their operations were adversely impacted when COVID-19 forced Michigan's government to take drastic but necessary steps to control the ravages of the pandemic. Plaintiffs, of course, were not alone; like those of other states' governments, Defendants' COVID-19 orders were statewide in scope, touching upon nearly all aspects of economic and social life outside the home. Plaintiffs claim that these public-health measures effected a "taking" under both the Fifth Amendment and Michigan's constitution, entitling them (and, presumably, thousands of other businesses) to compensation. The District Court properly dismissed these claims.

This Court should affirm. Plaintiffs, who eschewed a state-court remedy, cannot avoid the Eleventh Amendment. Their arguments to the contrary are beyond novel and depend on ignoring controlling precedent. Notwithstanding this immunity, the Takings Clause simply does not capture broad public-health measures enacted pursuant to a State's police power. Nor did a taking occur even if this Court applies settled takings jurisprudence. Finally, for a number of reasons, Plaintiffs should not be permitted to amend their complaint.

STATEMENT OF THE CASE

Michigan's Response to the COVID-19 Pandemic

The facts surrounding the COVID-19 pandemic, and the State of Michigan's response thereto, are well-established and undisputed. (*See* Pls. App. Br. at 2 ("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.").) SARS-CoV-2—the virus that causes COVID-19—is similar to other coronaviruses (a family of viruses that causes respiratory illnesses), but the strain is novel. The virus is highly contagious, spreading easily from person to person through respiratory droplets, and can cause severe illness and death. There is no general or natural immunity built up in the population, and, during the facts relevant to this case, no vaccine was widely available.

On March 10, 2020, in anticipation of the pandemic spreading in Michigan, Governor Gretchen Whitmer declared a state of emergency and invoked the emergency powers available to her under Michigan law to stem the tide of COVID-19 infections.[1] Soon thereafter, Michigan's

[1] All executive orders can be found at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

Department of Health and Human Services (MDHHS) began issuing emergency orders under Michigan's Public Health Code, Mich. Comp. Laws §§ 333.1101, *et. seq*., to protect the public health.[2]

Plaintiffs' complaint invokes nine of Governor Whitmer's executive orders and two of MDHHS's emergency orders. (Compl. ¶¶ 20–32, ECF No. 1, PageID.5-7.) Among other mitigation measures, the Governor's orders limited the general public's access to various places of public accommodation, including businesses like Plaintiffs'.[3] From the outset, however, these orders expressly "encouraged" such businesses to sell food or beverages on site for off-premises consumption.[4] They also permitted employees, vendors, and other non-public attendees to be present to maintain the business, and did not preclude businesses from using their premises to engage in otherwise-permitted commercial

[2] All MDHHS emergency orders can be found at: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-533660--,00.html.

[3] EO 2020-9 §§ 1(h) (closing "places of public amusement" to "ingress, egress, use, and occupancy by the public"), 3(b) (defining "place of public amusement" to include, *inter alia*, "bowling alley" and "skating rink").

[4] *Id.* § 1.

activities (such as the sale of goods for delivery or curbside pickup).[5] All the while, MDHHS issued orders reinforcing the measures put in place by the Governor's orders, having essentially the same scope but grounded in MDHHS's distinct and independent authority under Mich. Comp. Laws § 333.2253.[6]

As conditions improved, the orders' restrictions correspondingly lifted. Beginning September 4, 2020, the orders permitted businesses such as Plaintiffs' to facilitate "organized sports," i.e., league play, subject to restrictions, with broader public access to those facilities resuming a few weeks later.[7]

As the fall of 2020 progressed, a second wave of COVID-19 emerged. In the face of rapidly increasing COVID-19 infections and related hospitalizations in Michigan, MDHHS issued a public health order effective November 18, 2020, targeting indoor social gatherings

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[5] *E.g.*, *id.*; EO 2020-59 § 10(a).

[6] *See, e.g.*, DHHS 4/2/20 Order, https://www.michigan.gov/documents/coronavirus/DHHS_Order_Incorporating_EOs_into_epidemic_finding_final_4-2-20_002_685693_7.pdf (requiring that "[e]very person . . . must comply with the procedures and restrictions outlined in EO 2020-11, EO 2020-20, and EO 2020-21").

[7] EO 2020-176 § 7; EO 2020-183 § 3(c).

and other group activities.[8] Under that order, food service establishments were not permitted to offer indoor-dining services on premises (but could still offer outdoor dining, delivery, and pickup services), and places of public amusement were also closed to public access.[9] On December 21, 2020, Plaintiffs' businesses were permitted to reopen to public access. (Compl. ¶ 33, ECF No. 1, PageID.7.)[10]

Plaintiffs' Verified Complaint

Plaintiffs are several Michigan corporations and limited liability companies alleging that their businesses were affected by the COVID-19 pandemic and the State's response thereto. (Compl. ¶¶ 11–15, ECF No. 1, PageID.3–4.) Based on their names, Plaintiffs' respective businesses appear to relate to bowling, food service, "skating," and some form of golf. (*Id.*) That said, Plaintiffs exclusively refer to

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[8] Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (Nov. 15, 2020), https://www.michigan.gov/documents/coronavirus/2020.11.15_Masks_and_Gatherings_order_-_final_707806_7.pdf.

[9] *Id.* § 3.

[10] Emergency Order Under MCL 333.2253 – Gatherings and Face Mask Order (Dec. 18, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-547899--,00.html.

themselves as "bowling establishments." (*E.g.*, *id.*) Defendants are Governor Gretchen Whitmer, in her official capacity, the former Director of MDHHS, Robert Gordon, in his official capacity,[11] and MDHHS. (*Id.* ¶¶ 16–18, PageID.4–5.)

Plaintiffs allege that "Defendants unlawfully closed Plaintiffs' businesses and property for a public use, specifically, in the name of preventing the spread of COVID-19," without just compensation. (*Id.* ¶¶ 35, 37, PageID.7, 8.) It repeatedly states, without qualification, that their premises were fully closed. (*Id.* ¶ 36, PageID.7 (alleging that Plaintiffs' businesses were "unable to operate, unable to earn an income, and unable to function *in any way*." (emphasis added); *see also* Pl. Appeal Br. at 21 (asserting that the orders "prohibited any operation of their business at any level").) Their complaint contains two counts: (1) violation of the Fifth Amendment's Takings Clause; and (2) violation of Michigan's Taking Clause, Mich. Const. art X, § 2.

Plaintiffs sought declaratory relief in the form of an "order that Defendants have violated Plaintiffs[']] constitutional rights by taking

[11] Robert Gordon was the Director of MDHHS at all times relevant to this lawsuit; the current Director is Elizabeth Hertel.

their property for public use without just compensation," "damages and/or compensation for the value of the property taken by Defendants," and "any and all damages under federal law . . . including, . . . an award for nominal and punitive damages." (*Id.*, PageID.12.)

Plaintiffs also filed a motion for leave to amend their complaint to add personal-capacity claims against Governor Whitmer and former Director Gordon. (Mot. to Amend, ECF No. 20, PageID.120.)

Procedural History Below

In lieu of filing an answer, Defendants filed a motion to dismiss raising three defenses. (Br. in Support of Defs.' Mot. to Dismiss, ECF No. 15, PageID.35.) First, Defendants asserted that they were immune from Plaintiffs' suit under the Eleventh Amendment. (*Id.* at 12, PageID.54.) Alternatively, Defendants stated that their responses to the COVID-19 pandemic were exercises of the police power to which the Takings Clause did not apply. (*Id.* at 15, PageID.57.) Finally, Defendants asserted that, even if the Takings Clause *did* apply,

Plaintiffs' complaint did not state a claim upon which relief could be granted. (*Id.* at 20, PageID.62.)

The District Court agreed, granting Defendants' motion to dismiss. (9/2/21 Order, ECF No. 36, PageID.330.) The Court primarily relied on Defendants' Eleventh Amendment immunity. (*Id.* at 3–5, PageID.332–334.) In attempt to avoid that immunity, Plaintiffs had moved to amend their complaint to add personal-capacity claims against Defendants, but the District Court denied that motion as futile, observing that Plaintiffs failed to state a claim under the Fifth Amendment. (*Id.* at 6–10, PageID.335–339.) This appeal followed.

SUMMARY OF ARGUMENT

Plaintiffs cannot win without overcoming multiple insurmountable hurdles.

First, the Eleventh Amendment shields States and their agencies from suit for retrospective relief by private citizens in federal courts. Takings claims are no different; the Eleventh Amendment bars their adjudication in this forum. Furthermore, it is well settled that the Eleventh Amendment bars state-law claims against the State and its

officials, regardless of the relief sought. On this basis alone, Plaintiffs' takings claims must be dismissed.

Second, it is not a taking when a State exercises its police powers to protect the public health and safety as Defendants did here. This is well settled and makes intuitive sense; property owners do not have the right to use their properties "in a manner harmful to public health or safety," and thus, "the government's exercise of its powers to protect public health or safety does not constitute a compensable taking . . . ." *Hendler v. United States*, 38 Fed. Cl. 611, 615 (1997); *see also, e.g.*, *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Miller v. Schoene,* 276 U.S. 272, 280 (1928).

Third, even if Plaintiffs somehow avoid both the Eleventh Amendment and the case law recognizing that police-power actions of the sort at issue here are outside the reach of the Takings Clause, Plaintiffs' allegations still fail to state a cognizable claim for relief. Plaintiffs attempt to shoehorn their claim into the realm of "physical" takings, but that attempt is a non-starter; Plaintiffs' complaint does not, and cannot, allege that the orders resulted in a physical invasion or appropriation of their property. As for Plaintiffs' regulatory-takings

theories: Plaintiffs' admissions, along with the incontrovertible terms of the orders at issue, compel a conclusion that Plaintiffs were not totally deprived of the use of their property, so they cannot allege that their properties have been categorically taken. This leaves a claim for a non-categorical taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), but this claim fares no better.

Finally, the merits deficiencies in Plaintiffs' claims are fatal to Plaintiffs' bid to amend their complaint to sue Governor Whitmer and former Director Gordon—as are the doctrine of sovereign immunity and the established principle that takings claims such as Plaintiffs' cannot lie against government officials in their individual capacities.

Accordingly, the State's measures in this case are not properly before this Court and, in any event, do not comprise a constitutional taking. This Court should affirm the dismissal of the complaint and the denial of Plaintiffs' motion for leave to amend their complaint.

STANDARD OF REVIEW

The district court's order granting a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 793 (6th Cir. 2016) (citing *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008)).

Under Federal Rule Civil Procedure 12(b)(1) and (b)(6), "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). This "plausibility" review is "a context-specific task" that requires the reviewing court to determine whether a plaintiff has not just "alleged," but pleaded facts sufficient to "show[]," an entitlement to relief that is actually plausible, and not merely "conceivable" or "possible." *Id.* at 679, 680. "[F]acts that are merely consistent with a defendant's liability" are not enough. *Id.* at 678. And in making this assessment, courts are only to consider facts that are truly well pleaded: they are not to take as true "legal conclusions," including those "couched as a factual allegation," nor "mere conclusory statements" or "naked assertions devoid of further factual enhancement." *Id.* at 678–79 (cleaned up).

ARGUMENT

This Court should affirm the District Court. As set forth below, Plaintiffs cannot avoid Defendants' Eleventh Amendment immunity. Even if Defendants are not immune, Defendants' actions did not comprise a compensable taking. And, as the District Court correctly recognized, Plaintiffs cannot salvage their suit by adding personal-capacity claims to their complaint.

I. The Eleventh Amendment renders Defendants immune from suit.

Defendants enjoy Eleventh Amendment immunity from Plaintiffs' backward-looking claims. Plaintiffs concede that the *Ex parte Young* exception for prospective relief does not apply, but they insist that (1) the Fifth Amendment exists outside the ambit of the Eleventh Amendment and (2) a state-court decision regarding one defendant's authority stripped all Defendants of Eleventh Amendment immunity. For the reasons that follow, neither of Plaintiffs' arguments has any merit, and this Court should affirm.

A. Traditional principles of Eleventh Amendment jurisprudence immunize Defendants from Plaintiffs' claims.

The Eleventh Amendment provides states and their agencies immunity from suit by private citizens in federal courts. U.S. Const. amend. XI; *Lawson v. Shelby Cty., Tenn.*, 211 F.3d 331, 334 (2000). This immunity applies equally to claims asserted against government officials in their official capacities. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Supreme Court has recognized only three exceptions to this rule: (1) congressional abrogation, *id.* at 66; (2) express consent or waiver by the State, *id.*; and (3) official capacity suits for prospective equitable relief based on ongoing violations of federal law, *Ex parte Young*, 209 U.S. 123 (1908). *See also Lawson*, 211 F.3d at 334–35.

Plaintiffs sued the Governor and MDHHS Director in their official capacities, as well as MDHHS, and they do not purport to seek prospective relief against any of the defendants. (Compl. at 12, ECF No. 1, PageID.12.) Indeed, Plaintiffs' complaint acknowledges that the alleged taking ended before they filed their complaint. (*Id.* ¶ 33, PageID.7.) It is thus apparent that Plaintiffs are seeking relief for *past*

alleged constitutional violations. But they cannot do that in this forum, because the only pertinent exception to Eleventh Amendment immunity for official capacity suits applies to claims seeking *prospective* equitable relief based on ongoing violations of federal law. *See Lawson*, 211 F.3d at 335.

Plaintiffs' state-law takings claim, which invokes a similar provision in Michigan's constitution, is also barred. The Eleventh Amendment prohibits state-law claims in federal court against the State or one of its agencies or departments, regardless of the nature of the relief sought. *See Pennhurst State Sch & Hosp v. Halderman*, 465 U.S. 89, 100 (1984); *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) ("[T]he states' constitutional immunity from suit prohibits *all* state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature."). This immunity applies to state officials when the lawsuit is brought against them in their official capacities. *Pennhurst*, 465 U.S. at 121.

Plaintiffs admit that their claims do not qualify for the *Ex parte Young* exception for prospective equitable relief. (*See* Pls.' Appeal Br. at 6.) They assert, however, that two other exceptions are available to

them. For the reasons that follow, neither of these exceptions exists, let alone applies.

B. There is no "exception" to the Eleventh Amendment for a Fifth Amendment takings claim.

Contrary to Plaintiffs' suggestion, a Fifth Amendment takings claim is not "an exception to Eleventh Amendment immunity." (Pls.' Appeal Br. at 8; *see also id.* at 8–9 (citing *Knick v. Twp. Of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019).)

Recently, a plaintiff presented this Court with a functionally identical argument that, "so long as a taking has occurred a state cannot assert its sovereign immunity as a defense." *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020). In a published, unanimous opinion, this Court rejected that argument, holding that "the Fifth Amendment's Takings Clause does not abrogate sovereign immunity." *Id.* This issue is thus settled in Defendants' favor.[12]

[12] Notably, Plaintiffs invoked *Knick* below, (Pls.' Resp. to Mot. to Dismiss at 10, ECF No. 19, PageID.95), and Defendants replied that, in *Ladd*, this Court squarely held that *Knick* did not extend to their argument regarding the Eleventh Amendment. (Defs.' Reply at 3–4, ECF No. 27, PageID.156–157.) Plaintiffs are thus aware that *Ladd* disposes of their argument, yet they fail to notify this Court of this controlling authority.

This Court's decision in *Ladd* is not an outlier. Other circuit courts uniformly have held that a claim against a State entity or official brought in federal court under the Fifth Amendment's Takings Clause is barred by Eleventh Amendment immunity, as long as a remedy is available in state court. *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213–14 (10th Cir. 2019) (holding that a plaintiff's claim against a State department and officials was barred by Eleventh Amendment immunity); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (concluding "that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims"); *Jachetta v. United States*, 653 F.3d 898, 909–10 (9th Cir. 2011) (holding the Eleventh Amendment bars claims brought against a state in federal court under the federal Takings Clause); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 638, 640–41 (11th Cir. 1992) (holding Eleventh Amendment barred plaintiffs' claim "for violation of the Fifth and Fourteenth Amendments for a taking of their property"); *Garrett v. Illinois*, 612 F.2d 1038, 1039–40 (7th Cir. 1980) (holding Fifth

Amendment takings claim against the State of Illinois was barred by the Eleventh Amendment).[13]

Here, Plaintiffs do not claim that they are barred from bringing a claim in Michigan's state courts, nor could they. *See, e.g.*, *K & K Constr., Inc. v. Dep't of Nat'l Res.*, 575 N.W.2d 531 (Mich. 1998) (adjudicating takings claims against the State under the Fifth Amendment and the Michigan Constitution); *Dep't of Nat'l Res. v. Holloway Constr. Co.*, 478 N.W.2d 677, 678 (Mich. Ct. App. 1991) (recognizing that "[t]he [Michigan] Court of Claims is the exclusive forum in which to seek damages for an alleged taking of an owner's property without just compensation" against the State). Accordingly, well-settled principles of Eleventh Amendment jurisprudence instruct

[13] Correspondingly, federal courts have routinely recognized the Eleventh Amendment's applicability to COVID-related takings challenges. *See, e.g.*, *Hund v. Cuomo*, 501 F. Supp. 3d 185, 197, 205–206 (W.D.N.Y. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 n.11 (D. Mass. 2020); *Culinary Studios, Inc. v. Newsom*, No. 1:20-1340, 2021 WL 427115, at *9 (E.D. Cal. Feb. 8, 2021); *Alsop v. Desantis*, No. 8:20-1052-T-23SPF, 2020 WL 9071427, at *3 (M.D. Fla. Nov. 5, 2020); *Martinko v. Whitmer*, 465 F. Supp. 3d 774, 777 & n.2 (E.D. Mich. 2020). (*See also* Defs.' Br. in Supp. of Mot. to Dismiss at 14 n. 36, ECF No. 15, PageID.56; Defs.' Reply Br. at 4 n. 2, ECF No. 27, PageID.157.)

that Defendants are entitled to immunity, and this Court should affirm the District Court.

C. Michigan did not consent to the instant suit by ratifying the Fifth or Fourteenth Amendments.

Relatedly, Plaintiffs also invoke *Penneast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2262 (2021), seizing on a remark that a state's consent to be sued—one of the recognized exceptions to Eleventh Amendment immunity—may "be inherent in the constitutional plan." According to Plaintiffs, the States impliedly waived their Eleventh Amendment immunity as to all incorporated rights when they ratified the Fifth and Fourteenth Amendments. (Pls.' Appeal Br. at 10–11.) There are a number of problems with this novel theory that render it unpersuasive.

First, the District Court correctly held that the facts of *Penneast Pipeline* are materially distinguishable, and Plaintiffs provide no cause to extend its holding here. (9/2/21 Op. & Order at 4, ECF No. 36, PageID.333.) That case examined "whether the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest."

Penneast Pipeline, 141 S. Ct. at 2251. In holding that the federal government's eminent domain power took precedence over a State's sovereignty, *Penneast Pipeline* held that, "[a]lthough nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution." *Id.* at 2251–52.

This holding is a simple restatement of federal supremacy—a clear-cut, uncontroversial, and foreseeable consequence of ratifying "*the original constitution* . . . at the founding." *Id.* at 2258 (emphasis added). This result is consistent with the principle that consent to be sued must be "unequivocally expressed." *Id.* at 2258 (quoting *Sossamon v. Texas*, 563 U.S. 277, 284 (2011)).

By contrast, Plaintiffs would ascribe a similar clear-cut intent to States' ratification of the Fourteenth Amendment. Ratification of the Fourteenth Amendment occurred in 1868, but its ratification demonstrably did not include foreknowledge of the incorporation doctrine as Plaintiffs' theory presumes. (Pls.' Appeal Br. at 11 ("[T]he 14th Amendment, which incorporated the 5th Amendment, was adopted after the 11th Amendment.").) The Fifth Amendment's Takings Clause

was not recognized as having been incorporated for another thirty years, *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), with other selective incorporations occurring well into the 20th Century, *see e.g.*, *Mapp v. Ohio*, 367 U.S. 6443 (1961). Accordingly, ratification of the Fourteenth Amendment does not represent an "unequivocal" waiver of the States' sovereign immunity with respect to the Fifth Amendment on par with the understanding surrounding ratification of the original constitution.

Even if the Fourteenth Amendment's ratifiers had foreknowledge of the incorporation doctrine, Plaintiff's argument simply does not map onto the facts of *Penneast Pipeline*. The point of *Penneast Pipeline* was to reconcile two competing sovereign interests, but this case invokes the relationship between States and private condemnees—the latter of whom have no sovereign interest to weigh against the State's. Accordingly, *Penneast Pipeline* is inapplicable.

Furthermore, if adopted, Plaintiffs' argument would eviscerate the Eleventh Amendment with respect to any claim, prospective or retroactive, founded on a constitutional provision later incorporated via the Fourteenth Amendment. Such a result would be untenable.

Pennhurst, 465 U.S. at 105 (observing that extending *Ex parte Young* "to encompass retroactive relief . . . would effectively eliminate the constitutional immunity of the States").

D. There is no exception to the Eleventh Amendment for "unlawful" action, but if one is assumed, it does not apply here.

Plaintiffs also assert that Governor Whitmer's executive orders were issued pursuant to a statute that violated Michigan's constitution, removing her actions from the ambit of the Eleventh Amendment. (*Id.* at 7–8 (citing *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982)); *see also id.* at 13–16 (citing *Pennhurst*, 465 U.S. at 102–03).) In particular, Plaintiffs argue that, because the Michigan Supreme Court ruled in October 2020 that certain state statutes' grants of authority were no longer available to Governor Whitmer, *In re Certified Questions*, 958 N.W.2d 1 (Mich. 2020), the Governor's emergency orders do not implicate Eleventh Amendment jurisprudence. This argument fails for any one of several reasons.

As an initial matter, it is unclear how this theory fits with the Fifth Amendment's Takings Clause. The power of eminent domain permits the taking of public property for a public use—so long as the

property owner is compensated. Plaintiffs are in court *not* because they contest that Defendants' actions lacked a public purpose, but because they claim that they are owed compensation. The legality of the alleged taking is not part of this issue. Accordingly, it should have no bearing on the Eleventh Amendment's effect on a lawsuit that demands only just compensation.

Consistent with this common-sense reality, Plaintiffs' case law does not support their legal premise. Neither *Treasure Salvors* nor *Pennhurst* stands for the proposition that alleging any type of *ultra vires* behavior removes the hurdle of the Eleventh Amendment in a takings case. In fact, those cases reaffirm the settled principle that a suit against a state official alleging *ultra vires* acts may proceed *only if* it seeks prospective relief for ongoing behavior. *See Treasure Salvors*, 458 U.S. at 689–90; *Pennhurst*, 465 U.S. at 102–03; *see also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505–506 (1998) (clarifying that the plaintiffs in *Treasure Salvors* avoided the Eleventh Amendment only because "the State had possession—albeit unlawfully—of the artifacts at issue").

In other words, *Ex parte Young* still applies. By contrast, this lawsuit concerns only actions that ceased on December 21, 2020, prior to the complaint being filed. (Compl. ¶ 33, ECF No. 1, PageID.7.) There is no ongoing "taking" akin to the ongoing possession in *Treasure Salvors*. Accordingly, the Eleventh Amendment divests this Court of jurisdiction. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

Pennhurst, in particular, explicitly rejected a component of Plaintiffs' theory, *i.e.*, that "an allegation that official conduct is contrary to a state statute would suffice to override the State's protection under [the Eleventh] Amendment." 465 U.S. at 106. The majority deemed this theory "out of touch with reality," *id.* at 107, and stated, correctly, that "it would make the doctrine of sovereign immunity superfluous" insofar as "[a] plaintiff would need only to claim an invasion of his legal rights in order to override sovereign immunity," *id.* at 112 (citations and quotations omitted).[14] If Plaintiffs' argument is adopted, *Pennhurst*'s prediction would manifest.

[14] Of course, Plaintiffs' lawsuit is a degree removed from these principles: They are demanding compensation, not asserting a right to be free from the orders. But this degree of difference only hurts

Moreover, Plaintiffs' state-law premises are deeply flawed. To the extent this Court can adjudicate this issue of state law, the Michigan Supreme Court's ruling was not retroactive, meaning that Governor Whitmer did not act contrary to Michigan law.[15] And even assuming—for the sake of argument only—that the executive orders were *void ab initio* after April 30, 2020, Plaintiffs continue to ignore the fact that MDHHS used its independent statutory authority to issue functionally identical orders during the relevant time periods.[16] (*See also* Defs.' Br. in Support of Mot. to Dismiss at 19 n. 39, ECF No. 15, PageID.61; Defs. Reply at 1–2, ECF No. 27, PageID.153-154.) The MDHHS orders

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Plaintiffs' attempt to apply *Pennhurst* in their favor, because the orders' illegality is a necessary premise to their theory.

[15] *See, e.g.*, *In re Certified Questions*, 958 N.W.2d at 6 (concluding that "the executive orders issued by the Governor in response to the COVID-19 pandemic *now* lack any basis under Michigan law" and the Emergency Powers of Governor Act (EPGA), Mich. Comp. Laws § 10.31, "cannot *continue* to provide a basis for the Governor to exercise emergency powers") (emphases added); *House of Representatives v. Governor*, 949 N.W.2d 276, 276 (Mich. 2020) (explaining that the executive orders are "of no continuing legal effect") (emphasis added).

[16] *See* note 6, *supra*. The executive orders were valid through April 30 under any interpretation of *In re Certified Questions*. *See* 958 N.W.2d at 11. Plaintiffs' claim that *none* of the executive orders was valid is thus incorrect on multiple levels.

remain unimpeached in Michigan jurisprudence. They are not susceptible to the argument Plaintiffs raise regarding *ultra vires* behavior, meaning Plaintiffs have not alleged that the Governor's executive orders were the but-for cause of the alleged taking. *In re Certified Questions*, 958 N.W.2d at 42 (Viviano, J., concurring in part and dissenting in part) (noting that the source of MDHHS's authority, Mich. Comp. Laws § 333.2253, is "still the law"); *see also id.* at 56 (McCormack, C.J., concurring in part and dissenting in part) (affirming that *In re Certified Questions* "does not offer any opinion on the validity or continued enforcement of [the MDHHS] orders"). As a result, Plaintiffs cannot show that the use of their property was prohibited or restricted as a result of allegedly *ultra vires* actions by Governor Whitmer.

Simply put, there is no merit to this line of argument, nor any other Plaintiffs have raised in an attempt to avoid Defendants' settled entitlement to Eleventh Amendment immunity in this case. The District Court properly recognized as much, and this Court should affirm.

II. Notwithstanding Defendants' Eleventh Amendment immunity, Plaintiffs' claims fail as a matter of law.

While Defendants' Eleventh Amendment immunity is dispositive, Plaintiffs' takings claims also fail on their merits on multiple grounds. First, the regulations Plaintiffs challenge constitute an exercise of the State's police power to protect public health and safety which does not, as a matter of law, give rise to a compensable taking. Second, even if Defendants' measures conceivably could amount to a compensable taking, Plaintiffs have not pleaded any such viable claim here. Throughout this pandemic, courts across the country, considering takings challenges to all manner of COVID-19 restrictions, have consistently reached these conclusions.[17] So too did the District Court here, in rejecting Plaintiffs' motion to amend—and rightly so.

[17] *See, e.g.*, *TJM 64, Inc. v. Shelby Cty. Mayor*, 526 F. Supp. 3d 331 (W.D. Tenn. 2021); *Casey v. Ivey*, No. 2:20-777, 2021 WL 2210589 (M.D. Ala., June 1, 2021); *Underwood v. City of Starkville, Miss.*, No. 1:20-85, 2021 WL 1894900 (N.D. Miss. May 11, 2021); *1600 Walnut Corp. v. Cole Haan Co. Store*, 530 F. Supp. 3d 555 (E.D. Pa. 2021); *MetroFlex Oceanside LLC v. Newsom*, 532 F. Supp. 3d 976 (S.D. Cal. 2021); *State v. Wilson*, 489 P.3d 925 (N.M. 2021); *Mission Fitness Ctr., LLC v. Newsom*, No. 2:20-09824, 2021 WL 1856552 (C.D. Cal. May 10, 2021); *Amato v. Elicker*, 534 F. Supp. 3d 196 (D. Conn. 2021); *Northland Baptist Church of St. Paul v. Walz*, 530 F. Supp. 3d 790 (D. Minn. 2021); *Flint v. Cty of Kauai*, 521 F. Supp. 3d 978 (D. Haw. 2021);

A. Because Defendants' orders were classic exercises of the State's police power to protect public health and safety, they were not takings.

Plaintiffs frame the State's exercise of its police power as a taking of their properties under the Michigan and U.S. Constitutions. But this argument misses a critical distinction. Where the State regulates the use of property to promote the health, safety, morals, or general welfare, the Supreme Court routinely and uniformly upholds regulations that adversely affected or *even destroyed* recognized property interests. *Penn Central Transp. Co. v. New York City*, 438

Daugherty Speedway, Inc v. Freeland, 520 F. Supp. 3d 1070 (N.D. Ind. 2021); *Peinhopf v. Guerrero*, No. 20-00029, 2021 WL 218721 (D. Guam Jan. 21, 2021); *Our Wicked Lady LLC v. Cuomo*, No. 21-0165, 2021 WL 915033 (S.D.N.Y. Mar. 9, 2021); *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828 (W.D. Tenn. 2020); *Blackburn v. Dare Cty.*, 486 F. Supp. 3d 988 (E.D.N.C. 2020); *Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789 (D. Minn. 2020); *Oregon Rest. & Lodging Ass'n v. Brown*, No. 3:20-02017, 2020 WL 6905319 (D. Or. Nov. 24, 2020); *AJE Enter. LLC v. Justice*, No. 1:20-229, 2020 WL 6940381 (N.D. W. Va. Oct. 27, 2020); *Bimber's Delwood, Inc v. James*, 496 F. Supp. 3d 760 (W.D.N.Y. 2020); *Luke's Catering Serv., LLC v. Cuomo*, 485 F. Supp. 3d 369 (W.D.N.Y., 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020); *Lebanon Valley Auto Racing Corp v. Cuomo*, 478 F. Supp. 3d 389 (N.D.N.Y., 2020); *Savage v. Mills*, 478 F. Supp. 3d 16 (D. Me., 2020); *PCG-SP Venture I LLC v. Newsom*, No. 20-1138, 2020 WL 4344631 (C.D. Cal. June 23, 2020); *McCarthy v. Cuomo*, No. 20-2124, 2020 WL 3286530 (E.D.N.Y. June 18, 2020); *Alsop*, 2020 WL 9071427.

U.S. 104, 125 (1978). This is because these public-health-and-safety measures are not "takings" in the first place. Instead, as a long and settled line of Supreme Court authority reflects, the general rule is that state regulations reasonably aimed at securing or protecting public health and public safety do not obligate the state to pay just compensation or damages for those regulations' effects:

> Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community[,] . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (cleaned up). *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use, do not constitute a taking within the meaning of the constitutional provision[.]") (cleaned up); *Miller v. Schoene,* 276 U.S. 272, 280 (1928) (holding that the State of Virginia did not need to compensate the owners of cedar trees that needed to be destroyed to prevent a disease from spreading because "it was clear that the State's exercise of its police power to prevent the impending danger

was justified."); *United States v. Caltex*, 344 U.S. 149, 154 (1952) (explaining, in rejecting a takings claim, that "the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"); *Keystone Bituminous Coal*, 480 U.S. at 492 n. 22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."); *Tahoe-Sierra Pres Council v. Tahoe Reg'l Plan Agency*, 535 US 302, 329 (2002) ("[T]he [government] might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations" (cleaned up)). In short, regulations intended to protect the public's health and safety do not amount to exercise of the State's eminent domain power requiring compensation.

Circuit Courts, including the Sixth, have likewise recognized this established proposition. *See, e.g.*, *United States v. Droganes*, 728 F.3d 580, 591 (6th Cir. 2013) (explaining that "the government's seizure and

retention of property under its police power does not constitute a 'public use' " and thus is not a compensable taking, and "[t]his rule does not admit of any exceptions" (cleaned up)); *McCutchen v. United States*, 145 Fed. Cl. 42, 51 (2019) ("[I]t is well established that there is no taking for 'public use' where the government acts pursuant to its police power, *i.e.*, where it criminalizes or otherwise outlaws the use or possession of property that presents a danger to the public health and safety."); *National Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 63 (3d Cir. 2013) (categorically rejecting claim that a taking had occurred from government-mandated five-month closure of flea market in response to unexploded munitions discovered on the property because the abatement of the danger posed by the property was "an exercise of its police power that did not require just compensation"); *Hendler*, 38 Fed. Cl. at 615 ("[B]ecause a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights."); *see also TJM 64, Inc. v. Shelby Cty. Mayor*, 526 F. Supp. 3d 331, 336 (W.D. Tenn. 2021) ("The Supreme Court has consistently

stated that the Takings Clause does not require compensation when a government entity validly exercises its police powers" and "[s]everal circuit courts, including the Sixth Circuit [in *Droganes*], have also specifically held that actions the government performs pursuant to its police power, as compared to its power of eminent domain, cannot constitute a taking for 'public use.' ") (collecting cases). Consistent with this settled law, numerous other jurisdictions have already rejected "takings" claims virtually identical to Plaintiffs' in the COVID-19 context. *See, e.g.*, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 895–96 (Pa. 2020) (holding that the temporary closure of businesses during the pandemic "to protect the lives and health of millions of Pennsylvania citizens[] undoubtedly constitutes a classic example of the use of the police power to protect the lives, health, morals, comfort, and general welfare of the people" and thus does not constitute a compensable taking); *TJM 64*, 526 F. Supp. 3d at 337 ("The Court finds that because the Closure Order was a legitimate exercise of Defendants'

police powers, it was not a taking for 'public use' and therefore the Takings Clause does not require compensation.").[18]

There is no cause to deviate from this pattern here. The prevention of the spread of disease undoubtedly rests at the heart of a state's police power.[19] Plaintiffs do not contest that this was the basis for the orders. Plaintiffs allege that Defendants' orders temporarily shut down their businesses by requiring them to close to the public. They admit that the measures at issue were temporary in nature, (Compl. ¶¶ 30, 31, 33, ECF No. 1, PageID.6-7), and they admit that they were "in the name of preventing the spread of COVID-19," (*id.* ¶ 35,

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[18] *See also, e.g.*, *State v. Wilson*, 489 P.3d 925, 940–41 (N.M. 2021); *Casey v. Ivey*, ___ F. Supp. 3d. ___, 2021 WL 2210589, *23 (M.D. Ala, June 1, 2021); *Underwood v. City of Starkville*, ___ F. Supp. 3d. ___, 2021 WL 1894900, *7 (N.D. Miss., May 11, 2021); *Alsop*, 2020 WL 9071427 at *3.

[19] *See, e.g., Illinois v. Adams*, 597 N.E.2d 574, 339 (Ill. 1992) ("Like other measures intended to enhance public health and community well-being, governmental action designed to control the spread of disease falls within the State's police powers."); *see also Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 396 (6th Cir. 2001) (ordinance passed to, among other things, deter the spread of sexually transmitted disease, was enacted pursuant to municipality's police power); *People v. Bd. of Ed. of City of Lansing*, 195 N.W. 95, 96 (Mich. 1923) (holding that the police power of the state includes the right to enact laws that prevent the spread of disease).

PageID.7). Plaintiffs explicitly do not challenge the efficacy and necessity of this goal. (Pls.' Appeal Br. at 2–3.) Thus, Plaintiffs cannot adequately plead takings claims as a matter of law.

Plaintiffs offer a number of objections to this rationale, but none is persuasive. First, they restate their claim that Governor Whitmer's orders were *void ab initio*. (Pls. Appeal Br. at 17.) As set forth above, Plaintiffs' belief about the retroactivity of *Certified Questions* is mistaken and, in any event, irrelevant in light of the MDHHS orders that provided parallel yet independent restrictions pursuant to an entirely distinct statutory authority expressly undisturbed by *Certified Questions* (or any other ruling).[20]

Also unpersuasive is Plaintiffs' alternative claim that Defendants' actions in this case—the "merits" of which they concede—exceeded the

[20] Plaintiffs incorrectly assert that the District Court ignored their argument about the validity of Governor Whitmer's orders. (Pls.' Appeal Br. at 17–18.) In fact, the District Court expressly rejected it, explaining both that *Certified Questions* "does not suggest that the Governor acted ultra vires" in issuing her pre-ruling orders and also that "MDHHS repeatedly issued orders under its own authority to reinforce the Governor's orders," which Plaintiffs did not (and do not) "contend . . . were invalid." (9/2/21 Op. & Order at 5, 9, ECF No. 36, PageID.334, 338.)

scope of the police power. (Pls.' Appeal Br. at 2, 19.) Plaintiffs misread *Pennsylvania Coal Company v. Mahon* to support their argument that a valid exercise of police power can nevertheless exceed some undefined limit. (*Id.* at 19.) But *Pennsylvania Coal* did not hold that the state's exercise of its police power in that case was so extreme as to require compensation; rather, it concluded that the relevant statute *was not enacted via the "police power" at all*. *Pennsylvania Coal*, 260 U.S. 393, 413–14 (1922) ("The damage is not common or public. . . . The extent of the public interest is shown by the statute to be limited, [and] it is not justified as a protection of personal safety. . . . [T]he act cannot be sustained as an exercise of the police power . . . ."). The statute in question—a land use regulation reallocating surface and sub-surface rights—had protected one entity's private property rights at the expense of another's.[21] *See also Keystone Bituminous Coal*, 480 U.S. at 485 (noting that *Pennsylvania Coal* "involve[d] a balancing of the private economic interests of coal companies against the private

[21] The statute invalidated by *Pennsylvania Coal* prohibited certain types of mining when it would endanger residential structures, even though the miners possessed preexisting contractual rights that included a waiver from the residences' owners.

interests of the surface owners"). The Supreme Court rejected the state's attempt to stretch the definition of "police power"; it did not purport to disrupt the settled doctrine that public health actions taken under the police power fall outside the ambit of the Takings Clause, which doctrine "does not admit of any exceptions," *Droganes*, 728 F.3d at 591. Again, Plaintiffs concede the merits of Defendants' policies (notwithstanding their alleged illegality). And it is beyond question that the pertinent restrictions on Plaintiffs' businesses did not advance a purely private interest.

Another opinion, subsequent to *Pennsylvania Coal*, clarifies how the police-power principle works here. In *United States v. Central Eureka Mining Company*, 357 U.S. 155, 157 (1958), the government ordered non-essential gold mines to close, which was calculated to free up resources for different types of mining that better supported the war effort. The government "did not take physical possession of the gold mines [and] did not require the mine owners to dispose of any of their machinery or equipment." *Id.* at 158. The closure order remained in effect for almost three years. *Id.* Some of the affected mines alleged

that the closure order comprised a taking that violated the Fifth Amendment. *Id.* at 162.

The Supreme Court disagreed. The Court noted that, ordinarily, a takings inquiry was "a question properly turning upon the particular circumstances of each case." *Id.* at 168 (citing *Pennsylvania Coal*). But that case-specific inquiry was unnecessary when the needs of the government—and, more important, the citizenry at large—were sufficiently dire to require the use of the police power. The Court reasoned:

> In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands. We do not find in the temporary restrictions here placed on the operation of gold mines a taking of private property that would justify a departure from the trend of the above decisions.

Id. at 168–69 (citations omitted).

The conflict leading to the dispute in *Central Eureka*—World War II—ultimately cost 418,500 American lives over the course of roughly

four years.[22] By some estimates, COVID-19 has already cost 791,933 American lives in under *two* years.[23] Although controlling the raging pandemic was not a "war" between nations, it required wartime mobilization and wartime sacrifice.[24]

Notably, *Central Eureka* appeared to leave open the possibility that its analysis might have been different had the exercise of police power worked a physical taking. 357 U.S. at 169 (emphasizing that the closure of the gold mines "did not order any disposal of property or transfer of men"); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1294 (Fed. Cir. 2008) (distinguishing *Central Eureka* from a physical taking). But no such physical taking was at issue there,

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[22] *Research Starters: Worldwide Deaths in World War II*, available at https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war.

[23] *Coronavirus in the U.S.: Latest Map and Case Count*, NEW YORK TIMES (Dec. 9, 2021), available at https://www.nytimes.com/interactive/2021/us/covid-cases.html.

[24] *Cf. 'Our Big War.' As Coronavirus Spreads, Trump Refashions Himself as a Wartime President*, TIME MAGAZINE (March 19, 2020) ("The fight to slow the spread of COVID-19 is 'our big war,' Trump said Thursday. 'It's a medical war. We have to win this war. It's very important.' "), available at https://time.com/5806657/donald-trump-coronavirus-war-china/.

nor is it here: the State did not physically invade Plaintiffs' properties, affirmatively conscript their resources, or work any other physical taking. And indeed, the restrictions in this case were even laxer than those imposed in *Central Eureka*: Defendants' public-health measures effected only a cessation of *one facet* of Plaintiffs' business operations, and for a far shorter period than the three years ratified by *Central Eureka*.

Plaintiffs still have no response to *Central Eureka*, which Defendants raised below. Nor have they offered any colorable basis to depart from the established precedent that has consistently guided courts throughout this pandemic to the same conclusion the District Court reached here: the challenged actions taken by Defendants to protect public health and safety do not comprise a taking as a matter of law.

B. Even if Plaintiffs could plausibly allege a taking, their claims fail as a matter of law under both physical and regulatory takings jurisprudence.

The Fifth Amendment's Takings Clause provides that private property shall not "be taken for public use, without just compensation."

U.S. Const. amend. V. There are two kinds of takings: physical takings and regulatory takings. *See Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 737 (6th Cir. 1997). A physical taking occurs when the government appropriates or physically invades private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). A regulatory taking occurs when the government regulation of private property is "so onerous that its effect is tantamount to a direct appropriation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

Notwithstanding their protestations to the contrary, Plaintiffs do not, and cannot, allege that Defendants' measures resulted in a physical invasion of their property. Thus, the only takings theory potentially available to them is that of a regulatory taking. Nevertheless, Defendants will first address Plaintiffs' claims that the orders effected a physical taking.

1. Plaintiffs do not plausibly allege a physical taking.

As already discussed, Defendants' public-health regulations plainly did not work a physical taking of Plaintiffs' property; there was no physical invasion or affirmative appropriation of that property, but

only a restriction on how Plaintiffs could use it. Nonetheless, in an apparent conflation of "physical" and "categorical regulatory" takings, Plaintiffs invoke *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), a recent takings case addressing a California regulation mandating that agricultural employers permit union organizers to physically enter their property. (Pls.' Appeal Br. at 24–32.) *Cedar Point* was a physical takings case; the government forced plaintiffs to permit third parties to physically invade their properties. It is therefore inapposite, notwithstanding Plaintiffs' insistence that they are alleging a physical takings case. (*See also id.* at 23 (identifying two types of takings—physical and regulatory—and clarifying that "Plaintiffs' claims are primarily based upon the second type of taking, a regulatory taking").)

Plaintiffs' attempt to avoid this conclusion is deeply flawed. Plaintiffs twist the concept of a physical taking—which might occur when, for example, the government compels growers "to *physically* set aside a percentage of their crop *for the government*," *Cedar Point*, 141 S. Ct. at 2072 (emphases added)—into something that would apply each time a regulation restricted the universe of allowable behavior. (Pls.' Appeal Br. at 27 ("Just as the raisin growers were required to 'set aside'

their crops . . . , Defendants in this case required Plaintiffs to 'set aside' their businesses[.]").)

In fact, *Cedar Point* maintained the distinction between a physical and regulatory taking, such that the distinction still means something:

> 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. [*Cedar Point*, 141 S. Ct. at 2072 (citations omitted) (emphasis added).]

The regulation in *Cedar Point* effectuated the physical invasion of the plaintiffs' property because it granted third parties "a right to physically enter and occupy" the property. *Id.* By contrast, the orders at issue here "restricted [only] a property owner's ability to use his own property," and, therefore, "a different standard applies." *Id.* at 2071.

Plaintiffs' argument not only misreads *Cedar Point*, but it would, if adopted, generalize the concept of a "physical" taking beyond any meaning. If mere restrictions on uses of property, such as those at issue here, can be described as a requirement to physically "set aside" that use, every regulation is prone to becoming a physical taking, unduly

"transform[ing] government regulation into a luxury few governments could afford." *Tahoe-Sierra*, 535 U.S. at 324.[25]

Simply put, Plaintiffs are attempting to stretch the concept of a physical taking (along with its accompanying jurisprudence) beyond recognition in service of their interests in this case. Nothing in *Cedar Point* or other precedent supports that effort, and this Court should not countenance it.

2. Plaintiffs have not stated a regulatory takings claim.

A regulatory taking may be "categorical," which amounts to a total deprivation, or "non-categorical," which is anything less than a total loss. *Lingle*, 544 U.S. at 539–40. A categorical taking involves "the

[25] For example, *Cedar Point* identified *Andrus v. Allard*, 444 U.S. 51 (1979), as being properly analyzed under *Penn Central*'s regulatory takings framework. 141 S. Ct. at 2072. *Allard* concerned the prohibition of commercial transactions in parts of birds "legally killed before the birds came under the protection" of certain statutes. 444 U.S. at 53. *Allard* is therefore even more amenable to Plaintiffs' theory than the instant case, insofar as it required the plaintiff to shelve actual, physical inventory. Nevertheless, because there was neither physical invasion nor appropriation by the government, it was not a physical takings case. *Id.* at 65–66 ("The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them.").

extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted." *Tahoe-Sierra*, 535 U.S. at 330 (cleaned up). All other regulatory takings—*i.e.*, those involving "[a]nything less than a complete elimination of value, or total loss"—are termed "non-categorical." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Notably, notwithstanding whether a plaintiff alleges a categorical or non-categorical taking, the alleged "deprivation [must be] significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal*, 480 U.S. at 493. Here, for the reasons that follow, that heavy burden has not been met as to either a categorical or non-categorical regulatory taking.

a. No categorical taking occurred.

Plaintiffs allege that Defendants' orders "required the complete closure of [their] businesses." (Compl. ¶ 44, ECF No. 1, PageID.8-9.) According to Plaintiffs, their businesses were "closed and taken by Defendants from March 16, 2020 to October 2, 2020," (*id.*, PageID.6–7, ¶ 30), and bowling alleys, after shutting down again for a brief period of

time, were "permitted . . . to reopen on December 21, 2020," (*id.*, PageID.7, ¶ 33).

This is insufficient to state a categorical takings claim. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Lucas*, the Court explained that a categorical takings claim is limited to those situations in which "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good." *Id.* But as explained in *Tahoe-Sierra*, the *Lucas* holding is "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra*, 535 U.S. at 331 (quoting *Lucas*, 505 U.S. at 1017). Indeed, the categorical rule does "not apply if the diminution in value [is] 95% instead of 100%." *Id.* (citing *Lucas*, 505 U.S. at 1019, n. 8).

This conclusion follows from both the temporary nature of the regulation and its limited scope. First, temporary government actions do not give rise to categorical regulatory takings claims. *Id.* at 331–332 ("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.").[26] As noted, Plaintiffs admit the plainly temporary nature of the regulations they challenge. What's more, Plaintiffs were never prohibited from making *any and all* economic use of their property, even temporarily. This is proved by the plain terms of the orders themselves, public records of which this Court may take judicial notice. From the outset, orders prohibiting general access to a premises by the public nevertheless "encouraged" places of public accommodation—a term that includes Plaintiffs—"to offer food and beverage" using a variety of methods, such as walk-in pickup. (*E.g.*, EO 2020-9 § 1.) Plaintiffs' suggestion that this exception applied only to "restaurants," rather than all places of public accommodation that served food and beverage, is inaccurate. (*See* Pls.' Appeal Br. at 3.) Furthermore, and more broadly, the orders allowed employees on premises to conduct business activities that were otherwise permitted. (*E.g.*, *id*; EO 2020-59 § 10(a) (permitting sale of

[26] Defendants do not dispute Plaintiffs' abstract assertion that a government can effect a compensable temporary taking. (Pls.' Appellant Br. at 42–44.) The point, however, is that an alleged taking must be analyzed as a non-categorical taking when it is both (1) regulatory and (2) temporary. Plaintiffs fail to address these details.

goods via delivery or curbside pickup)). Plaintiffs do not plead in avoidance of the possibility that such revenue streams were available to each of them.[27] *See, e.g.*, *TJM 64, Inc.*, 526 F. Supp. 3d at 337 (allegations of categorical taking amounted to mere legal conclusion where plaintiffs did not plead in avoidance of possibility that "[o]ther business models remained available"). And Plaintiffs erroneously assert that Executive Orders 2020-176 and 2020-183 "continued the mandated closure of bowling establishments indefinitely," but each of those orders expressly permitted organized bowling, which included league play (EO 2020-176 § 3(e); EO 2020-183 § 3(d)), and EO 2020-183 made clear that full bowling activity could resume on October 9, 2020 (EO 2020-183 § 3).

In short, Plaintiffs' assertion that the orders "indisputably required that Plaintiffs[] totally close their businesses" is demonstrably false. (Pls. Appeal Br. at 4.) The orders, on their face, plainly did not impose such a requirement. Plaintiffs cannot "state a claim to relief

[27] Plaintiffs never actually allege the scope of their business activities in their verified complaint. (*See generally* Compl., ECF No. 1, PageID.1.) Indeed, at least one of the plaintiffs explicitly does business as a "restaurant," as reflected in the case caption.

that is plausible on its face" by reciting the legal conclusion they desire while misrepresenting the express, indisputable terms of the laws they challenge. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

At bottom, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . require[s]" a non-categorical taking analysis. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1019–20); *see also K & K Const, Inc*, 575 N.W.2d at 539. Here, even accepting their allegations as true, Plaintiffs have alleged only a temporary taking, and their belief about the orders' scope—a necessary premise to their argument—is demonstrably wrong. Thus, no categorical regulatory taking occurred.

b. No non-categorical taking occurred.

If an alleged regulatory taking results in less than a complete elimination of value, it is analyzed under the framework for non-categorical takings set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[28] Three factors are weighed under this

[28] Michigan courts also assess non-categorical takings claims under the Michigan Constitution under the *Penn Central* factors. *K & K Constr., Inc.*, 575 N.W.2d at 539–40 (reviewing takings claims brought under

framework: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.* at 124. This framework, which focuses on "the parcel as a whole," *id.* at 130–31, recognizes that "the Fifth Amendment's guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123–24 (cleaned up).

Applying this framework here shows that Defendants' actions did not constitute a non-categorical regulatory taking. Notably, although Plaintiffs ostensibly ask this Court to review the District Court's decision regarding the sufficiency of their verified complaint, Plaintiffs' discussion of the *Penn Central* factors does not contain a single reference to their complaint. (*See* Pls. Appeal Br. at 32–37.)

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the Fifth Amendment and Michigan Constitution under the *Penn Central* factors).

i. The economic impact of the regulation

As to the first *Penn Central* factor, Plaintiffs' allegations regarding the economic impact of the regulation at issue are sparse and conclusory. The complaint alleges that "Plaintiffs' businesses were shut down to the extent that they were unable to operate, unable to earn an income, and unable to function in any way," (Compl. ¶ 36, ECF No. 1, PageID.7), and that this "had a severe and destructive impact on [their] businesses and property," (*id.* ¶ 48, PageID.9). But as discussed, Defendants' orders were admittedly temporary, and they unambiguously allowed Plaintiffs to earn some income during the time they claim they were shut out from the economy altogether. For example, food service was available at all times, league bowling was available some of the time, and they still had possession of their facilities for any other use not covered by the public-health orders. Their verified complaint denies these undeniable facts, and, shockingly, Plaintiffs tell this Court that "[t]here was no leniency or exceptions in Defendants' orders." (Pls.' Appeal Br. at 34.) At best, Plaintiffs allege a cursory legal conclusion on this point, which this Court need not accept as true.

Although Defendants' public-health measures—put in place as the State came together in shared sacrifice to prevent COVID-19 from exponentially spreading through Michigan—likely had an economic impact on Plaintiffs, that supposition is unsupported by allegations permitting this factor to be *weighed* in Plaintiffs' favor. (In fact, by misrepresenting the contours of the orders to this Court and the District Court, Plaintiffs' allegations are worse than conclusory.) Any economic impact of the measures was blunted by their plainly limited and temporary nature, and the mere existence of limitations on particular uses of property does not necessarily diminish that property's value to a significant degree, such that allegations on this point are unnecessary. *See, e.g.*, *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304, 313 (N.D.N.Y. 1984) ("It is clear, however, that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred.").

ii. The extent to which the regulation has interfered with distinct investment-backed expectations

The second *Penn Central* factor entails "the extent to which the regulation has interfered with distinct investment-backed

expectations." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (citation omitted). As above, Plaintiffs' complaint makes only a conclusory allegation in this regard. (Compl. ¶¶ 49, 64, ECF No. 1, PageID.9, 11 ("Defendants' COVID-19 orders interfered with Plaintiffs' distinct, investment-backed expectations as to their businesses and property.").) But, again, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. And in any event, the same facts relevant to the first *Penn Central* factor are relevant here as well. The restrictions were temporary measures aimed at protecting the public health, which Plaintiffs' complaint does not dispute. Plaintiffs' sparse and conclusory allegations regarding these first two *Penn Central* factors do not betray a cognizable claim that the regulations at issue amount to a taking.

Confronted with the observation that the complaint merely restates this language and fails to allege a single fact supporting this conclusion, Plaintiffs baldly assert that it "goes without saying" that any business affected by an alleged taking will satisfy this factor. (Pls.' Appeal Br. at 34.)

Respectfully, in the context of a motion to dismiss, nothing "goes without saying." To the contrary, a plaintiff must allege facts going to all of the elements of its claim; parroting the elements of the cause of action is not enough. *See Iqbal*, 556 U.S. at 678. "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Furthermore, a regulation "readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). Plaintiffs' unilateral conceptions about the speculative profits of their business, whether or not compared to pre-pandemic circumstances, do not suffice—particularly when Plaintiffs do not allege anything about "*the extent to which*" the alleged taking interfered with their expectations. *Murr*, 137 S. Ct. at 1943 (emphasis added). As above, Plaintiffs simply have not alleged facts that, taken as true, show this factor weighs in their favor.

iii. The character of the governmental action

Finally, and regardless of whatever weight is afforded the first two factors, the third *Penn Central* factor demonstrates decisively that Plaintiffs have failed to state a claim. This factor weighs "the character of the governmental action." *Penn Central*, 438 U.S. at 124; *see also Tahoe-Sierra*, 535 U.S. at 320 (highlighting "the importance of the public interest served by the regulation" as part of a non-categorical inquiry); *Keystone Bituminous Coal*, 480 U.S. at 488 ("[T]he nature of the State's action is critical in takings analysis.").

The character of the government action dispositively favors the State. Defendants' orders arose from a genuine emergency that has inflicted untold human and economic suffering, and they were designed specifically to protect Michiganders from a highly infectious and dangerous disease. The danger was so serious, and the State's reaction so necessary, as to implicate the police power.

Indeed, Michigan's Constitution specifically enumerates that "[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern." Mich. Const.

art IV, § 51. And ultimately, "because a property owner does not have a right to use his property in a manner harmful to public health or safety, the government's exercise of its powers to protect public health or safety does not constitute a compensable taking of any of the owner's property rights." *Hendler*, 38 Fed. Cl. at 615.

Relying only on *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), Plaintiffs assert that the third factor relates only to the *method* of the alleged taking, not its purpose. (Pls.' Appeal Br. at 36.) But *Lingle* did not purport to circumscribe the third *Penn Central* factor. Rather, it disavowed "a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test," which "means-ends test" would ask "whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Lingle*, 544 U.S. at 540, 542. In other words, *Lingle* said it was insufficient to examine *only* the purpose of the alleged taking. *Id.* at 543 (stating that identifying a taking "by virtue of its ineffectiveness or foolishness is untenable"). *Lingle* did not say courts should disregard a regulation's compelling purpose or, for that matter, anything else falling under the umbrella of a regulation's "character."

Indeed, cases decided after *Lingle* continue to consider the purpose and general characteristics of the State's action. *E.g.*, *Murr*, 137 S. Ct. at 1949–50 ("Petitioners furthermore have not suffered a taking under the more general test of *Penn Central* . . . . [T]he governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land."). Correspondingly, and "[u]nsurprisingly, courts across the country agree that the final *Penn Central* factor, the character of the disputed government action during the COVID-19 pandemic, weighs heavily in Defendants' favor." *Daugherty Speedway, Inc. v. Freeland*, 520 F. Supp. 3d 1070, 1078 (N.D. Ind. 2021) (collecting cases); *see also, e.g.*, *Amato v. Elicker*, 534 F. Supp. 3d 196, 214 (D. Conn. 2021) ("The orders at issue here were a temporary exercise of the State's police power to protect the health and safety of the community, which weighs strongly against finding that they constituted a taking. Other courts have similarly concluded.") (citation omitted, collecting cases); *Blackburn v. Dare Cty.*, 486 F. Supp. 3d 988, 999 (E.D.N.C. 2020) ("Courts have long recognized that regulations that protect public

health or prevent the spread of disease are not of such a character as to work a taking.").

Even if only the method of the alleged taking is relevant to its character, this factor nevertheless suggests that a taking did not occur. The restriction was a negative one, not some affirmative appropriation of Plaintiffs' property. For the reasons set forth above, it did not effect a physical taking or ouster. As a result, this factor weighs against finding a taking. *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986). There was no "public use" of the property. The restriction lasted well under a year, in contrast to the three-year closure effected in *Central Eureka* that did not amount to a taking. *See, e.g.*, *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 784 (W.D.N.Y. 2020) (holding that a temporary exercise of the police power weighs against a taking when there is no physical invasion or permanent appropriation). And the orders took care to include exceptions intended to permit some economic activity, rendering them far narrower than what Plaintiffs would have this Court believe.

Accordingly, the character of the governmental action here had no hallmarks of a compensable taking, being sharply limited in terms of

both method *and* purpose. It represented a temporary adjustment of benefits and burdens to combat a once-in-a-generation public health crisis that spanned the globe. This factor, like the others, confirms that the orders did not effectuate a taking proscribed by the Fifth Amendment.

III. This Court should affirm that Plaintiffs' motion to amend their complaint is futile.

The District Court dismissed Plaintiffs' complaint based on the Eleventh Amendment, and it discussed the merits in the course of denying Plaintiffs' motion to amend as futile. (9/2/21 Op. & Order at 11, ECF No. 36, PageID.340.) For the reasons stated *supra*, this Court should affirm that rationale. Furthermore, Plaintiffs insistently misconceptualize a "physical" taking, they repeatedly ignore the orders' plainly stated exceptions, and they repeatedly disregard the parallel orders issued by DHHS that moot their claims about the executive orders' validity. These failures appear not just in Plaintiffs' response to Defendants' motion to dismiss, and before this Court, but also in their proposed amended complaint. An amendment would not just be futile; it would be vexatious.

But there are two additional reasons the addition of personal-capacity suits would fail: (1) Fifth Amendment claims are not cognizable against a State defendant sued in her individual capacity, and, in any event, (2) Defendants enjoy qualified immunity, which defense they would successfully invoke in response to the proposed amended complaint.

A. A Fifth Amendment claim is not cognizable against a State defendant sued in her individual capacity.

Putting aside that no taking has occurred here as a matter of law, takings jurisprudence inherently applies to situations where government action creates an entitlement to just compensation. Both the Fifth Amendment to the U.S. Constitution and Article X, § 2 of the Michigan Constitution reflect an obligation of the government to those who are governed. These constitutional provisions do not create obligations upon private actors. *Fed. Home Loan Mortgage Ass'n v. Kelley*, 858 N.W.2d 69, 72 (Mich. Ct. App. 2014). Hence, they cannot be construed to make Defendants personally liable for just compensation to Plaintiffs or anyone else.

As the Sixth Circuit has recognized, no case "suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment." *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984). If an individual appropriates property, it is akin to conversion—not a "taking for public use" in the constitutional sense. *Id.* *Vicory* correctly reasoned that, "[u]nlike a trespass or other property tort which may be committed by either an individual under or not under color of law or by a governmental entity, a 'taking without just compensation' in violation of the fifth amendment is an act or wrong committed by a government body—a taking for 'public use.'" *Id.* (emphasis added).

Plaintiffs' inability to grapple with the common-sense conclusion of *Vicory* is thrown into focus by their corresponding failure to present a single case in which an individual was found to have committed a Fifth Amendment taking for public use. Defendants are not aware of a case so holding.[29] And because takings claims under Michigan's

[29] Defendants have found some cases that have applied a qualified immunity analysis to an individual-capacity takings claim—but those cases did so without any apparent consideration of whether such an analysis was even necessary in the first place. *E.g.*, *Loc. 860 Laborers' Int'l Union of N. Am. v. Neff*, No. 1:20-CV-02714, 2021 WL 2477021, at *8 (N.D. Ohio June 17, 2021). Nothing in those cases suggests that, had

Constitution are analyzed similarly to those under the U.S. Constitution, *K & K Constr.,* 575 N.W.2d at 535, Plaintiffs' failure to point to any State law authority for their individual capacity theory is also unsurprising. Amendment is futile, and this Court should affirm.

B. Defendants' qualified immunity renders amendment futile.

Individual-capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer v. Melo*, 502 U.S. 21, 25 (1992). Officials sued in their individual capacities may assert personal immunity defenses, such as objectively reasonable reliance on existing law. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985)). Thus, if Plaintiffs are permitted to add personal-capacity claims, Defendants are entitled to assert the defense of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

"Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Id.* at 815 (citing *Gomez v.*

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this threshold question been asked and addressed, the courts would have—or could have, under controlling law—answered it in the plaintiffs' favor. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (noting that a legal premise "assumed without discussion by the Court" has "no precedential effect").

Toledo, 446 U.S. 635 (1980)). "[T]he doctrine of qualified immunity shields officials from liability 'insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.' " *Hearring v. Sliwowski*, 712 F.3d 275, 279 (6th Cir. 2013) (quoting *Harlow*, 457 U.S. at 818). "After a defending officer initially raises qualified immunity, the plaintiff bears the burden of showing that the officer is not entitled to qualified immunity." *Barton v. Martin*, 949 F.3d 938, 947 (6th Cir. 2020) (citing *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)).

Qualified immunity entails a two-part inquiry: (1) whether a constitutional right has been violated; and (2) whether that right was clearly established at the time of a defendant's offending conduct. *Hearring*, 712 F.3d at 279 (citations omitted). This Court may address the second prong first if it is evident that the right allegedly violated was not clearly established. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). When the right is not clearly established, it follows that the first prong cannot affect the immunity analysis; this Court may assume without deciding that a violation has occurred. *Id.* (citing

Ashcroft v. al-Kidd, 563 U.S. 731 (2011); *Waeschle v. Dragovic*, 576 F.3d 539, 544 (6th Cir. 2009)).

A right is "clearly established" under the second prong of the qualified-immunity inquiry if "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 280 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (cleaned up). To make this determination, this Court should not stray too far from "contexts other than the one being considered." *Id.* (quoting *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012)). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741 (citing *Anderson*, 483 U.S. at 640).

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 612 (2015) (quoting *al-Kidd*, 563 U.S. at 742). Rather, the Supreme Court requires a case with similar facts to cross the threshold of clearly established law and set aside an official's qualified immunity. It is therefore not sufficient to point to the fact that a taking for public use requires compensation.

As detailed at length above, Plaintiffs have failed to identify any existing precedent placing "beyond debate" their theory that a public-health measure of the sort at issue here can effectuate a compensable taking. To the contrary, as set forth above, myriad decisions—both in the context of this pandemic and beyond—point in the polar opposite direction.

Plaintiffs' claim that the Governor's orders were *ultra vires* does not change this result. Again, Plaintiffs' causes of action challenge only the lack of just compensation, and the premise of their *ultra vires* claim both misconstrues *Certified Questions* and ignores MDHHS's parallel and independently sufficient orders. Furthermore, in the context of qualified immunity, the law's presumptive validity is dispositive here. When the law is not "grossly and flagrantly unconstitutional" on its face, an official is entitled to rely upon it in good faith. *Vaduva v. City of Xenia*, 780 F. App'x 331, 337 (6th Cir. 2019) (quoting *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 441 (6th Cir. 2016)). This is true even for an official "faced with a statute of questionable validity." *Id.*

When Governor Whitmer acted, the terms of the EPGA permitted her to proclaim a state of emergency. *In re Certified Questions*, 958

N.W.2d at 13–14. In fact, in reviewing the Governor's actions under the EPGA, the Court confirmed "that there is one predominant and reasonable construction of the EPGA—the construction given to it by the Governor." *Id.* at 16.

Finally, although Plaintiffs correctly predicted that Defendants would discuss qualified immunity, they decline to discuss that doctrine. (Pls.' Appeal Br. at 46–47.) Defendants reserve the right to move for leave to file a sur-reply to address this issue, as well as the myriad other defenses raised below that Plaintiffs simply decided to ignore in their opening brief on appeal.

Accordingly, Plaintiffs cannot establish that the right invoked was clearly established. An amended complaint will not avoid qualified immunity, rendering it futile. This Court should affirm.

CONCLUSION AND RELIEF REQUESTED

Under well-established Eleventh Amendment jurisprudence, the District Court correctly held that it lacked jurisdiction to hear this lawsuit. And even without that jurisdictional bar, the case must be dismissed. As a proper exercise of police power, the public-health

measures at issue do not constitute a taking as a matter of law. To the extent that regulatory takings law is applicable, Plaintiffs' allegations fall well short of stating a plausible claim for relief under that law. Accordingly, Defendants respectfully ask this Court to affirm the dismissal ordered by the District Court.

Respectfully submitted,

/s/ Daniel J. Ping

Daniel J. Ping (P81482)
Darrin F. Fowler (P53464)
Kyla Barranco (P81082)
Assistant Attorneys General
Michigan Dep't of Attorney General
Attorneys for Defendants Robert Gordon, MDHHS, and Gretchen Whitmer
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
PingD@michigan.gov

Dated: December 27, 2021

CERTIFICATE OF COMPLIANCE

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/s/ Daniel J. Ping

Daniel J. Ping (P81482)
Darrin F. Fowler (P53464)
Kyla Barranco (P81082)
Assistant Attorneys General
Michigan Dep't of Attorney General
Attorneys for Defendants Robert Gordon, MDHHS, and Gretchen Whitmer
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
PingD@michigan.gov

Dated: December 27, 2021

CERTIFICATE OF SERVICE

I certify that on December 27, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

/s/ Daniel J. Ping
Daniel J. Ping (P81482)
Assistant Attorney General
Michigan Dep't of Attorney General
Attorney for Defendant MDHHS
Director Gordon
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
PingD@michigan.gov

Dated: December 27, 2021

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	01/20/2021	ECF No. 1	1-14
Defendants' Brief in Support of Motion to Dismiss in Lieu of an Answer	04/12/2021	ECF No. 15	35-70
Plaintiff's Answer to Defendant's Motion to Dismiss	05/24/2021	ECF No. 19	78-119
Defendants' Reply Brief in Support of Their Motion to Dismiss	06/21/2021	ECF No. 27	153-172
Opinion	09//02/2021	ECF No. 36	330-341