Order

Michigan Supreme Court
Lansing, Michigan

August 30, 2024

164557

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

v

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

STATE OF MICHIGAN,
Defendant-Appellee.
_____/

On January 10, 2024, the Court heard oral argument on the application for leave to appeal the March 31, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

In response to the COVID-19 pandemic, Governor Gretchen Whitmer issued numerous executive orders reaching nearly every aspect of life in our state. This Court struck down many of those orders as a violation of the separation of powers. *In re Certified Questions*, 506 Mich 332 (2020). But in their aftermath, important questions remained. This case raises the issue of whether the Governor's temporary closure of in-person fitness businesses during the start of the pandemic constituted a regulatory taking. By denying leave to appeal, the majority leaves unresolved novel and important questions regarding federal and state takings jurisprudence. Can the temporary impairment of business operations be a categorical taking if there are no reasonable alternative uses of the business property during the period in which its intended and normal use is prohibited? And, if not, can the prohibition of the normal business operations nonetheless constitute a taking under the multifactor test established by the United States Supreme Court and employed by our courts? Because neither that Court nor this one has given significant guidance on the actual application of the test, and because this case is an appropriate case in which to provide clarity in this area of the law, I would take the opportunity to do so. Plaintiff, on behalf of a putative class, has raised plausible claims that the government took its property without just compensation, and genuine issues of material fact exist regarding its claims. Further factual development would aid in the proper resolution of these questions that should

eventually be answered, such that summary disposition prior to the close of discovery was inappropriate. I would reverse the Court of Appeals and remand to the trial court to allow discovery to continue in this case.

I. FACTS AND PROCEDURAL HISTORY

In March 2020, in response to the COVID-19 pandemic, the Governor declared a state of emergency. She issued numerous emergency orders throughout 2020. Among them was an order requiring "[g]ymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas" to close to the public.[1] Some businesses, such as bars and restaurants, were allowed to reopen in June 2020, subject to a number of limitations, including reduced occupancy.[2] Gyms and similar facilities were allowed to reopen in September 2020.[3] This Court subsequently held that the Governor's executive orders exceeded her scope of authority under the Emergency Management Act[4] and that the Emergency Powers of the Governor Act[5] was unconstitutional because it violated the nondelegation doctrine.[6]

Plaintiff, The Gym 24/7 Fitness, LLC, is the lead plaintiff in a putative class of plaintiffs made up of gyms, fitness centers, recreation centers, and other similarly situated businesses in Michigan.[7] Plaintiff filed a complaint against the State of Michigan (hereinafter "defendant"), alleging that it and similarly situated businesses are entitled to just compensation under the federal and state takings clauses because of the closure of gyms and fitness centers for six months under executive orders issued by the Governor in response to the COVID-19 pandemic.[8] Plaintiff does not challenge the Governor's authority to issue the executive orders or argue that the closure did not serve a public

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[1] Executive Order No. 2020-9.

[2] See Executive Order No. 2020-110.

[3] See Executive Order No. 2020-176.

[4] MCL 30.401 *et seq*.

[5] MCL 10.31 *et seq*., repealed 2021 PA 77.

[6] *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich 332 (2020).

[7] The class has not been certified.

[8] Count I of the complaint alleged a cause of action for inverse condemnation, Count II alleged a taking under Const 1963, art 10, § 2, and Count III alleged a taking under US Const, Am V.

purpose; rather, it merely argues that the closure constituted takings for which just compensation is required.

Prior to the close of discovery, defendant sought summary disposition under MCR 2.116(C)(7), (8), and (10). The Court of Claims denied the motion, ruling that there was a genuine issue of material fact as to whether the closure was reasonable and not arbitrary. The Court of Appeals reversed in a published opinion, holding that plaintiff had not established a taking.[9] The Court of Appeals subsequently denied plaintiff's motion for reconsideration. Plaintiff sought leave to appeal in this Court, and we ordered oral argument on the application.

II. ANALYSIS

Both the United States Constitution and the Michigan Constitution prohibit the taking of private property for public use without just compensation.[10] The Legislature has enacted a number of statutes that govern the formal acquisition of private property by the government.[11] In order to make the protection of Const 1963, art 10, § 2 enforceable in the event that the government takes private property for public use without utilizing the proper legal mechanisms to do so, Michigan recognizes an "inverse or reverse condemnation" cause of action.[12]

Plaintiff claims that the Governor's closure orders amounted to a regulatory taking of its property. A regulatory taking occurs "[w]hen 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 . . . ."[13] There are two categories of regulatory action that usually constitute per se takings.[14] The first, described in *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 (1982), is when a government regulation requires an owner to suffer a permanent physical invasion of his or her

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[9] *The Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238 (2022).

[10] US Const, Am V; Const 1963, art 10, § 2.

[11] See MCL 213.1 through MCL 213.391.

[12] *Peterman v Dep't of Natural Resources*, 446 Mich 177, 187-188 (1994).

[13] *Cedar Point Nursery v Hassid*, 594 US 139, 148 (2021). This is in contrast to a physical taking, which occurs when the government "uses its power of eminent domain to formally condemn property," "physically takes possession of property without acquiring title to it," or "occupies property[.]" *Id*. at 147-148.

[14] *Lingle v Chevron USA Inc*, 544 US 528, 538 (2005).

property.[15] The second, described in *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), is when a "regulation denies all economically beneficial or productive use of land."[16] Unless a regulatory taking falls under one of these two categories, the test from *Penn Central Transp Co v City of New York*, 438 US 104 (1978), applies to determine whether a taking occurred.[17]

Plaintiff does not contend that a physical invasion occurred, and therefore this case does not fall under *Loretto*. But I believe there are genuine issues of material fact as to plaintiff's claims that a categorical taking occurred per *Lucas* and that a taking occurred under the *Penn Central* balancing test, such that summary disposition before the close of discovery was inappropriate.

A. PLAINTIFF'S CATEGORICAL-TAKING CLAIM

With regard to a categorical taking under *Lucas*, although the executive orders required gyms and similar businesses to close, they expressly allowed other businesses to remain open. Consequently, some "productive or economically beneficial use of land" was permitted under the executive orders.[18] But I disagree that *Lucas* stands for the proposition that the availability of *any* alternative use of the property, no matter how far-fetched, prevents a finding of a categorical taking. As one scholar has observed, "[t]his approach would make it difficult for any regulatory taking to be recognized as illustrated by [one federal district] court's farcical recommendation for strippers to sell sodas in front of their shuttered establishment."[19]

In *Kimball Laundry Co v United States*, the United States Supreme Court stated that compensation might be justified regardless of whether alternative uses of the property were

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[15] *Lingle*, 544 US at 538, citing *Loretto*, 458 US 419.

[16] *Lucas*, 505 US at 1015.

[17] *Lingle*, 544 US at 538; *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577 (1998). Although the three tests are distinct, they "share a common touchstone" in that they all serve to "identify regulatory actions that are functionally equivalent" to a classic physical taking and focus "directly upon the severity of the burden that government imposes upon private property rights." *Lingle*, 544 US at 539.

[18] *Lucas*, 505 US at 1017.

[19] Manns, *Economic Liberty Takings*, 29 Geo Mason L Rev 73, 129 (2021); see also *id*. at 127 (discussing *McCarthy v Cuomo*, unpublished opinion and order of the United States District Court for the Eastern District of New York, issued June 18, 2020 (Case No. 20-cv-2124), p 9).

technically possible.[20] The circumstances in *Kimball* were somewhat different, but an analogy to that case is apt. There, the government had temporarily taken over a laundry during World War II.[21] There was no question in *Kimball* that the plaintiff's real and personal property had been physically taken; the question was whether the plaintiff was entitled to compensation for the business's intangible assets.[22] The Court rejected the argument that the plaintiff could have set up a laundry elsewhere and made use of its intangible assets.[23] The rationale was that the interruption was temporary, rather than permanent, and thus requiring the plaintiff to obtain another laundry out of which to provide its services was infeasible.[24] "There was nothing it could do, therefore, but wait. . . . 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."[25]

Although the present case is factually distinguishable from *Kimball* because here there was no physical occupation of the property, the same reasoning should apply here. Whether the government physically takes a property or whether the government otherwise precludes use of a property, the result is the same from the perspective of one with an interest in the property—the government has prevented the interest holder from using property it is entitled to use to its detriment. The Supreme Court has recognized that when the government occupies and uses a business, that is a taking that requires just compensation, including for operating losses incurred.[26] When the government forces a business to incur losses by precluding use, I fail to see why just compensation would not be required. In this case, there are questions of fact as to the extent to which the executive orders deprived plaintiff and other members of the putative class of the economic use of their property. If only far-fetched alternative uses of the class members' property would have been an option during the time gyms were required to close, that could be sufficient to show that the executive orders had the effect of depriving them of all economic use of their property in the same manner as if the government had physically occupied the property.

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[20] *Kimball Laundry Co v United States*, 338 US 1, 15 (1949).

[21] *Id*. at 3-4.

[22] *Id*. at 11.

[23] *Id*. at 15.

[24] *Id*.

[25] *Id*. at 14-15.

[26] *United States v Pewee Coal Co*, 341 US 114, 118 (1951).

Another argument against plaintiff's position is that temporary takings cannot rise to the level of categorical takings because the economic value of the property returns once the taking ends. The Supreme Court suggested such a view in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*.[27] It is questionable whether this logic extends to the present circumstances, and further factual development would aid in resolving this issue. The property at issue in *Tahoe-Sierra* was land that had been subject to a development moratorium.[28] Once the moratorium ended, the land could be developed. Here, by contrast, the effects of the "temporary" government actions might be severe and permanent for many businesses in the putative class.[29] Numerous gyms and fitness centers went out of business during the shutdown.[30] At least for businesses that went bankrupt as a result of the executive orders (rather than broader market forces), further factual development may reveal that they were deprived of the entire value of their property.[31]

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[27] *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 332 (2002) ("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.").

[28] *Id*. at 306.

[29] See *Economic Liberty Takings*, 29 Geo Mason L Rev at 142 ("The severity and potentially lasting consequences of the 'temporary' shutdowns are very different than a temporal delay in development. Therefore, the *Lucas* categorical takings approach would be the more appropriate framework for the affected businesses.").

[30] See, e.g., Fernandez, *How Many Gyms Survived the Devastation That Was 2020?*, Health & Fitness Ass'n (August 5, 2021) <https://www.healthandfitness.org/improve-your-club/industry-news/how-many-gyms-survived-the-devastation-that-was-2020/> (accessed July 30, 2024) [https://perma.cc/W3WS-RA8T] (noting that nearly half of all fitness industry jobs were lost in 2020, that 22% of gyms had closed, and that revenue declined by $29.2 billion); Hermes, *Fitness Industry Leaders Fear 1 in 5 Michigan Gyms Will Close by 2022*, WDIV (February 4, 2021), <https://www.clickondetroit.com/news/michigan/2021/02/05/fitness-industry-leaders-fear-1-in-5-michigan-gyms-will-close-by-2022/> (accessed July 30, 2024) [https://perma.cc/PHS2-3VZF] (characterizing in-person fitness centers as "one of the hardest-hit" industries from the pandemic and noting that the Michigan Fitness Club Association expected approximately 20% of gyms in Michigan would have to close by 2022).

[31] See *Economic Liberty Takings*, 29 Geo Mason L Rev at 152 ("[I]f shutdowns pushed companies from profitability into bankruptcy restructurings or liquidations, then the firms will have strong arguments . . . under *Penn Central* and *Tahoe-Sierra* . . . .").

B. PLAINTIFF'S CLAIM UNDER *PENN CENTRAL*

In *Penn Central*, the United States Supreme Court recognized the overarching principle that "[t]he Fifth Amendment's guarantee is designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole . . . ."[32] The Court acknowledged that there is no "set formula" for determining when compensation must be paid for "economic injuries caused by public action," and whether compensation is required is often a fact-specific inquiry.[33] But it identified factors that should bear "particular significance."[34]

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[35]

The Court has given little definitive guidance as to how the three factors should be weighed. It has characterized the first two factors—economic impact and interference with investment-backed expectations—as "primary" among the three factors and stated that the character of the governmental action "*may* be relevant in discerning whether a taking has occurred."[36] Beyond this, the Court has not provided any significant guidance as to how courts should weigh the three factors, which has left courts to struggle as they attempt to

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[32] *Penn Central*, 438 US at 123 (cleaned up). The Court has since reaffirmed the recognition of this principle. See *Yee v City of Escondido*, 503 US 519, 522-523 (1992) (explaining that compensation is required when the government regulates the use of property "only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property *suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole*") (emphasis added).

[33] *Penn Central*, 438 US at 124 (quotation marks omitted); see also *K & K Constr*, 456 Mich at 588.

[34] *Penn Central*, 438 US at 124.

[35] *Id*. (citations omitted).

[36] *Lingle*, 544 US at 538-539.

apply *Penn Central*.[37] At least one commentator has characterized *Penn Central* as creating not a rigid test but a "flexible approach in which the persuasive force of each factor will vary with the facts of each case."[38] But consistent with *Lingle*, "the most important factor is economic impact."[39]

Turning to the present case, the Court of Appeals' application of *Penn Central* was quite brief:

> [T]he first two factors—economic impact of the [executive orders] and their interference with reasonable investment-backed expectations—weigh in favor of the Gym because its business was in fact shuttered under the [executive orders], but we do not give those factors all that much weight because the economic impact and the interference with business expectations arising from the closure orders were short lived. Moreover, the third factor—the character of the government's action—was compelling in that the aim of the [executive orders] was to stop the spread of COVID-19, which our Supreme Court described as "one of the most threatening public-health crises of modern times," resulting in "significant numbers of persons suffering serious illness or death." *In re Certified Questions from the United States Dist Court*, 506 Mich at 337-338 (opinion by MARKMAN, J.).[40]

Based on that application, the Court concluded that a regulatory taking had not occurred under *Penn Central*. Given the lack of guidance from the Supreme Court on the proper application of the *Penn Central* factors, it may be unfair to fault the Court of Appeals for

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[37] See Echeverria, *Making Sense of* Penn Central, 39 Env't L Rep News & Analysis 10,471, 10,485-10,486 (2009) (discussing how the three factors should be considered in resolving a case and noting that the Supreme Court "has provided no meaningful guidance on this point"); Merrill, *The Character of the Governmental Action*, 36 Vt L Rev 649, 652 (2012) (explaining that the Court's regulatory takings decision after *Penn Central* have primarily focused on whether *Penn Central* applies and not how it applies); Cobun, *In a 2002 Supreme Court Decision, Which Shifted Landowner and Government Expectations Regarding Temporary Regulatory Takings, the Court Held That Temporary Construction Moratoria During the Preparation of a Comprehensive Land-Use Plan Do Not Constitute Takings Requiring Compensation.* Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency, *535 US 302 (2002)*, 1 U Balt J Land & Dev 95, 96 (2011) (noting that lower courts have struggled in applying *Penn Central*, including how to weigh the factors).

[38] *Making Sense of* Penn Central, 39 Env't L Rep News & Analysis at 10,485.

[39] *Id*. at 10,486.

[40] *The Gym 24/7 Fitness*, 341 Mich App at 267.

its cursory application of the factors. But absent guidance from the Supreme Court, it is incumbent upon this Court to provide our state courts with guidance as to how they should analyze regulatory-takings claims.

This is especially true since the Michigan Constitution also prohibits the taking of private property for public use without just compensation. Although we have adopted *Penn Central* as the general test for regulatory takings,[41] and the parties do not argue that we should do away with *Penn Central* in its entirety, that the Supreme Court has not provided additional guidance as to how the factors should be applied to a claim under the federal Constitution should not stop this Court from providing guidance as to how they should be applied to a claim under the state Constitution.[42] By denying leave in this case, the Court passes up an important opportunity to provide clarity in this area of the law. Furthermore, the Court of Appeals' analysis in this case was flawed, and this Court's refusal to issue an opinion to provide guidance on this issue will perpetuate problems in our takings jurisprudence.

For the reasons explained below, I believe genuine issues of material fact exist such that summary disposition was inappropriate before the close of discovery. At the outset, it is crucial to recognize that takings claims are generally "fact-intensive" and that "courts are typically reluctant to decide such claims at the summary judgment stage, preferring to wait for a trial to fully develop the factual record."[43] This is particularly true of claims under *Penn Central*, as the inquiry under *Penn Central* involves "complex factual assessments of the purposes and economic effects of government actions."[44]

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[41] *K & K Constr*, 456 Mich at 576-577.

[42] See Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), p 174 (criticizing "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution"); *id*. at 184 (dismissing concerns that delinking state and federal constitutional inquiries will cause confusion). This is especially true in this context, because we have previously interpreted Michigan's Takings Clause as affording property owners greater protection than that afforded by the federal Takings Clause. Compare *Wayne Co v Hathcock*, 471 Mich 445 (2004), with *Kelo v City of New London*, 545 US 469 (2005).

[43] *Resource Investments, Inc v United States*, 85 Fed Cl 447, 466 (2009).

[44] *Yee*, 503 US at 523. See generally *Penn Central*, 438 US at 124 ("Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.") (quotation marks and citations omitted).

Regarding the first factor, the economic impact of the executive orders, further factual development is necessary to determine whether this factor weighs in favor of finding that a taking occurred. The economic impact on gyms in general due to the executive orders was certainly significant. But the economic impact from the orders was significant with respect to most—if not all—places of public accommodation, as what were frequently referred to as "nonessential" businesses were all forced to close to the public. Additionally, the economic burden cannot be evaluated simply by looking at prepandemic business levels. Even if the Governor had not issued the orders, some portion of the population would presumably have scaled back their public outings, including to gyms, simply due to their own concerns about COVID-19. Ultimately, the extent of revenues lost would be a question of what compensation is due, but a proper analysis of the first factor would recognize that there is some distinction between the economic impacts of the COVID-19 pandemic more broadly and those directly attributable to the executive orders.

As for the second factor, interference with reasonable investment-backed expectations, further factual development is also necessary. The Court of Appeals improperly frontloaded the inquiry on Factor Two and turned it into a legal question.[45] While the interference with reasonable investment-backed expectations was spread out across most places of public accommodation, the interference was likely significant. Defendant contends that the question is whether it would have been reasonable for businesses to expect it to do nothing once the pandemic started. But this is incorrect. "The reasonable, investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted."[46] Stated another way, the purpose of this factor "is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime."[47] While not dispositive, the fact that so many businesses closed due to the pandemic—likely at least in part due to defendant's restrictions—demonstrates that those business owners opened their businesses in reliance on a state of affairs that did not include the challenged restrictions.

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[45] See Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm & Mary Bill Rts J 1145, 1160 (2021) ("Most courts wrongly frontload the expectations inquiry and turn it into a legal question resolved by a judge, that the restrictions on the use of property are not 'takings' because the loss is merely the 'incidental inconvenience' of owning property. But expectations, the very fact-specific inquiry about what steps the plaintiff actually took that back up her claim that she expected that her property could not be taken away without compensation, should be left to the fact finder.") (citations omitted).

[46] *Love Terminal Partners, LP v United States*, 889 F3d 1331, 1345 (CA Fed, 2018).

[47] *Cienega Gardens v United States*, 331 F3d 1319, 1345-1346 (CA Fed, 2003).

The Court of Appeals also improperly analyzed the third factor, the character of the governmental action. Under this factor, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[48] In applying this factor, it must be remembered that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[49] Our Court of Appeals has interpreted *Penn Central* as "requir[ing] a court to place the challenged regulatory action along a spectrum ranging from an actually physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an average reciprocity of advantage on the other."[50] "The relevant inquiries are whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally."[51] The present case falls somewhere in the middle of this spectrum. There was no actual physical taking of property, but the regulations, also did not provide "*all* property owners with an average reciprocity of advantage."[52] Rather, the executive orders foisted on certain individuals and entities—including the putative class—the burden of preventing the spread of COVID-19. Thus, further factual development would aid in the proper analysis of this factor.

Further factual development is also necessary to determine the proper weight to be given to each factor. I fail to understand how the Court of Appeals could possibly analyze—let alone determine what weight to give—each of the *Penn Central* factors without a full understanding of (1) the precise economic impacts from the executive orders,

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[48] *Penn Central*, 438 US at 124.

[49] *Armstrong v United States*, 364 US 40, 49 (1960); see generally Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan Env't L J 525, 559 (2009) (arguing that *Armstrong*'s reciprocity principle should give meaning to the third *Penn Central* factor); Harris, *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 Loy LA L Rev 455, 483-493 (2021) (arguing that the *Armstrong* principle should be added as a determinative fourth factor to the *Penn Central* analysis).

[50] *K & K Constr*, 267 Mich App at 558 (quotation marks omitted).

[51] *Id*. at 559.

[52] *Id*. at 558 (quotation marks omitted).

(2) the precise interference with investment-backed expectations caused by the orders, and (3) what the burdens and benefits of the orders were with respect to the putative class as compared to the burdens and benefits with respect to the citizenry at large.

And even without further factual development, the Court of Appeals' decision to weigh the first two factors less than the third factor due to the temporary nature of the restrictions is questionable for a number of reasons. First, the Supreme Court itself said that the first two factors are "primary among" the three.[53] A number of commentators have been critical of courts' tendencies to place too much focus on the third *Penn Central* factor when determining whether a taking took place as the government responded to an emergency.[54] Second, *Tahoe-Sierra* expressly left open the possibility that a temporary restriction could constitute a taking under *Penn Central*, *Tahoe-Sierra*, 535 US at 334, and

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[53] *Lingle*, 544 US at 538.

[54] In the context of the COVID-19 pandemic specifically, Professor Jeffrey Manns argues that courts should give more weight to the first two factors and less weight to the third factor, contending "that courts routinely give conclusory weight to the character of the government action and fail to consider that takings compensation may be justified even in cases where the state is legitimately exercising its police powers." *Economic Liberty Takings*, 29 Geo Mason L Rev at 136. Attorney Robert Thomas similarly explains:

> [C]ourts consistently misapply the takings test in emergency situations, most often treating it as dispositive, cutting off further inquiry even though an invocation of police power—responding to an emergency or otherwise—is not an exception to the just compensation requirement. Indeed, the entire regulatory takings doctrine is premised on the idea that certain otherwise valid police power actions intrude "too far" into property rights and as a consequence require compensation. [*Evaluating Emergency Takings*, 29 Wm & Mary Bill Rts J at 1164 (citations omitted).]

Thomas later notes, "In the midst of emergencies, the courts may be even more reluctant to provide a remedy, even where they should." *Id*. at 1196.

explained that the temporary nature of government action would not preclude finding a taking and "should not be given exclusive significance one way or the other," *id*. at 337. The temporary nature of regulations would be a factor that could affect the amount of compensation, not whether a taking took place. Whether a taking has occurred is contingent on loss of use, whereas the value of what was lost is a matter of the compensation owed.[55] Moreover, as noted, the executive orders might have been temporary, but their effects on many businesses subjected to them were not.[56]

III. CONCLUSION

For these reasons, the trial court erred by granting summary disposition to plaintiff before the close of discovery. There are genuine issues of material fact, and further discovery would aid in the resolution of those issues. It is this Court's "duty to ensure that the branches of government . . . operate within the constitutionally established boundaries, particularly during times of crisis."[57] By denying leave we not only fail to provide guidance to lower courts on how to analyze claims under *Penn Central*, but we also damage the credibility of the judiciary to serve as a bulwark of our liberty and ensure that the government does not take private property without just compensation—even in times of crisis. For these reasons, I respectfully dissent.

BERNSTEIN, J., joins the statement of VIVIANO, J.

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[55] *Evaluating Emergency Takings*, 29 Wm & Mary Bill Rts J at 1159.

[56] Cf. *Friends of Danny DeVito v Wolf*, 658 Pa 165, 218 (2020) (Saylor, C.J., concurring and dissenting) ("While the majority repeatedly stresses that such closure is temporary, . . . this may in fact not be so for businesses that are unable to endure the associated revenue losses. Additionally, the damage to surviving businesses may be vast.").

[57] *Carter v DTN Mgt Co*, ___ Mich ___, ___ (2024) (Docket No. 165425) (VIVIANO, J., dissenting); slip op at 12, citing *South Bay United Pentecostal Church v Newsom*, ___ US ___, ___; 141 S Ct 716, 718 (2021) (statement of Gorsuch, J.) ("Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.").