Nos. 24-754, 24-757

IN THE

Supreme Court of the United States

MOUNT CLEMENS RECREATIONAL BOWL, INC., *et al.*,
Petitioners,

v.

ELIZABETH HERTEL, DIRECTOR,
MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,
Respondents.

THE GYM 24/7 FITNESS, LLC,
Petitioner,

v.

MICHIGAN,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

RENTAL HOUSING ASSOCIATION OF WASHINGTON *AMICUS* BRIEF IN SUPPORT OF PETITIONERS

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A. INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Rental Housing Association of Washington ("RHA") is a 5,000 plus member non-profit organization of rental housing owners (single family homes to multi-family communities) in Washington State. Its objectives are to oversee the general welfare of Washington's rental housing industry, lead advocacy efforts, provide continuous development of skills and knowledge for its members, and assist members to provide appropriate services to the renting public.

RHA represents the interests of rental housing owners to state and local legislative bodies, news media, and the general public. RHA is actively involved in the Washington Legislature and local governments on any legislation affecting landlords. Its staff studies the regular meeting agendas of the local governments, meets with city and county council members, and reports to its board about any issues which affect the local community. It is also involved in educating and encouraging member involvement on issues affecting the rental housing industry. RHA offers educational programs which enhance rental property owners' knowledge and provides different fora for knowledge sharing and social interaction. RHA also offers products and services that rental property owners need to be successful, while encouraging the highest standards of ethics and integrity for its members. RHA

1. Pursuant to Rule 37, counsel for *amicus* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus*, their members, or counsel, made any monetary contribution to its preparation or submission. Notice was given to the parties as required by SCR 37.2 on February 5, 2025

promotes the value of the rental housing industry to the community and educates renters about the process of becoming a tenant and being a good tenant.

RHA, or its predecessor, has also appeared as an *amicus curiae* in numerous federal and Washington cases.[2]

RHA's members were directly impacted by the State of Washington's ("State") eviction moratoria discussed in *Jevons v. Inslee*, 2023 WL 5031498 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 500 (2023); *El Papel, LLC v. City of Seattle*, 2023 WL 7040314 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 827 (2024), and *Gonzalez v. Inlsee*, 2 Wn.3d 280, 535 P.3d 864 (2023), *cert. denied*, 144 S. Ct. 2685 (2024), just as were the petitioners by the Michigan Covid-19 ("Covid") proclamation. The Washington eviction moratoria deprived landlords like RHA's members of any viable means of evicting tenants who failed to pay rent or held over in violation of the terms of a tenancy. Tenants simply stopped paying rent. By government fiat, Washington landlords were required to bear the brunt of the public policy for the Covid pandemic's effect on housing. Those landlords were not fully compensated by local, state, and federal public programs for their attendant losses.

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2. *See*, *e.g.*, *Gonzalez v. Inslee*, (Supreme Ct. No. 23-935); *El Papel, LLC v. City of Seattle* (Supreme Ct. No. 23-807); *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023); *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019); *Faciszewski v. Brown*, 187 Wn.2d 308, 386 P.3d 711 (2016); *Segura v. Cabrera*, 184 Wn.2d 587, 362 P.3d 1278 (2015); *Cary v. Mason Cnty.*, 173 Wn.2d 697, 272 P.3d 194 (2012); *City of Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007).

Whether a regulatory taking of business owners' property occurred in Michigan is relevant to RHA's members now and in connection with possible future situations governments deem to be crises. This Court's regulatory takings principles do not provide clear guideposts for their understanding by parties affected by governmental actions or for their application by the bench and the bar. This case merits review by this Court.

B. INTRODUCTION AND SUMMARY OF ARGUMENT

RHA concurs with petitioners that this Court's regulatory takings precedents are seemingly at odds and provide a confusing standard that is difficult to apply in the real world.

Covid-related proclamations like Michigan's,[3] though temporary in duration, may still effect a regulatory taking of property under the Fifth/Fourteenth Amendment. RHA's members and landlords across Washington, for example, as will be noted *infra*, were precluded by gubernatorial proclamation from evicting tenants or from taking usual steps to address failure to pay rent such as late fees or using deposits to cover unpaid rent even when a tenant chose to leave the tenancy.

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3. That the Covid pandemic was an emergency does not alter the standard of the Fifth/Fourteenth Amendments' takings jurisprudence. *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (temporary taking during to assist with war effort constituted a compensable taking); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (*per curium*) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

But the petition filed in this case has implications beyond Covid. Governments take actions in situations that they deem to be a crises that impact private property rights. The principles for analyzing regulation takings should be clear for governments proposing to take such actions, as well as property owners. Moreover, the principles for such regulatory takings must be clear and specific in order for the courts to apply them.

Amicus RHA agrees with and adopts the arguments presented by petitioners in this matter, but it further highlights the real world impact this Court's regulatory takings precedents have for private property owners, including RHA's members. Review is warranted.

C. ARGUMENT

The petitioners' petition for writ of certiorari articulates why this case meets the criteria for review in Rule 10. In particular, the Michigan courts' decision in this case is at odds with this Court's regulatory takings jurisprudence. The eloquent plea of the Michigan Supreme Court justices who dissented from that court's decision to deny review in *The Gym 24/7 Fitness v. Michigan*, 10 N.W.3d 443 (Mich. 2024), is particularly apt in noting that courts struggle as they attempt to apply *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), particularly in light of the lack of guidance from this Court on the proper application of the *Penn Central* factors. *Id.* at 447-52.

By denying the petitioners just compensation for bearing the burden of Michigan's social policy relating to the Covid pandemic, the Michigan courts' decisions

conflicted squarely with this Court's determination that "the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Lingle v. Chevron USA., Inc.*, 544 U.S. 528, 537 (2005) ("Government [cannot force] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" without just compensation).

RHA will not repeat all of the legal arguments advanced by petitioners, but will discuss how Circuit Courts like the Ninth Circuit have struggled to apply this Court's regulatory taking jurisprudence consistently, and it will discuss the real world impacts of the regulatory taking here.

(1) Michigan's Covid Proclamations Take the Petitioners Property under the Fifth/ Fourteenth Amendments

The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V.[4] The clause

4. "Just compensation" requires that the property owner be put in the same position monetarily that he or she would have occupied had the property not been taken. *See, e.g.*, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973).

prohibits "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." *Penn. Central*, 438 U.S. at 123.

Classically, a Fifth Amendment taking occurs: (1) where the government requires the owner to suffer a permanent physical invasion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); or (2) where a regulation completely deprives an owner of all economically beneficial use of the property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). But where an onerous regulation "goes too far," a taking is present because it is the functional equivalent of a direct appropriation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

After *Penn Central*, *Tahoe-Sierra Pres. Council v. Regional Planning Agency*, 535 U.S. 302 (2002), and *Lingle*, an ordinance goes "too far" where the economic impact of the regulation on the property owner is onerous, the regulation has interfered with the property owner's distinct investment-backed expectations, and the character of the governmental action is such that it is tantamount to a physical invasion of the owner's property. A more frequently applied iteration of this last factor considers whether the challenged regulation places a high burden on a few private property owners that should more fairly be apportioned more broadly among taxpayers or property owners generally. But these tenets of a regulatory taking are difficult to apply in practice, as petitioners document.

Under the economic impact factor of the *Penn Central* test, petitioners need only demonstrate a loss of value that may be less than 100 percent, but high enough to have "go[ne] too far." *Penn Central*, 438 U.S. at 124. They need not assign a specific dollar amount to their constitutional deprivations at this stage of the case because they are not proving their *damages*, only the constitutional *harm*. But that standard is amorphous, to say the least.

Under the second *Penn Central* factor, the reasonable investor-backed expectations, the petitioners' expectations must be "reasonable . . . [and] must be more than a unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (quotation omitted). This factor limits takings claims to those who can "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004), *cert. denied*, 559 U.S. 935 (2010) (quotation omitted).

While the existence of some regulation may be understood by an investor, a jurisdiction's enactment of wildly more onerous regulatory restrictions on the use of property can hardly be predicted by such investors. *Some* regulation is simply unlike regulations that are the functional equivalent of a physical taking.

Finally, under the third *Penn Central* factor relating to the character of the government action, this Court must assess what Michigan did and how it affected property rights: a government cannot impose the burdens of a societal policy upon a select few. This standard seems to invite courts to weigh the degree of the need, or

the emergency, that prompted the government to act, in derogation of the property owners' rights. Almost invariably, the apparent need for government action will outweigh the countervailing rights of the property owner.

Even if temporary in duration, this Court has repeatedly held that a taking can occur. This Court has "confirm[ed] that takings temporary in duration can be compensable." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012) (citing cases); *see also*, *e.g.*, *R. J. Widen Co. v. U.S.*, 357 F.2d 988, 996 (Ct. Cl. 1966) ("Temporary takings are recognized in the law of federal eminent domain" and require payment of just compensation during time the government effected a taking temporarily) (past taking occurred for which compensation must be paid when federal engineers temporarily entered plaintiffs land to construct flood control measures). Such takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation," because the loss imposed on a property owner by a temporary taking "may be great indeed." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 319 (1987).

Here, Michigan, like Washington, as will be discussed *infra*, placed the economic burden of Covid solely on the shoulders of the petitioners. Michigan singled out businesses to address Covid. This runs afoul of one of the primary policy concerns animating takings jurisprudence, namely the notion that the Takings Clause "bar[s] 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." *Armstrong*, 364 U.S.

at 49; *Lingle*, 544 U.S. at 537. Singling out a small class to bear a societal burden "is the kind of expense-shifting to a few persons that amounts to a taking." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338-39 (Fed. Cir. 2003).

In *Cienega Gardens*, two federal statutes abrogated property developers' contractual rights to prepay their forty-year mortgage loans after twenty years. The developers were effectively prevented from exiting the low-rent housing programs in which they were required to participate while carrying the loans. The statutes led to a 96 percent loss of return on equity for the developers. The Federal Circuit found that the government's action placed the expense of low-income housing on a few private property owners, instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low-rent apartments. *Id.* at 1338-39. Like the government in *Cienega Gardens*, Michigan improperly singled out the petitioners to bear the societal burden of addressing the pandemic's burden on society.

Michigan's proclamations required that the State's Covid policy falls on the shoulders of businesses. If the policy was as beneficial for the public as Michigan claims, then it should fall on *all* citizens alike. Only businesses bear obligations similar to those imposed on the petitioner owners here. Nor does Michigan tax its citizens to bear the true cost of its social policy addressing Covid's impacts. Whatever the rationale for Michigan's proclamations, it is clear businesses are being asked to shoulder more than their share of the societal burden of providing affordable housing.

Weighing all of the *Penn Central/Lingle* factors together, Michigan's Covid proclamations caused substantial economic hardship to the petitioners and interfered with their investment-backed expectations. The ordinances singled them out and forced them to bear a burden that should fairly be borne by society as a whole. The proclamations went "too far" and amounted to a regulatory taking under the Fifth and Fourteenth Amendments.

Notwithstanding the foregoing, if, as the Michigan courts concluded, the fact that the regulatory taking was of a short duration (as the *Tahoe-Sierra* court apparently condoned, despite this Court's decisions in *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021), *Arkansas Game & Fish Comm'n*, *supra*, and *First English Evangelical Lutheran Church*, *supra*, as to temporary takings), almost any situation that a government deems to be a crisis is temporally limited so that a regulatory taking will never occur.

For the reasons the petitioners have articulated, this Court needs to provide practical, coherent guidelines for the existence of a regulatory taking. *See Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 732 (2021) (Thomas, J. dissent from denial of certiorari) (rejecting "know it when you see it" standard for regulatory takings).

(2) Application of Regulatory Takings Analysis in the Ninth Circuit

To illustrate the confusing standards for regulatory takings and how they play out in the courts, this Court

need look no further than to the regulatory takings jurisprudence of the Ninth Circuit, the Circuit with which RHA and its members are most familiar. That Circuit has rarely, if ever, found a regulatory taking in its decisions over the last decade or so.

But more pointedly apt for this Court's review decision, the Ninth Circuit has not produced a clear delineation of what constitutes a regulatory taking in light of *Penn Central/Tahoe-Sierra/Lingle*. This results in a lack of coherent standards for district courts as well. Consequently, what may be legitimate regulatory takings cases go unlitigated, and property rights are left unprotected.

Beginning with *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), *cert. denied*, 563 U.S. 988 (2011) a split *en banc* decision, the court rejected a regulatory taking applying the *Penn Central* protocol[5] in a case involving a municipality's severe restrictions on mobile home park rents. This case was followed by a series of mobile home park cases in which regulatory takings were rejected. *See Laurel Park Community LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012) (no regulatory taking under *Penn Central* where a municipality enacted ordinances that effectively barred property owners from using their property for anything but mobile home parks); *MHC Financing Ltd. P'ship v. City of San Rafael*, 714

5. The *Guggenheim* court recognized that *Lingle* made the three *Penn Central* elements factors in the taking analysis, rather than a set formula. 638 F.3d at 1120. This analysis only make the test for a regulatory taking ever the more "mushy." The *en banc* court did not even assess all three *Penn Central* factors, limiting its analysis to the element of investment-backed expectations.

F.3d 1118 (9th Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014) (no regulatory taking where the city enacted rent controls on mobile home parks that severely limited rents). *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015) (no regulatory taking despite diminution in park value from mobile home rent control ordinance).

The Ninth Circuit has rejected regulatory takings outside the mobile home park rent control setting as well. In *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019), later reversed by this Court, the Ninth Circuit declined to find a regulatory taking where a California regulation allowed union organizers access to worksites of agricultural employers because the issue was not preserved for review, *id.* at 534, but the court noted the temporary duration of any access was not the equivalent of a permanent physical taking.

In *Bridge Aina Le'a LLC v. Hawaii Land Use Comm'n*, 950 F.3d 610 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 731 (2021), the court rejected a regulatory taking where the commission altered land use for 1060 acres on the island of Hawaii from conditional urban agriculture. In *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), a case this Court later vacated, 142 S. Ct. 2895 (2022), the court rejected a regulatory taking in a case where a California statute prohibited gun owners' possession of large-capacity ammunition magazines.

From this short recitation of the regulatory takings precedents of a single Circuit Court of Appeals, it is readily apparent that in applying this Court's protocol for regulatory takings, there are no clearly lineated principles for a regulatory taking to guide lower courts;

it is virtually impossible to establish a case, even when the government's regulations are pervasive and result in the functional equivalent of physical taking. This Court did not envision such a stringent standard in *Penn Central/ Tahoe-Sierra/Lingle*. The very imprecision of the three *Penn Central* elements forestalls a regulatory taking.

(3) Washington State's Eviction Moratoria Resulted in Devastating Real World Consequences for RHA Landlord Members and Landlords Generally

Another example of just how broadly governmental proclamations can sweep may be seen in Washington State's eviction moratoria proclamations that were issued in response to the Covid pandemic. Those proclamations intruded upon RHA members' property rights. It is difficult to envision a regulatory action by government that had more profound impacts on property rights. The real world effect of Washington State's eviction moratoria was that tenants refused to pay rent and often held over on the premises long past the legal termination of the tenancies. Government programs, local, state and federal did not fully compensate landlords for their massive financial losses. This includes enormous financial strain on those that provide housing for low-income tenants. *See Jevons v. Inslee*, No. 23-490, Br. of Amicus Curiae GRE Downtowner LLC in Support of Petitioners, https://www.supremecourt.gov/DocketPDF/23/23-490/292269/20231205093516355_23-490%20GRE%20Amicus%20Brief%20Final.pdf, (Seattle housing provider documenting $1,270,757 in unpaid rent in 2022, up more than tenfold from recent years and paling in comparison to the rental assistance received from the State in the same year). Reimbursement

programs did not make property owners, like RHA's members, whole.

This financial strain was borne not just by large, sophisticated housing providers. It is well-documented that "about 20 million of the country's 48 million rental units are owned and managed by individual" property owners, not corporations. Scott Lincicome, *The CDC Eviction Moratorium: An Epic Case Study in Very Bad Policy*, CATO Institute (Sept. 18, 2020) https://www.cato.org/commentary/cdc-eviction-moratorium-epic-case-study-very-bad-policy.

RHA member landlords were forced to suffer tenants occupying their land despite material breaches of their leases. More critically, landowners were forced to "assume the financial distress" of their renters, without adequate compensation from the government. Lincicome, *supra*. While this may be a legitimate social policy during a time of crisis, that policy fell squarely on the backs of only one segment of Washington society – not taxpayers generally, not property owners generally, not tenants, *only* landlords.

In striking down the CDC's federal eviction moratorium as an unconstitutional exercise of federal power, this Court explained the inequitable burden such moratoria place on one subset of citizens – residential lessors:

> The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC's determination that

> landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership – the right to exclude . . . It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.

Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., 594 U.S. 758, 765-766 (2021). A social policy to prevent homelessness due to a situation like a pandemic may be necessary, but appropriating private property for that public purpose, without providing just compensation as required by the Fifth Amendment, is "unlawful[]." *Id.* at 766.

The courts' response to the challenges to Washington's eviction-related actions was to find the challenge mooted by the end of the crisis. *See Jevons, supra.* Here, again the temporal duration of the taking resulted in denial of any protection under the Fifth/Fourteenth Amendments to private property rights. Washington State, in effect, commandeered residential landlords, by executive action, to provide housing to its citizens.

D. CONCLUSION

The freewheeling use of governmental authority in times of what are deemed to be crises that adversely impact private property rights is not going away, even

as the public fears about Covid ebb. A myriad of other crises from public health to storms or fires, just to name a few, will confront governments in the years ahead. This Court's protocol for regulatory takings needs to be clear when governments promulgate regulations that impact private property rights. It is not. This Court's review is appropriate in this case.

For the reasons set forth by petitioners and fully supported herein by RHA, this Court should grant review.

DATED this 13th day of February 2025.

Respectfully submitted,

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