No. 24-757

IN THE

Supreme Court of the United States

THE GYM 24/7 FITNESS, LLC,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

BRIEF *AMICI CURIAE* OF CITIZEN ACTION DEFENSE FUND, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, AND WASHINGTON BUSINESS PROPERTIES ASSOCIATION IN SUPPORT OF PETITIONER

SAM SPIEGELMAN
Counsel of Record
JACKSON MAYNARD
Citizen Action Defense Fund
111 21st Avenue SW, Ste. 13
Olympia, WA 98501
(850) 519-3495
sam@citizenactiondefense.org
jackson@citizenactiondefense.org
Counsel for Amici CADF, WBPA

ASHLI PENNER
SYDNEY PHILLIPS
Building Industry Association of Washington
300 Deschutes Way SW
Olympia, WA 98501
(360) 352-7800
ashlip@biaw.com
sydneyp@biaw.com
Counsel for Amici BIAW

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INTEREST OF *AMICI CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"), the **Building Industry Association of Washington** ("BIAW"), and **Business Properties Association of Washington** ("WBPA").

CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation to advance free markets, restrain government overreach, and defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when a state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the Fifth Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

BIAW is a Washington state-based trade association representing over eight-thousand-member home builders, remodelers, suppliers, and other professionals supporting the home building industry. The Association is made up of fourteen affiliated local associations. BIAW is one of the largest home-building associations in America, championing the rights of its members and fighting for affordable home ownership at all levels of government. BIAW is a committed advocate in Washington State, and the Ninth Circuit, frequently participating as a party

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[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *Amici*'s intention to file.

litigant and *amicus curiae* to safeguard the rights and interests of its members, and all others interested in the availability and affordability of housing nationwide.

WBPA is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

Amici have a strong interest in the outcome of this case as they are committed to the protection of the individual from the mercurial nature of state police power. Specifically, *Amici* are concerned that if the Court does not grant review, then the thousands of *ultra vires* actions of the Covid Era will continue morphing into a feature and not a bug of American governance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner, The Gym 24/7 Fitness LLC, owns an indoor gym and fitness center located in Alma, Michigan. Petitioner, as well as other Michigan businesses, were subject to the Executive Order and MDHSS Order reprinted in the Petitions for Review.[2]

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[2] *See also,* Petition for Writ of Certiorari, *Mount Clemens Recreational Bowl, Inc., et al. v. Hertel, et al.*, Docket No. 24-754.

On March 10, 2020, Michigan Governor Gretchen Whitmer issued Executive Order 2020-09, which was extended by subsequent orders and terminated on September 3, 2020, declaring a state of emergency in response to the uptick in COVID-19 cases in Michigan. These orders decreed that businesses of public accommodation must be "closed to ingress, egress, use, and occupancy by members of the public." During the State's control over the use of their properties, Petitioner earned little or no income while their monthly expenses and obligations continued unabated. App. 75a-76a, 79a. Four years on and Petitioner has not come close to recovering.

In this brief, *Amici* provide a concise history of ownership in the common law and American constitutional traditions. *Amici* then explain how the so-called "*Penn Central* test"—an amorphous blob of *some among many* factors for analyzing whether a regulation is a taking—has failed in both theory and practice to protect ownership from the whims of the public. The *Penn Central* test is in desperate need of replacement or overhaul—especially in view of its widespread misuse in so-called "emergency" takings cases. *Amici* then proceed to a discussion of government's *emergency* regulatory powers, demonstrating that the limits and obligations Michigan authorities imposed on Petitioner falls well outside the ambit of justifiable *salus populi* actions. Any overhaul or replacement to *Penn Central* must elaborate the grounds upon which a regulation of private property that functions as a taking morphs beyond the exigency for which it was crafted.

Permitting Governor Whitmer and other public officials to run roughshod over the fundamental uses

and rights of ownership without compensation exposes businesses across the United States to future extraconstitutional restrictions under false claims or exaggerations of an "emergency." Covid-related closures predictably have generated substantial litigation in recent years and there is widespread concern that if the Court does not finally intervene and rectify the proverbial runaway train that is *Penn Central*, this will further embolden state and local officials to trample such rights under increasingly thinly veiled guises.

ARGUMENT

I. PRIVATE PROPERTY IS THE *SINE QUA NON* OF LIBERTY.

A. Ownership as Fundamental.

The Court regularly—and properly—relies upon legal history and tradition to cite fundamental rights, even those not explicitly included in the Constitution's text (*cf.*, the right to free speech). *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246–48 (2022). The history of the "right to exclude" in the property rights "bundle of sticks" highlights the consistent and quintessential role in limiting governmental overreach. Professor Thomas Merrill, one of the most cited legal scholars, called the right "more than just 'one of the most essential' constituents of property—it is [its] *sine qua non*"—*i.e.*, ownership could not exist without it. Thomas W. Merrill, *Property and the Right to Exclude,* 77 Neb. L. Rev. 730, 730–31 (1998). This is especially so within the Anglo-American conception of property, though the right to exclude has been a mainstay of most legal and cultural frameworks since the dawn of civilization. *See* Robert C. Ellickson &

Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 Chi.-Kent L. Rev. 321, 341 (1995) ("The foundational norm of private property" being "the right to control entry. On this legal issue there is much textual evidence from Mesopotamia and Israel, the two civilizations for which law codes have been found."). The right to exclude as the *sine qua non* of ownership has been central to *Western* legal theory since at least the Greek Golden Age and the *Pax Romana*. *See* Aristotle, *Rhet.*, 1361a (c. 4th cent. BCE) (writing that a thing "is our own if it is in our power to dispose of it or not"); *see also*, Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world.").

Knowing these origins, it is no surprise that the protection of private property against sovereign interference was among the core freedoms English King John's rebellious barons demanded from him in the Magna Carta (1215)—the "Great Charter" that put a (granted, *temporary*) stop to their uprising. Specifically, the *Great Charter* includes that "[n]o free man shall be seized or imprisoned or stripped of his rights *or possessions* . . . except by the lawful judgments of his equals or by the law of the land." Magna Carta, art. 39 (cleaned up) (emphasis added).

By the 1600s, after centuries of violent struggle between kings, nobles, and crowds for overall hegemony of Europe's nation-states, many "Enlightenment" thinkers began gravitating towards the most rights-based theories of government theretofore conceived. Most prominent among those

spearheading this shift was English philosopher John Locke, who soon after the Glorious Revolution of 1688 declared that the "great and chief end" for which men "unite into commonwealths" is to ensure the "preservation of their property." John Locke, *Second Treatise of Government*, IX § 123 (1689) (cleaned up). Locke himself found inspiration in the writings of Dutchman Hugo Grotius, who earlier offered that "no man could justly take from another, what he had thus first taken to himself." Hugo Grotius, *De Jure Belli ac Pacis*, § II.II.II (1625).

B. "Property" in the Original Public Meaning.

Shortly after ratification of the Constitution, James Madison gave full endorsement to his intellectual forebears' understanding of *property*, declaring "[t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, "Property," in *James Madison: Writings*, 515 (Jack N. Rakove, ed., 1999) (1792). And in this he was hardly alone.

Summarizing the classical-liberal contours of public authority, American legal scholar Richard Epstein declared that "the proper ends under the police power are those of the private law of nuisance, no more and no less." Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 353 (2014). Epstein did not devise this approach in a vacuum. Rather, it reflects the consensus regarding government—and the limitations thereon, especially with respect to property rights—shared between the Constitution's Framers and among eighteenth and nineteenth century American courts tasked with interpreting

their words. Together, the conception of the Takings Clause and *property* in general comprise the former's original public meaning, a theory of interpretation that, with some ebbs and flows, has proven the most durable means of constitutional interpretation. Precisely because it asks what the document was popularly understood to mean *at ratification*. *See* Jack N. Rakove, *Original Meanings* 339–68 (1996).

The Framers, following Locke, understood the necessity for robust constitutional protection of property. James Madison, the chief author of the Constitution (including of the Takings Clause), already enamored of Locke and Grotius, also relied upon distinguished English jurist William Blackstone's definition of *property—viz.*, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." W. Blackstone, *Commentaries on the Laws of England*, *2 (1768); Madison, *supra*, at 515 ("This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'").

As Chief Justice Roberts wrote in *Cedar Point*, "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery, et al. v. Hassid, et al.*, 141 S.Ct. 2063, 2071 (2021). As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." "Discourses on Davila," in *6 Works of John Adams* (C. Adams ed., 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own

destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

C. Regulations Have Always Been Subject to Takings Analysis.

Much hay has been made of the argument, typified in a series of articles by Professor Michael Treanor, that "mere" *regulations* were never meant to fall under the canopy of takings protection. *See generally*, Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995). As evidence, proponents like Professor Treanor point to the scant number of regulations that garnered constitutional scrutiny before the modern age—conveniently ignoring that until the twentieth century, regulations of the sort we now grapple with were very rare. *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39, 40–57 (2005) (explaining that "[p]roperty ownership had long been understood to encompass use and enjoyment, not mere title," and that "[James] Madison anticipated the regulatory takings doctrine.") Professor Ely correctly points out that the doctrine emerged later not by mere judicial fiat but because there were suddenly troves of property-interfering regulations where few had existed before.

Professor Treanor also relied upon the dubious posit that the Framers, in crafting the Constitution, were driven more by "civic republicanism" than by Lockean classical liberalism. Per Treanor:

> *Liberalism begins with the belief that individuals are motivated primarily, if*

> *not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest.*

Treanor, *supra*, at 821.

Professor James Ely offers a strong historical counter to Professor Treanor's misunderstanding of the Takings Clause as a shield *against*—rather than a sword *for*—public intervention into the private-property realm. Within the broad context of property rights, the narrow classical-liberal concern around the state's authority to seize private property or to regulate it into oblivion—without framework limitations—is the public's tendency to shortchange the productive power of profit-driven individuals for the short-term satisfaction of majoritarian whims. Civic republicanism favors this "wisdom" of the crowd and essentially views the "tragedy of the commons" as a failure of political imagination more than a natural and inevitable byproduct of conceiving property in communitarian rather than ultimately private terms—i.e., property remains private until the public devises "better" purposes for which to utilize it. Armed with this premise, it is not a far leap to Justice William O. Douglas's temptingly simplistic approach that "when the legislature has spoken, the public interest has been declared in terms well-nigh

conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Many opinions citing *Berman* on this fail to clarify that Justice Douglas prefaced that this deference is still "[s]ubject to specific constitutional limitations." *Id.*

Courts using *Penn Central* to uphold Covid-related restrictions tend to mimic the civic-republican approach, searching for any *conceivable* justification (even some the public never proffer) to excuse even total-value-killing measures as "mere" regulations. Once understood that the Framers conceived the Takings Clause to protect ownership instead of providing a framework for its orderly dismantling, then of course the universe of measures qualifying as overriding public *necessities* will shrink.

II. *PENN CENTRAL* PROVIDES NO GUIDANCE ON THE LINE BETWEEN TAKINGS AND BONA FIDE EMERGENCY REGULATIONS.

Outside of standing "inspection regimes" and other laws designed to prevent nuisance uses of private property—*i.e.*, state actions preventing owners from utilizing their properties in ways the common law already patently prohibits—government must always pay for what it takes. *Cedar Point*, 141 S.Ct. at 2071. Of course, even wholly innocuous uses of property can become a source of harm in the right—or rather, wrong—context. And by no fault of its owners' actions or inaction.

Thus, beyond government's ordinary *salus populi* power exists a limited universe of extraordinary powers, triggerable only in exigent (read: emergency) circumstances, permitting it to regulate private property—even to the point of total-value-loss—fully outside the ambit of the Takings Clause. Properly

justified and deemed necessary, emergencies even permit government to *physically destroy* private property without providing compensation—regardless of the owners' culpability (or lack thereof). *See, e.g.*, *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952) (endorsing the uncompensated destruction of private oil facility to prevent its immediate enemy capture). Such circumstances are, however, exceedingly rare, and courts need not accept proffered justifications pell-mell—in fact, they would be derelict to do so.

Judicial confusion over how to apply *Penn Central* to Covid-related property restrictions (among other potentially *ultra vires* actions) makes abundantly clear that this "test" is ill-equipped to address measures taken in response to public exigencies—especially those constraining fundamental rights. *See generally*, Michelle M. Mello, et al., *Judicial Decisions Constraining Public Health Powers During Covid-19: Implications for Public Health Policy Making*, 43 Health Aff. 759 (2024) (analyzing a significant number of Covid-related lawsuits and success rates across subject-matters).

Justified "emergencies" include, *inter alia*, conflagrations, stopping active crimes, and stemming emergent floods. *See generally*, Brian A. Lee, *Emergency Takings*, 114 Mich. L. Rev. 391 (2015). Of course, stopping or slowing the spread of disease is among these as well. *Id.* at 399–401 (discussing long-practiced public measures to combat disease, including the destruction of buildings). But there are two important caveats.

First, because the powers wielded in these situations are so extraordinary, government cannot

simply claim a proper justification and expect courts to accept its proffer as "well-nigh conclusive"—at least not when the rights being abrogated are fundamental (*e.g.*, the rights of ownership). Second, if the property is not destroyed or restricted *in pursuit of an articulated, justified objective*, but rather taken—even constructively—and impressed into service to combat the emergency, then government *is* liable to pay compensation. *See, e.g.*, *Standard-Vacuum Oil Co. v. United States*, 127 F. Supp. 195, 196–97 (Ct. Cl. 1955); *Chi. League Ball Club v. City of Chicago*, 77 Ill. App. 124, 138–39 (1898); *Caltex*, 344 U.S. at 152–53 (compensation is due for impressment and use for wartime purposes, in contrast to outright destruction to avoid enemy capture).

Unless the Court intervenes here, lower courts will continue permitting state and local officials to exaggerate or invent emergency powers to shield *ultra vires* acts from the judicial scrutiny they deserve. In *Block v. Hirsch*, the Court upheld a District of Columbia rent-control ordinance on the grounds that the emergency—urban overpopulation resulting from the rapid acceleration of industrial output during the First World War—was "a publicly, notorious and almost worldwide fact." 256 U.S. 135, 154 (1921). Whether the coronavirus pandemic was an emergency sufficient to justify state-sponsored holdover tenancies and other drastic measures is a matter of much greater debate. *See, e.g.*, Amanda L. Taylor, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 Va. L. Rev. 489 (2023); John Yoo, *Emergency Powers During a Viral Pandemic*, 15 N.Y.U. J.L. & Liberty 822 (2022). Thus the White House, states, counties, and municipalities offered wildly different and often

divergent responses. *See* R. Hamad, K.A. Lyman, et al., *The U.S. COVID-19 County Policy Database: A Novel Resource to Support Pandemic-Related Research*, 22 BMC Public Health 1882 (2022); Thomas J. Bollyky, Emma Castro, et al., *Assessing Covid-19 Pandemic Policies and Behaviours and Their Economic and Educational Trade-Offs Across U.S. States From Jan. 1, 2020 to July 31, 2022: An Observational Analysis*, 401 Lancet 1341 (2023). Among these measures, one stands out as particularly bold: the Centers for Disease Control and Prevention's ("CDC") nationwide eviction moratorium, which the Court dispatched *per curiam*. *Alabama Ass'n of Realtors, et al. v. Dep't of Health & Human Servs.*, 141 S.Ct. 2485 (2021). Though the ultimate conclusion was that Congress, rather than a lone federal agency, decides what constitutes an "emergency" of the caliber necessary to justify the disruption of property rights, the Court in *Alabama Association of Realtors* crucially noted that the CDC "preventing [rental owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Id.* at 2489.

Perhaps on the merits the Court will find, in view of the Framers' intent and its own emergencies doctrine, that Governor Whitmer and others indeed acted within their emergency, or even ordinary police powers, when they imposed the closures here in issue. Still, as the Court noted in an earlier Covid case, "even in a pandemic the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Bklyn. v. Cuomo*, 141 S.Ct. 63, 68 (2020). That is, "emergencies" are not get-out-jail-free cards for those who have sworn to uphold the Constitution. This is especially the case for property rights—the ends of government,

as Locke declared—which are particularly susceptible to erosion when the majority takes unfettered and unprincipled actions. The Takings Clause *is the* restraining mechanism. Casting it aside in times of crisis is a recipe for constitutional disaster.

It is not enough for the government to proffer that property interference is preventing public harm rather than merely conferring a public benefit (for which compensation is owed). Whatever the outcome, *Amici* urge the Court to grant review of this case to resolve these and the other outstanding legal questions at stake.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review of the Petition, reverse the Michigan Court of Appeals, and remand the case for further proceedings in accordance with the Court's longstanding recognition that the Takings Clause is designed to protect property rights, not as a blueprint for abrogating them without compensation.

Respectfully submitted,

MARCH 28, 2025

/S/ SAM SPIEGELMAN
Counsel of Record
JACKSON MAYNARD
Citizen Action Defense Fund
111 21st SW, Ste. 13
Olympia, Washington 98501
(850) 519-3495
sam@citizenactiondefense.org
jackson@citizenactiondefense.org
Counsel for Amici CADF, BIAW

ASHLI PENNER
SYDNEY PHILLIPS
Building Industry Association of Washington
300 Deschutes Way SW
Olympia, Washington 98501
(360) 352-7800
ashlip@biaw.com
sydneyp@biaw.com
Counsel for Amici BIAW