No.

In the Supreme Court of the United States

MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., AND MIRAGE CATERING, INC.,
Petitioners,

v.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, PATRICK GAGLIARDI, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE MICHIGAN LIQUOR CONTROL COMMISSION, AND GRETCHEN WHITMER, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MICHIGAN,
Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this Fifth Amendment regulatory takings case, Michigan's Executive Orders and Administrative Orders took dominion and control of the use of Petitioners' property; first, by barring all customers from the premises and, then, by imposing severe use restrictions that substantially idled the property. Both caused economic devastation and destroyed Petitioners' reasonable investment-backed expectations to benefit the general public. However, Michigan courts dismissed Petitioners' case at the pleadings stage, generating three conflicting interpretations of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The result demonstrates *Penn Central*'s inability to protect fundamental property rights and to provide a clear, consistent, and uniform determination of "how far is too far."

The question presented is:

Whether *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), should be clarified or overruled?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Mount Clemens Recreational Bowl, Inc., K.M.I., Inc., and Mirage Catering, Inc. were plaintiffs-appellants in all proceedings below. All are S-type corporations organized under the laws of the State of Michigan, have no parent corporations, and issue no shares.

Respondents Elizabeth Hertel, in her official Capacity as Director of the Michigan Department of Health and Human Services, Patrick Gagliardi, in his official capacity as Chair of the Michigan Liquor Control Commission, and Gretchen Whitmer, in her official capacity as Governor of the State of Michigan, were defendants-appellees in all proceedings below.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Mount Clemens Recreational Bowl, Inc. v. Dir. of Dep't of Health & Hum. Servs., No. 165169 (Mich. Aug. 30, 2024).

Mount Clemens Recreational Bowl, Inc. v. Dir. of Dep't of Health & Hum. Servs., No. 358755 (Mich. App. Nov. 17, 2022).

Mount Clemens Recreational Bowl, Inc. v. Hertel, No. 21-000126-MZ (Mich. Ct. Cl. Sept. 14, 2021).

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PETITION FOR A WRIT OF CERTIORARI

It is undisputed that Petitioners' properties, a bowling alley and two banquet halls, were pressed into public service. By both Executive Order and Administrative Order, the Respondents[1] commandeered their use. They forcibly closed the Petitioners' businesses and idled all of the property within, and then restricted the properties to such a degree that they could not be used in any economically viable way. The State also claimed the exclusive right to determine if, when, and how, it would someday allow Petitioners to use their private property.

The State did not compel everyone to shoulder this burden. But for those, like Petitioners, that were stripped of their property rights by government decree, the impact was severe: economic use was nullified and Petitioners' reasonable investment-backed expectations were destroyed.

The very purpose of the Fifth Amendment's Takings Clause is to protect owners from "bear[ing] 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). However, when the court below dismissed Petitioners' regulatory takings lawsuit at the pleadings stage, it left Petitioners without a remedy for the clear confiscation of their fundamental property rights.

The Michigan Supreme Court denied review over the strong dissent of two Justices, whose opinion revealed the larger and deeper flaws in *Penn Central*. The challenge in regulatory takings cases is to determine "how far is too far?" *Pennsylvania Coal Co.*

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[1] Collectively referred to herein as the "State."

v. Mahon, 260 U.S. 393, 415 (1922). For decades, the answer to that question has been buried within *Penn Central*'s ad hoc, multi-factor test, particularly its three indeterminate primary factors—economic impact, interference with reasonable investment-backed expectations, and the regulation's character. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

The enduring problem is that no one—courts included—know what these factors really mean, collectively or individually. Nor how to apply them, nor how, or even if, to weigh them. At this point, it is axiomatic that *Penn Central* is simply not capable of predictably, consistently, and uniformly determining "how far is too far?" The economic impact factor is "a dilemma" with no guidelines; the investment-backed expectations factor is "problematic" and "circular" and incapable of being a basis for determination; character is "the most mysterious of all"; and altogether "each of the factors [] has created great difficulty for the lower courts." Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 651 (2012); Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. Marshall L. Rev. 573, 576-78 (2007) (*Penn Central* is "a disaster in terms of clarity and predictability. None of the test's three prongs can be calculated by landowners or government officials with any certainty[.]"); R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 (2011) (the *Penn Central* test is an "unworkable, if not incomprehensible, standard").

It is no small problem. If courts do not understand how *Penn Central* works, or what it means, or how to

apply its factors, the result is conflict and chaos, not justice. Conflicting decisions amongst the lower courts undermine stare decisis, leaving both property owners and government regulators uncertain of their rights and responsibilities. The lack of uniformity also diminishes the equal treatment of litigants under law and functionally extinguishes the meaning of a property owner's fundamental right to economic use. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2270-71 (2024) ("A rule of law that is so wholly 'in the eye of the beholder' [and] invites different results in like cases" is "arbitrary" "impressionistic" and "malleable" and it "cannot stand as an everyday test[.]").

In addition, the lack of concrete guidance both incentivizes questionable litigation outside of the reasonable boundaries of the Takings Clause's protection and, at the same time, virtually guarantees that the *Penn Central* test will be systemically under-protective. Simply put, constitutional rights cannot be protected if the courts do not know how to protect them. *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (determining whether government action "be in opposition to the constitution" is "the very essence of judicial duty").

The case below reflects the inevitable conflict. The three opinions generated by the Michigan Court of Claims, the Michigan Court of Appeals, and the two-Justice dissent of the Michigan Supreme Court, respectively, applied the same facts to the same law and yet agreed on nothing. Moreover, when coupled with the fact that the Michigan Court of Appeals based its decision on, but also diverted from, *The Gym 24/7 Fitness, LLC v. Michigan*, 989 N.W.2d 844 (2022), an additional conflicting interpretation is

added to the mix. Collectively, these courts disagreed on: (a) the definitions of different *Penn Central* factors; (b) what facts were relevant for the court to consider; (c) which factors had primacy; (d) how to balance them; and (e) the role of the court in evaluating them at the pleadings stage.

It is thus a clear window into what Justice Thomas called a "standardless standard," resulting in "starkly different outcomes based on the application of the same law. . . . A know-it-when-you-see-it test is no good if one court sees it and another does not." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 731-32 (2021) (Thomas, J., dissenting from denial of certiorari). With *Penn Central* as the muddled polestar, the boundaries of the Fifth Amendment's protection are a mystery. This Court should therefore grant certiorari to determine whether *Penn Central* should be clarified or overruled in order to provide a clear, consistent, and uniform rule of law for determining "how far is too far."[2]

OPINIONS BELOW

The decision of the Michigan Court of Claims (App. 29a-41a) is unpublished but available at *Mount Clemens Recreation Bowl, Inc. v. Hertel*, 2021 WL 9870147 (Mich. Ct. Cl. July 23, 2021). The Michigan Court of Appeals decision (App. 1a-22a) is published at *Mount Clemens Recreational Bowl, Inc. v. Dir. of*

[2] A Petition for Writ of Certiorari is filed concurrently in *The Gym 24/7 Fitness, LLC v. State of Michigan*. The Court of Appeals below treated the Court of Appeals decision in *Gym 24/7* as precedent. And the dissent of the Michigan Supreme Court order denying review adopted and incorporated its dissent in *Gym 24/7*.

Dep't of Health & Hum. Servs., 344 Mich. App. 227 (2022). The decision of the Michigan Supreme Court denying review (App. 23a-28a) is published at *Mount Clemens Recreational Bowl, Inc. v. Dir. of Dep't of Health & Hum. Servs.*, 10 N.W.3d 453 (Mich. 2024).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Michigan Court of Appeals entered Judgment on November 17, 2022. The Michigan Supreme Court denied review on August 30, 2024. Petitioners received an extension of time to file this Petition to and including January 15, 2025. *See* No. 24A435.

Petitioners' complaint alleged state constitutional violations. App. 85a-86a. As the Michigan Court of Claims held, the takings clause of the state constitution is to be interpreted coextensively with the federal Takings Clause; and its decision was based exclusively upon federal law. App. 35a. The Court of Appeals and Michigan Supreme Court likewise evaluated this matter under federal law. App. 11a, 25a. Both also explicitly followed the reasoning of *Gym 24/7 Fitness, LLC v. Michigan*, in which the property owners filed a Fifth Amendment takings claim under similar facts and identical legal issues; and that the courts resolved under federal law. App. 12a-19a, 25a-28a. Therefore, this Court has jurisdiction to consider the federal question presented. *Fla. v. Powell*, 559 U.S. 50, 56-57 (2010); *Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

CONSTITUTIONAL PROVISION AND ORDERS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

Michigan's Executive Order (EO) 2020-09 (March 16, 2020) provides, in relevant part:[3]

> To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and necessary to impose limited and temporary restrictions on the use of places of public accommodation.
>
> Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:
>
> Beginning as soon as possible but no later than March 16, 2020 at 3:00 pm, and continuing until March 30, 2020 at 11:59 pm, the following places of public accommodation are closed to ingress, egress, use, and occupancy by members of the public:
>
> (a) Restaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption;
>
> (b) Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption;…

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[3] The Executive Order is reprinted in full at App. 42a-46a.

(f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas;

(h) Places of public amusement not otherwise listed above.[4]

The State of Michigan Department of Health and Human Services (MDHSS) Emergency Order Under MCL 333.2253 of October 9, 2020, provides, in relevant part:[5]

Attendance limitations at gatherings.

(a) The restrictions imposed by this section do not apply to the incidental gathering of persons in a shared space, including an airport, bus station, factory floor, food service establishment, shopping mall, public pool, or workplace.

(b) Gatherings are permitted only as follows:

(1) Indoor gatherings of up to 10 persons occurring at a residence are permitted (face coverings are strongly recommended for such gatherings);

(2) Indoor gatherings of up to 10 persons occurring at a non-residential venue are permitted provided each person at the gathering wears a face covering except as provided in section 6 of this order;

(3) Indoor gatherings of more than 10 and up to 500 persons occurring at a non-residential

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[4] Executive Order 2020-09 was extended by subsequent orders and ultimately terminated on September 3, 2020, by Executive Order 2020-176.

[5] The MDHHS Order is reprinted in full at App. 47a-65a.

venue are permitted only to the extent that the organizers and venue:

(A) In venues with fixed seating, limit attendance to 20% of seating capacity of the venue, provided however that gatherings at up to 25% of seating capacity are permitted in Region 6;

(B) In venues without fixed seating, limit attendance to 20 persons per 1,000 square feet in each occupied room, provided however that gatherings of up to 25 persons per 1,000 square feet in each occupied room are permitted in Region 6.[6]

STATEMENT OF THE CASE

A. Michigan's Shut-Down Order and the Resulting Confiscation of Petitioners' Property

Petitioner Mount Clemens Recreational Bowl is a bowling alley and restaurant in Macomb Township, Michigan. App. 30a, 67a. Petitioner KMI, Inc. owns Kings Mill, a combined 40-seat restaurant and 180-seat banquet hall. *Ibid.* And Petitioner Mirage Catering owned a 29,000-square-foot banquet-wedding hall. *Ibid.* All were subject to the Executive Order and MDHSS Order reprinted above.

On March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency in response to

[6] This Order was extended by subsequent MDHHS Orders of January 22, 2021; February 4, 2021; March 2, 2021; March 19, 2021; April 16, 2021; May 4, 2021; and May 24, 2021. It was rescinded on June 22, 2021, by MDHHS Order dated June 17, 2021.

the COVID-19 pandemic. App. 42a. Thereafter, Gov. Whitmer issued Executive Order 2020-09. *Ibid.* It decreed that multiple different businesses of public accommodation were to be "closed to ingress, egress, *use*, and occupancy by members of the public." App. 43a-44a (emphasis added). Originally intended to expire after two weeks, the shutdown order was repeatedly extended. *See* Executive Orders 2020-20, 2020-43, 2020-69.

The Executive Order as applicable to these properties was lifted in June 2020, but the businesses were not free to resume operations. The State then imposed capacity restrictions that limited the number of customers permitted in Petitioners' businesses to 50% of their otherwise legal capacity. *See* Executive Orders 2020-97 and 2020-110.

In October 2020, the Michigan Supreme Court held the bulk of the Executive Orders to be ultra vires and contrary to its constitution. *In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 385 (2020). Following that decision, the Michigan Department of Health and Human Services enacted the functional equivalent of the stricken Executive Orders, but this time restricting capacity to a mere 20% or 20 people per 1,000 feet.[7] App. 52a.

The net effect of these Executive and MDHHS Orders was the substantial destruction of the use of Petitioners' properties. App. 79a-81a. As noted above,

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[7] The MDDHS Order had seemingly inconsistent restrictions. While the referenced section limited venues, including food service establishments, to the 20%/20 people per 1,000 feet restriction (App. 52a), a different section limited food service establishments to a 50% capacity limit. App. 60a.

Petitioners are specialty properties with a primary commercial purpose of providing an indoor space for public gathering and ill-suited for outdoor dining or take-out. As such, the regulations prohibited all Petitioners from utilizing their business property in any economically viable way. App. 81a. With certain expenses continuing regardless of the substantial restriction of the property's use, the businesses suffered continuing losses until the regulations rendered them largely valueless. App. 85a. Four years later, Petitioners have yet to fully recover.

B. The Proceedings Below

In July 2021, Petitioners sued Elizabeth Hertel, in her official capacity as Director of the Michigan Department of Health and Human Services, Patrick Gagliardi, acting in his official capacity as Chairperson of the Michigan Liquor Control Commission, and Michigan Governor Gretchen Whitmer, acting in her official capacity, alleging that the Executive Orders violated the Michigan Constitution's prohibition on takings without just compensation, Mich. Const. art. X, § 2, and state tort theories not at issue here. App. 66a, *et seq*.

The takings claim alleged that "the operation of bars, restaurants, and banquet halls in Michigan necessarily requires an interest in real property in order to function, either through ownership or leasehold interests," and the shutdown orders "interfered with and regulated that property and the use of that property substantially to the point that these properties have become valueless or largely valueless." App. 85a. They sought relief of "[j]ust compensation in the form of monetary damages to Plaintiffs' businesses for

the regulatory takings perpetrated by Defendants, including business expenses and lost profits." *Ibid.*

The trial court dismissed the takings claims on summary disposition. App. 29a, *et seq*. Conflating the question of whether the government has the police power to issue regulations with the potential takings effect of those regulations, the trial court held that, under federal law, there was no need to discuss the factors that establish a regulatory taking under *Penn Central*. App. 37a ("'Takings' jurisprudence instructs that valid regulations promoting public health, safety and welfare are not compensable."). The court elaborated that "the restrictions put in place . . . were designed to stop the spread of COVID-19. The orders advanced legitimate state interests flowing from traditional police powers and did not result in a taking under the Michigan Constitution." App. 39a.

The Court of Appeals of Michigan affirmed the summary disposition in a per curiam opinion that explicitly followed the rationale of a companion case, *The Gym 24/7 Fitness, LLC v. Michigan*. App. 13a-19a. Like the trial court, the appellate panel focused on the government's purpose in enacting the orders and emphasized that Petitioners, "*for purposes of the regulatory-takings claim*, are not arguing on appeal that the EOs were imprudent." App. 19a. And again, the court viewed that position as dispositive for the Petitioners. The court concluded: "The upshot is that *Gym 24/7 Fitness* is not distinguishable from the present case. Even if . . . *Gym 24/7 Fitness* intermingled, to some extent, concepts of taking and governmental necessity, *Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan." *Ibid.* The court also held that there was "no fair likelihood that further

discovery would yield support" to the Petitioners' claims and therefore declined to remand. *Ibid.*

Petitioners sought leave to appeal to the Michigan Supreme Court. The parties submitted briefs and conducted oral argument on the application, simultaneously with argument on *Gym 24/7*'s application for leave to appeal, after which the court could have chosen to render a decision on the merits. *See* MCR 7.305(H)(1). However, on August 30, 2024, the court denied leave to appeal for both cases. Justices Viviano and Bernstein dissented, incorporating by reference their dissent in *Gym 24/7*. App. 23a-28a.

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Needed to Bring Uniformity and Clarity to Regulatory Takings Cases

A. *Penn Central*'s persistent difficulties

Property ownership comes with certain fundamental and well-established rights: the right to exclude, the right to use property for your economic benefit, and the right to alienate your property as you wish. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). This Court protects property rights vigilantly because they are "indispensable to the promotion of individual freedom" and empower people "to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544, 552 (1972) (property rights are "an essential pre-condition to the realization of other basic civil rights and liberties").

However, for one of these property rights, its safeguarding has proven difficult. For over a century,

this Court has recognized that the regulatory taking of a property owner's fundamental right to use is just as much a taking as the exercise of eminent domain. *Mahon*, 260 U.S. at 415. Yet determining when a regulation has crossed the threshold and gone "too far" has been a nebulous exercise. *Ibid.* ("The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.").

Courts try to answer that question with the *Penn Central* test. It is an "ad hoc test," based on all relevant facts and circumstances, with three factors warranting "particular significance:" (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." *Penn Cent.*, 438 U.S. at 124-25.

But still, what counts as "too far?" Unfortunately, the test lacks clear boundaries, guidance, or explanation. Neither courts nor litigants know what any of those factors are supposed to mean or how to evaluate them. Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 602 (2014) (it is "a compilation of moving parts that are neither individually coherent nor collectively compatible"). Nor do courts understand how to weigh the three factors against "other relevant facts and circumstances."

Thus, *Penn Central* vaguely tells courts some of what to look at, but not how to determine how far is too far. It is a "nearly vacuous test." *Dist. Intown Properties Ltd. P'ship v. D.C.*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring). Its detractors

emerged quickly and the drumbeat of criticism has continued steadily ever since. *See, e.g.*, James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981); Michael M. Berger, *Whither Regulatory Takings?*, 51 Urb. Law. 171, 201 (2021).

The passage of time has not provided clarity. Because each of its three factors remain a definitional mystery, as is the method to apply them, it is not hyperbole to suppose that if the same set of facts were presented to ten different courts, the likely output would be contrasting decisions with ten different reasons as to why. Consequently, the constitutional boundaries are no more than guesswork because this Court's regulatory takings jurisprudence has been unable to "prevent[]the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

For example, lower courts remain conflicted about whether to consider all the *Penn Central* factors or just some of them; and how to weigh the considered factors against each other. *See, e.g.*, *Blackburn v. Dare Cnty.*, 58 F.4th 807, 815 (4th Cir. 2023) ("Just as there is no clear guidance on what exactly the *Penn Central* factors encompass, there is no hard and fast way to weigh them."); *Nekrilov v. City of Jersey City*, 45 F.4th 662, 683 (3d Cir. 2022) (Bibas, J., concurring) ("Applying *Penn Central* can be hard [because] we do not know how much weight to give each factor. Courts often knock out regulatory-takings claims for lacking one factor. . . . This one-strike-you're-out practice is especially troubling because *Penn Central* overlaps with per se regulatory takings claims.").

In 2013, an empirical study of 491 federal cases found that only 22% of appellate cases and 13% of trial cases considered and balanced all three factors. Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 690 (2013). The study also showed that no two courts apply *Penn Central* in the same way. There is no uniformity within trial courts of the same circuit, within appellate courts of the same circuit, as between trial courts and appellate courts in the same circuit, or as between these groups across circuit boundaries. *Id.* at 689-90.

The gross disparity in answering the predicate questions of how many of the *Penn Central* factors should be considered and how, or even whether, the court should weigh them, reflects that the *Penn Central* test is incapable of predictably determining when a regulation of use is contrary to the Fifth Amendment's Takings Clause. When courts cannot agree on even the framework of the test to be applied, then stare decisis and the equal treatment of litigants becomes an impossibility. Courts are thus resigned to casting about in the dark, "with little direct case law guidance," *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994), hoping only that "[o]ver time, . . . enough cases will be decided with sufficient care and clarity that the line will more clearly emerge." *Id.* at 1571. Nearly five decades after *Penn Central*, the lower courts are still waiting.

Digging down into the specific factors also yields no consensus. With regard to economic impact, how much is enough to weigh this factor in the property owner's favor? There is a substantial conflict in how the lower courts answer that question.

Some courts do not require any particular percentage of economic loss. *See, e.g.*, *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 734 (8th Cir. 2022) (in the context of a COVID-related regulation); *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003) (the threshold is "serious financial loss"); *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990) (there is no "automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value").

Others, however, treat the percentage loss as a material—and sometimes dispositive—factor, yet they conflict as to what that percentage loss should be. *See, e.g.*, *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (a 92.5% diminution in value is not enough to constitute a taking); *Formanek v. United States*, 26 Cl. Ct. 332, 340 (1992) (an 87% loss in value satisfies the economic impact factor); *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 (1999) (73% loss is sufficient); *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 311 F. Supp. 2d 972, 994 (D. Nev. 2004) (50% loss in value "stated an economic impact"); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 273 (Tex. App. 2016) (46% decline satisfied the "economic impact" factor); *Cmty. Housing Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 49-50 (E.D.N.Y. 2020) (a 20%-40% loss is sufficient to state a claim). And at least one court held that the economic impact factor is satisfied only if the owner can show a taking of *all* economic use. *Greater Chautauqua Fed. Credit Union v. Marks*, No. 1:22-CV-2753 (MKV), 2023 WL 2744499, at *12 (S.D.N.Y. Mar. 31, 2023).

Nor do courts agree as to whether economic impact measures lost profit or lost property value. *Compare Bordelon v. Baldwin Cnty.*, No. CV 20-0057-C, 2022 WL 16543269 (S.D. Ala. Oct. 28, 2022) (finding a taking where the owner was deprived of $600,000 in lost rent, which equated to approximately 18% of property value), *aff'd* No. 22-13958, 2024 WL 302382 (11th Cir. Jan. 26, 2024); *with CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ($700,000 loss in net income, representing 18% of property value, was not enough to support a taking).

In short, "[n]o one knows how much diminution in value is required." Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 604 (2007); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 334 (2007) (noting that "the Supreme Court has never given us definite numbers" or "a specified percentage" or any "threshold").

The second factor—investment-backed expectations—is equally undefined. Indeed, even this Court alternatively describes the relevant expectations as being either "reasonable," *see, e.g.*, *Cedar Point*, 594 U.S. at 148; *Tahoe-Sierra Preservation Council v. Tahoe-Sierra Regional Planning Agency*, 535 U.S. 302, 342 (2002); *E. Enterprises v. Apfel*, 524 U.S. 498, 523-24 (1998), or "distinct." *See, e.g.*, *Penn Cent.*, 438 U.S. at 124; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992).

But regardless of nomenclature, no one knows what the prototypical investment-backed expectation is. Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1, 35

(2006) ("courts and commentators have often puzzled over what 'interference with investments-backed expectations' means"); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 337-38 (1998) (although the "reasonable expectations" consideration often plays a critical role in *Penn Central* analysis . . . "no one really knows what [it] . . . means").

Lacking concrete guidance, "courts have struggled to adequately define this term" and "beyond the general landscape, there is a paucity of clear landmarks that can be used to navigate the terrain" with "many areas [] still uncharted." *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36-37 (1st Cir. 2002); *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 154 (1st Cir. 2012) ("reasonable investment-backed expectations is a concept that can be difficult to define more concretely"); Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 48 (2014) (it is "woefully unclear").

Some courts focus on the owner's investment in the property after purchase. *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611 (M.D. Fla 1989). Some focus on whether the owner should have anticipated specific, but then nonexistent, regulations, to be enacted in the future. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015); *Englewood Hospital & Med. Ctr. v. New Jersey*, 478 N.J. Super. 626, 648 (App. Div. 2024) (property owners' expectations "must consider the laws in effect at that time as well as those which may be adopted by our Legislature"). Some attempt to discern what an objective market participant would have expected. *Cienega Gardens,* 331 F.3d at 1346. And others

loosely link reasonable investment-backed expectations to arbitrary and capricious government conduct. *Fla. Rock Indus.,* 18 F.3d at 1571.

Penn Central's character prong is similarly amorphous. *Blackburn*, 58 F.4th at 813 ("exactly what this factor refers to is, admittedly, a little fuzzy"); John D. Echeverria, *Making Sense of* Penn Central, 39 Envtl. L. Rep. News & Analysis 10471, 10477 (2009) ("the definition of the term 'character' is a veritable mess" with nine different and often conflicting definitions). *Penn Central* linked character to an "interference" that "can be characterized as a physical invasion by government." 438 U.S. at 124. But thereafter, the Court identified physical invasions as a separate category of taking; one that is not dependent on individual facts and circumstances. *Cedar Point*, 594 U.S. 139; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

Lingle discussed the character prong briefly, positing examples such as "whether it amounts to a physical invasion" or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." 544 U.S. at 539. But the Court held that the examination of the regulation's means and ends was irrelevant to takings claims because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* at 542; Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm. & Mary Bill Rts. J. 1145, 1153 (2021) ("The character of the governmental action does not mean the government's reasons. It is not a substitute for a due process or rational basis test.") (citation omitted); *see also Murr v. Wisconsin,*

582 U.S. 383, 414 (2017) (Roberts, C.J., dissenting) ("The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals."). The Court offered no guidance on how to evaluate a regulation's character as it "adjusts the benefits and burdens of economic life" without some sort of "substantially advances" inquiry. That is, the Court removed one methodological approach and replaced it with nothing.

The result is jurisprudential turmoil. When decoupled from physical invasions and the means and the ends of the regulation, this factor becomes the source of skepticism. D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 353 (2006) ("the analysis in *Lingle* illustrates why the character of the government act generally should have no role").

Despite *Lingle*, many courts continue to focus on the government's reasons for the regulation. *See 74 Pinehurst LLC v. New York*, 59 F.4th 557, 568 (2d Cir. 2023); *Brewer v. Alaska*, 341 P.3d 1107, 1109 (Alaska 2014). Others more sensibly shift their analysis from the government's perspective to that of the property owner, focusing on whether the claimant was singled out to bear a public burden. *See Cienega Gardens*, 331 F.3d at 1340; *Kafka v. Montana Dep't of Fish, Wildlife and Parks*, 348 Mont. 80, 107 (2008) ("The rejection of the 'substantially advances' formula with respect to the character of the governmental action prong was simply meant to ensure that courts correctly quantify the effect of the regulation in terms of actual property rights and the magnitude of the infringement on those rights."); *Dep't of Agriculture & Consumer Services v.*

Mid-Florida Growers, Inc., 521 So. 2d 101, 103 (Fla. 1988) (the character of the governmental action asks about the nature of the action and its effect, not its intent). And some courts view character as related to a reciprocity of advantage. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 640-41 (Minn. 2007) ("character" prong favors property owner who bears a "disproportionate" burden of a comprehensive regulation); *Sansotta v. Town of Nags Head*, 97 F. Supp. 3d 713, 735 (E.D.N.C. 2014).

In sum, *Penn Central* cannot predictably and consistently determine when regulatory impingements on property rights have gone "too far" and violated the Constitution's prohibition of taking private property for public use without payment of just compensation. Lower courts are searching for clarity. *Blackburn*, 58 F.4th at 813 (*Penn Central* "is a veritable mess. But we must do our best.") (citation omitted); *Nekrilov*, 45 F.4th at 683 (Bibas, J., concurring) (discussing the "notoriously hard to apply" *Penn Central* test and observing that "though I am bound by Supreme Court precedent, I can still take up part of Justice Thomas's challenge" and suggest a replacement).

This Court is also keenly aware of *Penn Central*'s problems. It should not further delay review of this troubled area of constitutional law. *See Bridge Aina Le'a, LLC*, 141 S. Ct. at 732 (Thomas, J., dissenting from denial of certiorari) ("Next year [2022] will mark a century since *Mahon*, during which this Court for the most part has refrained from providing definitive rules. It is time to give more than just 'some, but not too specific, guidance.'") (cleaned up); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013) (characterizing *Penn Central* as an "already

difficult and uncertain rule"); *E. Enterprises*, 524 U.S. at 540-41 (Kennedy, J., concurring in the judgment and dissenting in part) (Regulatory takings are "difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law."); *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 341 n.17 (1987) (Stevens, J., dissenting) (regulatory takings jurisprudence is "open-ended and standardless").

B. This case offers an excellent vehicle to provide clarity, consistency, and uniformity to the regulatory takings test

This case highlights the many problems of *Penn Central*. But at the same time, it does not implicate the reliance interests of more typical regulatory takings claims, such as rent control. Consequently, it presents a uniquely contained opportunity for this Court to provide constitutional clarity.

The court below should not have dismissed Petitioners' regulatory takings claim as a matter of law at the pleadings stage. The State prohibited, and then severely restricted, the use of the Petitioners' properties, due to no fault of the Petitioners; a confiscatory action that deprived the Petitioners of the economic use of their property and destroyed their reasonable investment-backed expectations. While the government has the police power to single out private property to bear the cost of public use, the Takings Clause ensures that such burdens are spread across the general public by compensating the targeted property owners.

The protection of fundamental property rights remains out of reach. The problem with a hopelessly indeterminate regulatory takings test is that meaningful appellate review becomes an impossibility. Herein, the two dissenting Justices from the Michigan Supreme Court adopted their dissent from *Gym 24/7* (App. 26a-27a), in which they repeatedly discussed *Penn Central*'s lack of guidance and direction and noted that these deficiencies have "left courts to struggle" in evaluating regulatory takings claims. *The Gym 24/7 Fitness, LLC v. Michigan*, 10 N.W.3d 443, 448 (Mich. 2024) (Viviano, J., dissenting). They found this lack of clarity to be so pronounced that despite the dissent's disagreement with the legal determinations made by the Court of Appeals, "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 its cursory application of the factors." *Ibid.* Consequently, they opined that it was their judicial duty to provide clearer and better guidance to the lower courts. *Id.* at 452 ("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[.]"); App. 28a (same).

The dissenters also expanded on their *Gym 24/7* opinion, noting that "[Petitioners] in this case have an even stronger argument that the Court of Appeals erred in its *Penn Central* analysis." App. 27a. The restrictions placed upon food and beverage businesses were "unique" and "would affect all three *Penn Central* factors." *Ibid.* The dissent opined that

amongst the facts and circumstances surrounding 140 Executive Orders and dozens of MDHHS orders, there were complex facts that warranted this case proceeding past the pleadings stage. *Ibid.*

The confusion is evident. Each Michigan opinion considered the same facts. But they produced widely conflicting opinions that lacked any consensus about how to apply the *Penn Central* factors to those facts.

With regard to character, it is appropriate to consider both *Mount Clemens* and *Gym 24/7*. The Court of Appeals in *Mount Clemens* adopted its *Gym 24/7* opinion as precedent, and in both, character was evaluated independent of the property's specific use. At the same time, *Mount Clemens* took issue with the *Gym 24/7* analysis and further relied upon a second distinct interpretation of what this *Penn Central* factor means. When taken together—the *Mount Clemens* Court of Claims decision and the Court of Appeals affirmation, plus the precedential *Gym 24/7* decision and the Court of Claims opinion that it reversed, and the *Mount Clemens* Michigan Supreme Court dissent—there are five different and conflicting evaluations of the character of the *same* regulation and the *same* facts under *Penn Central*.

Interpretation No. 1. The Court of Claims in *Mount Clemens* held that the public purpose of the regulation transcended any takings implications because the regulations were enacted to protect the public health and stop the spread of COVID: "Takings jurisprudence instructs that valid regulations promoting public health, safety and welfare are not compensable." App. 37a. Consequently, it did not reach the *Penn Central* factors.

Interpretation No. 2. Before the Court of Claims in *Gym 24/7*, the government made substantially the same argument on the same facts. However, the Court of Claims in that case held the general public purpose of the regulation to be insufficient. Because the government failed to produce any evidence as to why the specific property at issue was subject to closure, the trial court denied summary disposition and allowed the petitioner's *Penn Central* case to proceed to discovery. *The Gym 24/7 Fitness, LLC v. Michigan*, No. 20-000132-MM, 2020 WL 6050543, at *3 (Mich. Ct. Cl. Sept. 24, 2020).

Interpretation No. 3. The Court of Appeals in *Gym 24/7* reversed the trial court using a different evaluation of *Penn Central*'s character prong. It engaged in the *Penn Central* balancing test. However, while acknowledging the lack of any evidence supporting the government's shutdown order of the fitness centers, it held that general considerations of the public health so heavily tipped the "character" factor in the government's favor that it justified dismissal of the regulatory takings claim. *The Gym 24/7 Fitness, LLC*, 989 N.W.2d at 863.

Interpretation No. 4. The Court of Appeals in *Mount Clemens* adopted the *Gym 24/7* decision as precedent. App. 19a ("Even if one could argue that the Court in *Gym 24/7 Fitness* intermingled, to some extent, concepts of taking and governmental necessity, *Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan."). Yet despite the court's view that it was bound by *Gym 24/7*, it also concluded that "caselaw supports" that "the government's purpose in making the restrictive regulations is not pertinent to a regulatory-takings analysis under *Penn Central*." App. 17a (citing *Lingle*,

544 U.S. at 544). Thus, the Court of Appeals below reviewed a second alternate analysis of the character factor. Without any factual findings, and contrary to Petitioners' allegations in their complaint, App. 80a-81a, the court found that the regulations' impact was spread evenly amongst Petitioners and the general public because "the actions challenged here applied to all similarly situated property owners." App. 18a.

Interpretation No. 5. The Michigan Supreme Court dissenters below incorporated their opinion from *Gym 24/7*. App. 26a-27a. That decision disagreed with how the *Gym 24/7* Court of Appeals opinion viewed character. *Gym 24/7 Fitness, LLC,* 10 N.W.3d at 450 ("The Court of Appeals also improperly analyzed the third factor, the character of the governmental action."). Instead, the dissenters viewed the regulation along a spectrum, with physical takings at one end and regulations that equally burdened all citizens on the other. *Id.* at 450-51. The Executive Order was "in the middle of this spectrum," and definitely burdened the Petitioners, but the dissent could go no further absent more evidence. *Id.* at 451.

These widely divergent opinions, addressing the same facts, demonstrate the utter lack of clarity and consistency with respect to the character prong of *Penn Central*.

Regarding the other *Penn Central* factors, the opinions in *Mount Clemens* echo those adopted in *Gym 24/7*. App. 26a-27a. The Michigan Supreme Court dissenters believed that the character prong "may" be relevant but that economic impact was the most important factor. *Gym 24/7 Fitness, LLC*, 10 N.W.3d at 448. They also opined that it was "questionable" for the Court of Appeals to weigh the first two factors less

than the third factor. *Ibid.* Conversely, the Court of Appeals in *Mount Clemens* (and *Gym 24/7*) held that character was the key factor and that the others had minimal importance. App. 14a-15a; *Gym 24/7 Fitness, LLC*, 989 N.W.2d at 863.

The incorporated *Gym 24/7* dissent also was less definitive than the *Mount Clemens* Court of Appeals' as to whether economic impact weighed in the Petitioners' favor. *Compare* App. 14a *with Gym 24/7 Fitness, LLC*, 10 N.W.3d at 449. While both the dissent and the Court of Appeals weighed reasonable investment-backed expectations in the petitioners' favor, the dissent did so as a factual matter, *Gym 24/7 Fitness, LLC*, 10 N.W.3d at 450, whereas the Court of Appeals resolved it as a legal determination. App. 14a.

The vagueness of *Penn Central* also creates judicial conflict in terms of the courts' role in applying the *Penn Central* factors to the facts of a regulatory takings case. The Michigan Supreme Court dissenters interpreted *Penn Central*'s ad hoc test to mean that once the factors were sufficiently pled, the case moved onward to discovery. App. 27a-28a. As they stated in the incorporated *Gym 24/7* decision, "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 the facts." *Gym 24/7 Fitness*, 10 N.W.3d at 451. Conversely, the Court of Appeals below viewed its initial role under *Penn Central* more expansively, requiring it to weigh the facts only as pled and render a judgment as a matter of law. With *Penn Central* silent as to the definition and proper

application of all these legal criteria, the lower courts are in need of clarity. A rule of constitutional law that creates materially disparate decisions based on the exact same facts—differing not only in the final result but in how the final result was achieved—is one that strongly warrants this Court's review.

C. A viable solution based on the traditional adjudication of property rights

The absence of concrete guidelines erodes the rule of law. No one knows what a regulatory taking actually is, nor the scope of protection provided by the Fifth Amendment's Takings Clause. Conflicting legal decisions are inevitable because *Penn Central*'s factors cannot answer how far is too far in any way that offers guidance to future disputes. This nullifies the function of stare decisis and underprotects property owners' fundamental right to use. Courts, property owners, and government regulators are left adrift.

A takings test grounded upon the property owner's market-based, reasonable rate of return is one solution to restoring the traditional understanding of the scope of real property rights and remedying the problems caused by *Penn Central*.

The reasonable rate of return played a substantial role within *Penn Central* itself. 438 U.S. at 136 ("the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel . . . not only to profit from the Terminal but also to obtain a reasonable return on its investment"); *id.* at 136 n.13 ("if an owner files suit and establishes that he is incapable of earning a 'reasonable return' on the site in its present state, he

can be afforded judicial relief"); *id.* at 149-50 (Rehnquist, J., dissenting) ("The Court has frequently held that, even where a destruction of property rights would not otherwise constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment."); William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 Envtl. L. Rep. News & Analysis 10936, 10942 (2011) ("Fundamentally, the *Penn Central* test requires a showing that [distinct investment-backed expectations] have been frustrated; i.e., the investment is not earning a reasonable or competitive return on the investment.").

This principle echoes throughout other cases of this Court and in lower courts. *Pennell v. City of San Jose*, 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring); *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 (1986); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984); *Cienega Gardens*, 331 F.3d at 1341-43; *Fla. Rock Indus.*, 45 Fed. Cl. at 39; *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985).

The rate of return is a measure of the fundamental right to the profitable use of property. That right was recognized by English law and made its way into the early common law of the states. *See* 1 Edward Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812) ("[F]or what is the land but the profits thereof[?]"); *Green v. Biddle*, 21 U.S. 1, 74-75 (1823) ("The common law of England was, at that period, as it still is, the law of that State; and we are informed by the highest authority, that a right to land, by that law, includes . . . [the right] to receive the issues and profits arising from it.");

Heinlen v. Martin, 53 Cal. 321, 345 (1879) (a fee owner is entitled to "enjoy the fruits of the land" and the rental value therefrom); *Woodruff v. Neal*, 28 Conn. 165, 167 (1859) (The rights of property include "every use and profit which can be derived from it[.]"); *Baxter v. Brand*, 36 Ky. 296, 300 (1838) (the rightful owner of the land was entitled to "the reasonable profits of the land" starting from the vesting of title); *Stackpole v. Healy*, 16 Mass. 33, 34 (1819) (the common law rights of property owners include "every use to which the land may be applied, and all the profits which may be derived from it"); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, 1160-61 (8th ed. 1927) ("any regulation which deprives any person of the profitable use of his property constitutes a taking . . . unless the invasion of rights is so slight as to permit the regulation to be justified under the police power.").

The protection of this right reflects that "[t]he framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value," including "all the essential elements of ownership which make property valuable. Among these elements is, fundamentally, the right of user." *Eaton v. Bos., C. & M.R.R.*, 51 N.H. 504, 512 (1872). *See also* John M. Groen, *Takings, Original Meaning, and Applying Property Law Principles to Fix*, 39 Touro L. Rev. 973, 986-89 (2024) (reviewing sources including William Blackstone, James Madison, Founder and Justice James Wilson, and Noah Webster). As a matter of history and tradition, the rights to rents and profits are therefore part of the possessory bundle of rights inextricably bound to the property itself.

Stevens v. Worrill, 73 S.E. 366, 367 (Ga. 1911); *Allied Credit Corp. v. Davis (In re Davis)*, 989 F.2d 208, 212-13 (6th Cir. 1993).

This Court also has experience determining the rate of return in takings cases pertaining to public utilities. *See, e.g.*, *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 481 (2002); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989); *see Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri*, 262 U.S. 276, 287-91 (1923) (Brandeis, J., concurring). While public utilities differ from free market commercial enterprises, the Court's ability to assess when the deprivation of a reasonable rate of return is confiscatory can help inform a revised regulatory takings test. *See, e.g.*, *Stone v. Farmers' Loan & Tr. Co.*, 116 U.S. 307, 331 (1886) ("Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation[.]"); *Covington & L. Turnp. Road Co. v. Sandford*, 164 U.S. 578, 594-95 (1896) (allowing property owners to "make their proofs" to show confiscatory nature of regulation that "destroy[s] the value of the property for all the purposes for which it was acquired"); *Los Angeles Gas & Elec. Corp. v. R.R. Comm'n of Cal.*, 289 U.S. 287, 305-06 (1933) ("Just compensation is a fair return upon the reasonable value of the property" and "judicial ascertainment of value for the purpose of deciding whether rates are confiscatory is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts.") (cleaned up).

A reasonable rate of return test would answer the question of "how far is too far" with clarity and predictability. It is a known delineator but one that, within the rate determination, allows for flexibility and ad hoc determinations based upon market factors and circumstances particular to the owner and the regulation at issue. It identifies when a regulation, as applied, has singled out a property owner to bear the burden of public use. But at the same time, a test grounded in the reasonable rate of return will recognize that not every diminution in value arising from a land use regulation gives rise to Fifth Amendment liability. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (there is no constitutional entitlement to the property's most beneficial use); *Mahon*, 260 U.S. at 413 ("government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

The reasonable rate of return analysis is also related to, but more precise than, *Penn Central*'s economic impact and reasonable investment-backed expectations factors. Thus, if it chose, the Court could situate a rate-of-return analysis within *Penn Central* and other regulatory takings cases.

Here, Michigan's shutdown order forced Petitioners to stop using their property for its intended commercial purpose and instead use it as a protective shield for public health. Obviously, "[t]he requirement that compensation be made for public use imposes no restrictions upon the power of the state to make reasonable regulations to protect life and secure the safety of its people." *City of Belleville v. St. Clair Cnty. Turnpike Co.*, 84 N.E. 1049, 1053 (Ill. 1908). However, the failure to compensate the

property owner cannot be squared with the traditional understanding that commercial property's primary and defining use is that of generating income.

Accordingly, this case presents an ideal opportunity for this Court to provide a clear, consistent, and uniform rule of law for determining "how far is too far." *See* Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (the adoption of a "totality of circumstances" test "is effectively to conclude that uniformity is not a particularly important objective[.] This last point suggests another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability.").

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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