No. ____

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

PETITION FOR WRIT OF CERTIORARI

PHILIP L. ELLISON
Outside Legal Counsel PLC
530 W. Saginaw St.
Hemlock, MI 48626

JONATHAN M. HOUGHTON
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
3100 Clarendon Boulevard,
Suite 1000
Arlington, VA 22201
(202) 888-6881
JHoughton@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

In this Fifth Amendment regulatory takings case, Michigan's Executive Order took dominion and control of the use of Petitioner's commercial property. It barred all customers from the premises for six months, which erased the property's economic use and destroyed Petitioner's reasonable investment-backed expectations to benefit the general public. However, Michigan courts dismissed Petitioner's case at the pleadings stage, generating three disparate opinions, with two different outcomes, and 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." There is also tension in this Court's decisions, and those below, as to whether the element of time should be a determinant of takings liability.

The questions presented are:

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

2. Whether a taking occurs upon the government asserting control over a property right, as the Court held in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), or instead, upon the government asserting control over a property right for some undefined period of time, as the Court held in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner The Gym 24/7 Fitness, LLC, was the plaintiff-appellant in all proceedings below. Petitioner is a limited liability corporation organized under the laws of the State of Michigan. It has no parent corporation and issues no shares.

Respondent the State of Michigan was the defendant-appellee in all proceedings below.

STATEMENT OF RELATED CASES

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

The Gym 24/7 Fitness, LLC v. State, No. 164557 (Mich. Aug. 30, 2024).

The Gym 24/7 Fitness, LLC v. State, No. 355148 (Mich. Ct. App. Mar. 31, 2022).

The Gym 24/7 Fitness, LLC v. State, No. 20-000132-MM (Mich. Ct. Cl. Sept. 24, 2020).

TABLE OF CONTENTS

Petition for a Writ of Certiorari 1

Opinions Below 5

Jurisdiction 5

Constitutional Provision
and Order at Issue 5

Statement of the Case 6

A. Michigan's Shut-Down Order and the Resulting Confiscation of Petitioner's Property 6

B. Proceedings Below 7

Reasons for Granting the Petition 10

I. Certiorari Is Needed to Bring Uniformity and Clarity to Regulatory Takings Cases 10

A. *Penn Central*'s persistent difficulties 10

B. This case offers an excellent vehicle to provide clarity, consistency, and uniformity to the regulatory takings test 20

C. A viable solution based on the traditional adjudication of property rights 23

II. Certiorari Should Be Granted to Address the Tension Between *Cedar Point* and *Tahoe-Sierra* 28

Conclusion 33

Appendix

Opinion of the Michigan State Court of Appeals,
March 31, 2022 .... 1a

Order of the Michigan State Supreme Court, denying application for leave to appeal,
August 31, 2024 .... 38a

Opinion and Order of the Michigan State Court of Claims, Ingham County, September 24, 2020 .... 59a

Michigan Executive Order 2020-09, March 16, 2020 .... 68a

Verified Class Action Complaint, filed in Michigan State Court of Claims, Ingham County, July 8, 2020 .... 73a

TABLE OF AUTHORITIES

Page(s)

Cases

74 Pinehurst LLC v. New York,
59 F.4th 557 (2d Cir. 2023) 18

Allied Credit Corp. v. Davis (In re Davis),
989 F.2d 208 (6th Cir. 1993) 26

Armstrong v. United States,
364 U.S. 40 (1960) 1

Baxter v. Brand,
36 Ky. 296 (1838)... 25

Blackburn v. Dare Cnty.,
58 F.4th 807 (4th Cir. 2023).................. 12, 16, 19

Block v. Hirsh,
256 U.S. 135 (1921) 31

Bordelon v. Baldwin Cnty.,
No. CV 20-0057-C, 2022 WL 16543269
(S.D. Ala. Oct. 28, 2022), *aff'd* No. 22-
13958, 2024 WL 302382
(11th Cir. Jan. 26, 2024) 14

Brakke v. Iowa Dep't of Natural Resources,
897 N.W.2d 522 (Iowa 2017) 32

Brewer v. State,
341 P.3d 1107 (Alaska 2014)............................ 18

Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n, 141 S. Ct. 731 (2021).................. 4, 7, 19

CCA Assocs. v. United States,
667 F.3d 1239 (Fed. Cir. 2011).......................... 14

Cedar Point Nursery v. Hassid,
594 U.S. 139 (2021) 4, 10, 15, 17, 29, 30

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir. 2003)........ 13, 16, 18, 24

City of Belleville v. St. Clair Cnty. Turnpike Co., 84 N.E. 1049 (Ill. 1908) 28
Cmty. Housing Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) 14
Colony Cove Properties, LLC v. City of Carson, 888 F.3d 445 (9th Cir. 2018) 14
Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 311 F. Supp. 2d 972 (D. Nev. 2004) 14
Covington & L. Turnp. Road Co. v. Sandford, 164 U.S. 578 (1896) 26
Dep't of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988) 18
Dist. Intown Properties Ltd. P'ship v. D.C., 198 F.3d 874 (D.C. Cir. 1999) 11
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) 26
E. Enterprises v. Apfel, 524 U.S. 498 (1998) 15, 19
Eaton v. Bos., C. & M.R.R., 51 N.H. 504 (1872) 25
Englewood Hospital & Med. Ctr. v. New Jersey, 478 N.J. Super. 626 (App. Div. 2024) 16
First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304 (1987) 19
Fisher v. Bountiful City, 21 Utah 29, 59 P. 520 (1899) 31

Fla. Rock Indus., Inc. v. United States,
18 F.3d 1560 (Fed. Cir. 1994)................13, 16, 24
Fla. Rock Indus., Inc. v. United States,
45 Fed. Cl. 21 (1999)..................................14, 24
FLCT, Ltd. v. City of Frisco,
493 S.W.3d 238 (Tex. App. 2016).......................14
Formanek v. United States,
26 Cl. Ct. 332 (1992)..14
Goldblatt v. Town of Hempstead,
369 U.S. 590 (1962) 27
Greater Chautauqua Fed. Credit Union v. Marks, No. 1:22-CV-2753 (MKV), 2023 WL 2744499 (S.D.N.Y. Mar. 31, 2023) 14
Green v. Biddle,
21 U.S. 1 (1823) 24
Heights Apartments, LLC v. Walz,
30 F.4th 720 (8th Cir. 2022)..............................13
Heinlen v. Martin,
53 Cal. 321 (1879)...25
Kafka v. Montana Dep't of Fish, Wildlife and Parks,
348 Mont. 80 (2008)...18
Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 9
Kimball Laundry Co. v. United States,
338 U.S. 1 (1949) 31
Kirby Forest Indus., Inc. v. United States,
467 U.S. 1 (1984) 24
Knick v. Twp. of Scott,
588 U.S. 180 (2019) 30
Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).................................19

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 15, 17, 18
Loper Bright Enterprises v. Raimondo,
144 S. Ct. 2244 (2024) 3
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 17
Los Angeles Gas & Elec. Corp. v. R.R. Comm'n of Cal.,
289 U.S. 287 (1933) 26
Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 9, 15, 29, 30
Lynch v. Household Fin. Corp.,
405 U.S. 538 (1972) 10
MacDonald, Sommer & Frates v. Yolo Cnty.,
477 U.S. 340 (1986) 24
Maine Educ. Ass'n Benefits Trust v. Cioppa,
695 F.3d 145 (1st Cir. 2012) 15
Marbury v. Madison,
5 U.S. 137 (1803) 3
McNulty v. Town of Indialantic,
727 F. Supp. 604 (M.D. Fla 1989) 16
Monongahela Nav. Co. v. United States,
148 U.S. 312 (1893) 12
Murr v. Wisconsin,
582 U.S. 383 (2017) 17
Nekrilov v. City of Jersey City,
45 F.4th 662 (3d Cir. 2022) 12, 19
Nemmers v. City of Dubuque,
764 F.2d 502 (8th Cir. 1985) 24
Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 30
Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 2, 9, 11, 15, 16, 23, 24

Pennell v. City of San Jose,
485 U.S. 1 (1988) 24
Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 1, 10, 19, 27
Philip Morris, Inc. v. Reilly,
312 F.3d 24 (1st Cir. 2002)...............................15
Rancho de Calistoga v. City of Calistoga,
800 F.3d 1083 (9th Cir. 2015) 16
San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 30, 31
Sansotta v. Town of Nags Head,
97 F. Supp. 3d 713 (E.D.N.C. 2014)..................18
Stackpole v. Healy,
16 Mass. 33 (1819)..25
Stevens v. Worrill,
73 S.E. 366 (Ga. 1911).......................................26
Stone v. Farmers' Loan & Tr. Co.,
116 U.S. 307 (1886) 26
Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri,
262 U.S. 276 (1923) 26
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency,
535 U.S. 302 (2002) 4, 15, 29, 30
Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs, 876 F.2d 1013 (1st Cir. 1989)...............32
The Gym 24/7 Fitness, L.L.C. v. State,
No. 20-000132-MM, 2020 WL 6050543
(Mich. Ct. Cl. Sept. 24, 2020) 5
The Gym 24/7 Fitness, LLC v. State,
10 N.W.3d 443 (Mich. 2024)...............................5
The Gym 24/7 Fitness, LLC v. State,
341 Mich. App. 238 (2022)..................................5

United States v. Gen. Motors Corp.,
323 U.S. 373 (1945) 10
Verizon Commc'ns, Inc. v. F.C.C.,
535 U.S. 467 (2002) 26
Wensmann Realty, Inc. v. City of Eagan,
734 N.W.2d 623 (Minn. 2007) 18
Wheeler v. City of Pleasant Grove,
833 F.2d 267 (11th Cir. 1987) 24
Woodruff v. Neal,
28 Conn. 165 (1859)...25
Yancey v. United States,
915 F.2d 1534 (Fed. Cir. 1990)..........................13

Constitutional Provision

U.S. Const. amend. V..5

Statute

28 U.S.C. § 1257(a) 5

Rule

MCR 7.305(H)(1)...9

Other Authorities

Barros, D. Benjamin, *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 (2006) 17
Berger, Michael M., *Whither Regulatory Takings?*, 51 Urb. Law. 171 (2021)...................11
Coke, Edward, 1 Institutes, ch. 1, § 1
(1st Am. ed. 1812)...24
Cooley, Thomas M., *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (8th ed. 1927)...............25

Cordes, Mark W., *Takings Jurisprudence as Three-Tiered Review*, 20 J. Nat. Resources & Envtl. L. 1 (2006) 15

Eagle, Steven J., *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601 (2014) 11

Eagle, Steven J., Penn Central *and Its Reluctant Muftis*, 66 Baylor L. Rev. 1 (2014) 16

Echeverria, John D., *Making Sense of* Penn Central, 39 Envtl. L. Rep. News & Analysis 10471 (2009) 16

Epstein, Richard A., *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593 (2007) 14

Groen, John M., *Takings, Original Meaning, and Applying Property Law Principles to Fix*, 39 Touro L. Rev. 973 (2024) 25

Kanner, Gideon, *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 (1998) 15

Meltz, Robert, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307 (2007) 15

Merrill, Thomas W., *The Character of the Governmental Action*, 36 Vt. L. Rev. 649 (2012) 2

Oakes, James L., *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583 (1981) 11

Pomeroy, Adam R., *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677 (2013) 12

Radford, R.S. & Wake, Luke A., *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731 (2011) 2

Scalia, Antonin, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 28

Thomas, Robert H., *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm. & Mary Bill Rts. J. 1145 (2021) 17

Wade, William W., *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 Envtl. L. Rep. News & Analysis 10936 (2011) 24

Wade, William W., *Temporary Takings,* Tahoe Sierra*, and the Denominator Problem*, 43 Envtl. L. Rep. News & Analysis 10189 (2013) 32

Whitman, Dale A., *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. Marshall L. Rev. 573 (2007) 2

PETITION FOR A WRIT OF CERTIORARI

It is undisputed that Petitioner's property was pressed into public service. By Executive Order, the Respondent State commandeered its use and then forcibly closed Petitioner's gym and idled all of the property within it to benefit the general public health. The State also claimed the exclusive right to determine if, when, and how, it would someday allow Petitioner to use its private property.

The State did not compel everyone to shoulder this burden. But for those, like Petitioner, that were forced to cease the use of their property by government decree, the impact was severe: it could earn no income and Petitioner's 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 Petitioner's regulatory takings lawsuit at the pleadings stage, it left Petitioner without a remedy for the clear confiscation of its 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. 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 Cent.*, 438 U.S. at 124-25.

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. There were two different results and three different evaluations. 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."[1]

This case also asks the Court to clarify the tension in its decisions about whether time is an element of property rights. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002), this Court held that a taking occurs not when all economic use is taken, but upon the deprivation of the right plus the passage of some undefined measure of time. That holding sits uneasily with *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), wherein this Court held that time is not a component of property rights. *Id.* at 153. Once a property right has been taken, it has been taken, and time is relevant only to the calculation of just compensation. Here, in accord with *Tahoe-Sierra*, but contrary to *Cedar Point*, the court below determined time (i.e., the temporary nature of the regulation) to be a material factor in the dismissal of Petitioner's categorical takings claim and its *Penn Central* claim. How courts address temporary takings is a significant constitutional issue that can be resolved only by this Court.

---

[1] A Petition for Certiorari is filed concurrently in *Mount Clemens Recreational Bowl, Inc. v. Hertel*. The Michigan courts' decisions in that case explicitly followed those of the courts here, and it raises a substantially similar *Penn Central* question.

Certiorari should be granted.

OPINIONS BELOW

The decision of the Michigan Court of Claims (App. 59a-67a) is unpublished but available at *The Gym 24/7 Fitness, L.L.C. v. State*, No. 20-000132-MM, 2020 WL 6050543 (Mich. Ct. Cl. Sept. 24, 2020). The Michigan Court of Appeals decision (App. 1a-37a) is published at *The Gym 24/7 Fitness, LLC v. State,* 341 Mich. App. 238 (2022). The decision of the Michigan Supreme Court denying review (App. 38a-58a) is published at *The Gym 24/7 Fitness, LLC v. State*, 10 N.W.3d 443 (Mich. 2024).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Michigan Court of Appeals entered Judgment on March 31, 2022. The Michigan Supreme Court denied review on August 30, 2024. Petitioner obtained an extension to file this Petition to and including January 16, 2025. *See* No. 24A418.

CONSTITUTIONAL PROVISION AND ORDER AT ISSUE

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 Executive Order (EO) 2020-09 (Mar. 16, 2020) provides in relevant part:[2]

> To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is reasonable and

[2] The order is reprinted in full at App. 68a-72a.

> 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:
>
> (f) Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas.[3]

STATEMENT OF THE CASE

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

Petitioner The Gym 24/7 Fitness, LLC owns an indoor gym and fitness center located in Alma, Michigan. App. 74a. It is owned and operated by Randy Clark, a personal trainer for over 40 years, and his wife Yvette Franco-Clark, who has a degree in health, wellness, and nutrition, and who teaches classes at a local college. In 2019, they achieved their forever dream of opening a gym.

Their dream was cut short. A year later, on March 10, 2020, Michigan Governor Gretchen

---

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

Whitmer declared a state of emergency in response to COVID-19 (App. 68a) and thereafter issued Executive Order 2020-09. App. 68a-72a. It decreed that all gymnasiums (and selected other businesses) must be "closed to ingress, egress, *use*, and occupancy by members of the public." App. 69a-70a (emphasis added). Originally intended to expire after two weeks, the State repeatedly extended the regulation. *See* Executive Orders 2020-20, 2020-43, 2020-69, 2020-110, and 2020-160. The shutdown order finally ended on September 8, 2020. Executive Order 2020-176.

During the State's control over the use of Petitioner's property, the Gym could earn no income while its monthly expenses and obligations continued unabated. App. 75a-76a, 79a. Now, over four years later, Gym 24/7—like so many businesses shuttered by order of the State—has yet to fully recover.

B. Proceedings Below

On July 8, 2020, Petitioner filed a putative class action suit in Michigan state court. App. 73a-81a. It did not challenge the Governor's authority to issue the Executive Order, nor whether it benefited public health and safety. App. 76a. But at the same time, because the Executive Order caused the Gym's economic devastation, Petitioner sought recompense in the form of just compensation for the unconstitutional taking of its private property under the Fifth and Fourteenth Amendments and Article X, Section 2, of the Michigan Constitution. App. 78a-81a. It alleged both a categorical taking of property and a *Penn Central* taking. *Ibid.*

The State immediately filed a motion for summary disposition based on the Complaint alone. The State argued that the public health emergency entitled it to

total deference such that Petitioner's takings claims were not actionable. App. 66a. However, the trial court held otherwise because "the state's ability to act pursuant to the police power, even during a pandemic, is not absolute." App. 65a.

The trial court found that the State failed to produce any evidence to justify its actions. Specifically, it "produced no evidence in support of its initial decision to close fitness facilities, nor has it provided evidence that informed its decision to continue to prohibit use of the facilities, even in a reduced or limited capacity." App. 66a. The State also failed to produce any evidence to support "why gyms and fitness centers were forced to remain closed after other indoor public gathering places were allowed to re-open." *Ibid.* The trial court did not specifically address the *Penn Central* factors or the temporary nature of the regulation, allowing the claims to proceed to discovery. App. 67a.

The Michigan Court of Appeals reversed and dismissed Petitioner's regulatory takings claim as a matter of law. It agreed that there was no specific evidence supporting the closure of gyms and fitness centers. App. 11a. Regardless, the court turned to the merits of the takings claims because the public use was undisputed.

Under *Penn Central,* the court held that "[t]he first two factors—economic impact of the EOs and their interference with reasonable investment-backed expectations—weigh in favor of the Gym because its business was in fact shuttered under the EOs[.]" App. 32a-33a. Nonetheless, the court "[did] not give those factors all that much weight" because the regulation was "short lived." App. 33a.

With regard to character, the court gave no consideration to the severity of the burden placed on Petitioner, the State's lack of evidentiary support, or and whether the property owner was singled out. App. 33a-36a. Instead, the court shortcut the evaluation, holding that the "compelling" aim of the Executive Order was to stop the spread of COVID and the public risk of illness and death that came with it. App. 33a. Thus, character "strongly favors the State, or perhaps actually demands that we find no taking." *Ibid.* The court dismissed the *Penn Central* claim at the pleadings stage, holding that "[i]n light of [] precedent, we cannot conclude that the Gym has a viable takings case under the *Penn Central* balancing test." App. 35a (discussing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992); *Penn Central*, 438 U.S. at 125; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987)).

The Court of Appeals also dismissed the categorical takings claim because the shutdown order was only temporary. App. 32a. Relying heavily on *Tahoe-Sierra*, the court held that there could be no taking as a matter of law because "any lost value relative to the real and personal property was likely recovered as soon as the temporary prohibition was lifted." *Ibid.*

Petitioner sought leave to appeal to the Michigan Supreme Court. The parties submitted briefs and conducted oral argument on the application, after which the court could have chosen to render a decision on the merits. *See* MCR 7.305(H)(1). However, the court instead denied leave to appeal, with a lengthy dissent from two Justices largely addressing the difficulties of adjudicating *Penn Central* claims. App. 38a-67a. It is discussed in greater detail, *infra.*

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*, 594 U.S. at 147; *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 econo-

mic 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) (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) (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*, 535 U.S. at 342; *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*, 505 U.S. at 1019 n.8.

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. State*, 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 Petitioner's regulatory takings claim as a matter of law at the pleadings stage. The State prohibited the use of Petitioner's property, due to no fault of Petitioner; a confiscatory action that stripped away the economic use of the property and destroyed Petitioner's reasonable investment-backed expectations. It was the regulatory equivalent of a physical invasion. Nor were all commercial (non-health care) businesses subject to the same prohibitions of use. Other commercial businesses, including retail, were quickly permitted to use their property. *See* Executive Orders 2020-92, 2020-96, and 2020-110. The government also allowed casinos and certain bars to reopen. Executive Order 2020-160. But Petitioner's property remained forcibly idled by the Respondent without explanation. App. 66a.

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. The two dissenting Justices from the Michigan Supreme Court repeatedly discussed *Penn Central*'s lack of guidance and direction, App. 48a, 49a, 51a, 58a, and that these deficiencies have "left courts to struggle" in

evaluating regulatory takings claims. App. 49a. 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." App. 50a. Consequently, they opined that it was their judicial duty to provide clearer and better guidance to the lower courts. App. 58a ("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[.]").

The confusion is evident. Each Michigan opinion had a conflicting view about how to assess the character of the regulation. The trial court focused on the specific, not the general. It gave no weight to the State's broad generalization that the Executive Order was enacted to stop the spread of COVID. App. 66a-67a. Instead, it denied the government's motion and moved the case into discovery due to the government's complete lack of evidence as to why Petitioner's gym was singled out for closure. *Id.*

Conversely, the Court of Appeals focused on the general and discounted the specific. While it agreed that no particular evidence supported closure, App. 11a, the State's general statement that the regulation was enacted to stop the spread of COVID and protect the public health and safety weighed character in the government's favor to such a degree that the court dismissed Petitioner's case. App. 33a.

For a third view, the Michigan Supreme Court dissenters gave only limited consideration to either the specific or the general public purpose. App. 54a-55a. Instead, they viewed the regulation along a spectrum of infringement on property rights, with physical takings at one end and regulations that equally burdened all citizens on the other. App. 55a. The shutdown order was "in the middle of this spectrum," and plainly burdened Petitioner, but the dissent could go no further absent more evidence. *Ibid*.

Regarding the other *Penn Central* factors, the dissent believed that the character prong "may" be relevant, but that economic impact was the most important factor. App. 49a. It also opined that it was "questionable" for the Court of Appeals to weigh the first two factors less than the third factor. App. 56a. Conversely, the Court of Appeals held that character was the most important factor and substantially minimized the others. App. 32a-33a.

The dissent also was less definitive than the Court of Appeals as to whether economic impact weighed in Petitioner's favor. *Compare* App. 52a-53a *with* App. 32a-33a. While both the dissent and the Court of Appeals weighed reasonable investment-backed expectations in Petitioner's favor, the dissent did so as a factual matter, App. 53a-54a, whereas the Court of Appeals resolved it as a legal determination. App. 32a-33a.

The vagueness of *Penn Central* also creates judicial conflict in terms of what role the court should take, how and when. In this case, the trial court and 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. 56a-58a, 67a. The Court of Appeals viewed its initial role under *Penn Central* more expansively, requiring it to weigh only the as-pled facts and render a judgment as a matter of law. App. 32a-35a. With *Penn Central* silent as to all of these important 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 Petitioner to stop using its 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.").

II. Certiorari Should Be Granted to Address the Tension Between *Cedar Point* and *Tahoe-Sierra*

When the State took dominion and control over the use of Petitioner's property, it also took the concomitant power to determine if, and when, the right to use would be returned. After six months had passed, the State gave this fundamental right back to Petitioner. However, the court below determined liability not based upon whether the property right was taken in the first instance, but the duration of the State's dominion and control. That the forced deprivation of the right to use was, ultimately, only temporary was a material factor in the dismissal of both of the Petitioner's takings claims as a matter of law. But

whether time should play a role at all remains an open question.

This Court has issued two decisions that are at odds with each other about whether the taking of property rights, in any context, are defined by the element of time: *Tahoe-Sierra* and *Cedar Point*.

In *Tahoe-Sierra,* the owners brought a facial *Lucas* challenge to a temporary moratorium that prohibited all use of the owner's property. *Tahoe-Sierra*, 535 U.S. 302 (citing *Lucas*, 505 U.S. at 1019) ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."). This Court held that stripping all economic use from property was not a categorical taking unless that commandeering of property was also a permanent one. *Tahoe-Sierra*, 535 U.S. at 332 (citing Restatement of Property §§ 7-9 (1936)). Consequently, there can never be a temporary categorical taking of use because "the property will recover value as soon as the prohibition is lifted." *Ibid.* While non-categorical claims remain actionable under *Penn Central*, the Court declined to state how long this taking of property must persist to be recognized as a Takings clause violation. *Id.* at 341-42.

The Court reached a different conclusion in *Cedar Point*. That case involved a regulation that granted access rights to private property for up to 120 days per year, for up to three hours per invasion. *Cedar Point*, 594 U.S. at 144. This Court held that the duration of the physical taking was irrelevant to determining liability. *Id.* at 153 ("a physical appropriation is a taking whether it is permanent or temporary").

Rather, liability is fixed when the right is taken and "the duration of an appropriation—just like the size of an appropriation, bears only on the amount of compensation." *Ibid.*

To be sure, *Tahoe-Sierra* distinguished between physical takings and regulatory takings. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323 (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' and vice versa."); *but see Lucas*, 505 U.S. at 1017 ("total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"). However, that distinction should be revisited.

As noted most recently by *Cedar Point*, liability attaches when the property right is taken. *Cedar Point*, 594 U.S. at 153-54; *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) ("a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 638-39 (2001) (Stevens, J., concurring in part and dissenting in part) ("A taking is a discrete event. . . . Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner."); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting) (the analysis is not about how the government action is labeled or what the government intends, but what it does).

Tahoe-Sierra is thus in tension with that established rule. Temporary takings work no less of a

constitutional injury to property owners than permanent ones. *See Fisher v. Bountiful City*, 21 Utah 29, 59 P. 520, 522 (1899) ("To take away the dominion and control over property is to take the property itself; for the absolute right to property includes the right of dominion, control, and the management thereof.'").

Nonetheless, instead of liability attaching when the property right is taken, *Tahoe-Sierra* holds that liability attaches when the right is taken, *plus* the elapsing of some unknown period of time. This construct of time and property rights also relegates the right to use to second-class status and affords it less constitutional protection than the right to exclude. *See San Diego Gas & Elec. Co.*, 450 U.S. at 657 (Brennan, J., dissenting) ("This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.'").

This case is an exemplary vehicle to resolve this tension. Michigan's shutdown order stripped Petitioner's property of the ability to earn income but left it with the hardship of continuing expenses. Undisputedly it was a severe burden, and regardless of its "temporary" moniker, there was no certainty, even within the government itself, as to when it would end. *See* App. 75a (noting multiple extensions of the Michigan shutdown orders); *Block v. Hirsh*, 256 U.S. 135, 167 (1921) (McKenna, J., dissenting) ("If [an oppressive regulation] can be made to endure for two years, it can be made to endure for more."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) ("There was nothing [the property owner] could do, therefore, but wait.").

For the duration, Petitioner had no feasible way to sell the property. *Cf. Brakke v. Iowa Dep't of Natural Resources*, 897 N.W.2d 522, 543 (Iowa 2017) (during five-year emergency order shuttering their business, property owners cannot "escape the tentacles of the DNR because the DNR restrictions will scare away potential buyers"). And even though the State eventually rescinded the order, "returning the use of the property after some taking period does not return the income flow that was lost in time." William W. Wade, *Temporary Takings,* Tahoe Sierra*, and the Denominator Problem*, 43 Envtl. L. Rep. News & Analysis 10189, 10200 (2013).

Notwithstanding these irreversible effects, because the Respondent's confiscatory regulation was temporary in duration, the court below dismissed Petitioner's categorical takings claim as a matter of law.[4] App. 32a. "Time" also played a role in Petitioner's *Penn Central* claim. Specifically, it was the means by which the court below minimized the two factors in Peti-

---

[4] The Michigan Supreme Court dissent disagreed. App. 45a ("When the government forces a business to incur losses by precluding use, I fail to see why just compensation would not be required."); s*ee also Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1027 (1st Cir. 1989) (noting that fixed costs make the temporary loss of income economically prohibitive). In a footnote, the Court of Appeals also speculated that some use could remain through "remote fitness services" or "the sale of products," although there was no evidence that the gym ever engaged in those businesses or had the necessary equipment to do so. App. 32a. This reflects the downside of dismissing claims prior to discovery. Moreover, the Michigan Supreme Court dissenters opined that "far-fetched" alternative uses were irrelevant. App. 43a.

tioner's favor, allowing the character of the regulation to be dispositive. App. 33a.

In light of *Cedar Point*, this Court should revisit *Tahoe-Sierra*'s distinction between physical takings and regulatory takings and whether time plays a role in property rights in light of *Cedar Point*. The issue is squarely presented for review and certiorari should be granted.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JONATHAN M. HOUGHTON
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
3100 Clarendon Boulevard,
Suite 1000
Arlington VA 22201
(202) 888-6881
JHoughton@pacificlegal.org

PHILIP L. ELLISON
Outside Legal Counsel PLC
530 W. Saginaw St.
Hemlock, MI 48626

Counsel for Petitioner

JANUARY 2025.