No. 24-757

IN THE
Supreme Court of the United States

THE GYM 24/7 FITNESS, LLC,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

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

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS®, MANUFACTURED HOUSING INSTITUTE, NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, AND MICHIGAN REALTORS® IN SUPPORT OF PETITIONER

SOPHIA CHUA-RUBENFELD
JONES DAY
1221 Peachtree Street, NE
Suite 400
Atlanta, GA 30361

BRINTON LUCAS
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
blucas@jonesday.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND EXECUTIVE ORDERS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The National Association of REALTORS® (NAR) is a national trade association, representing over 1.5 million members, including institutes, societies, and councils involved in all aspects of residential and commercial real estate. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®, and support private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

The Manufactured Housing Institute (MHI) is the only national trade organization representing all segments of the factory-built housing industry. MHI represents over 1,000 member companies involved in the production, sale and financing of manufactured housing, prefabricated home and modular home units. MHI's advocacy helps make the dream of homeownership a reality for millions of Americans.

The National Apartment Association (NAA) serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state

---

[1] Counsel of record for all parties received timely notice of *amici*'s intent to file this brief as required by Rule 37. No counsel for any party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission.

and local affiliates, NAA encompasses over 96,000 members representing more than 12 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community and emphasizes integrity, accountability, collaboration, community responsibility, inclusivity, and innovation. NAA and its network of affiliated apartment associations seek the fair governmental treatment of multifamily housing organizations, including advocating the interests of the rental housing business community at large in legal cases of national concern.

Based in Washington, D.C., the National Multifamily Housing Council (NMHC) is where rental housing providers and suppliers come together to help meet America's housing needs by creating inclusive and resilient communities where people build their lives. NMHC advocates for solutions to America's housing challenges, conducts rental-related research and promotes the desirability of rental living. Over one-third of American households rent, and over 21 million U.S. households live in an apartment home (buildings with five or more units).

Michigan REALTORS® is Michigan's largest nonprofit trade association, comprised of 38 local boards and membership of more than 34,000 brokers and salespersons licensed under Michigan law. It is the recognized public-policy and legal advocate for private property rights and the real estate industry in Michigan, as well as the acknowledged leading resource for professional development, knowledge exchange, and wide-ranging business services.

Amici are interested in this case because *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), have a significant impact on the ability of individuals and organizations to protect their private property rights, particularly when it comes to residential property.

SUMMARY OF ARGUMENT

In March 2020, the Governor of Michigan declared a state of emergency and issued a series of executive orders in response to the COVID-19 pandemic. Among other things, the orders required "gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, and spas" to close to the public. Mich. Exec. Order No. 2020-9. While other businesses such as bars and restaurants were soon allowed to reopen, gyms such as petitioner's remained shuttered until September 2020. The Michigan Supreme Court later held that the Governor's orders exceeded her authority under Michigan law. *In re Certified Questions from U.S. Dist. Ct.*, 958 N.W.2d 1, 31 (Mich. 2020).

All told, petitioner's gym was forced to remain closed for six months. During that time, petitioner earned zero income from that property. Seeking compensation for that loss, petitioner sued Michigan under the Takings Clause, yet the Michigan Court of Appeals granted summary disposition for the State. Applying *Penn Central*, the court held that there was no partial taking under that "balancing test." Pet. App. 32a. And applying *Tahoe-Sierra*, the court held that there was "no categorical" taking either, because the

value of the gym "likely recovered as soon as the temporary prohibition was lifted." *Id.* The Michigan Supreme Court denied review over the dissent of two justices. *Id.* at 38a-58a.

The short shrift given petitioner's lawsuit underscores just how difficult it is for anyone to obtain relief for regulatory takings. Given its protean nature, *Penn Central* discourages property owners from challenging such takings, thereby fostering the excessive regulation of residential property contributing to the country's affordable housing crisis. And *Tahoe-Sierra*, at least as read by the lower courts, has given government actors a free hand to deprive citizens of all economic use of their property so long as they do it temporarily.

This case provides the perfect opportunity for this Court to correct either or both of those problems. If *Penn Central* and *Tahoe-Sierra* free regulators to deprive property owners of all economically beneficial use of their land for half a year without just compensation (or even legal authorization), it is hard to imagine what regulatory takings claims could ever succeed—save perhaps one for a "permanent" total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a rare bird indeed. Clarifying either or both of those precedents could go a long way to making regulatory takings claims a meaningful avenue for relief. And without a change in this area, government actors throughout the country will continue to impose burdensome regulations on residential property, to the detriment of owners and renters alike.

ARGUMENT

I. *PENN CENTRAL* LEAVES PROPERTY OWNERS ESSENTIALLY POWERLESS TO CHALLENGE EXCESSIVE REGULATION OF RESIDENTIAL PROPERTY.

As petitioner explains (Pet. 10-19), *Penn Central*'s ad hoc balancing test has led to widespread confusion in the lower courts, perhaps best summed up by the observation that 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, 732 (2021) (Thomas, J., dissenting from denial of certiorari). On top of these jurisprudential difficulties, *Penn Central* has real-world harms on the housing market—and in particular, on the *affordable* housing market. Specifically, the unpredictable nature of the current *Penn Central* framework discourages property owners from bringing meritorious challenges under the Takings Clause. And that in turn has only emboldened governments at all levels to excessively regulate residential property, thereby hamstringing the country's housing supply.

A. *Penn Central* deters property owners from bringing meritorious claims.

Because *Penn Central* is so unpredictable, potential litigants and their lawyers cannot accurately conduct a risk-reward analysis of a takings claim. Under *Penn Central*, "lawyers are unable to ascertain which facts of the controversy will prove to be the operative, much less decisive," to say nothing of "the prospective likelihood" of success in litigation. G. Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New

York, 13 WM. & MARY BILL RTS. J. 679, 692 (2005). And that leaves them "handicapped when trying to advise clients, plan contemplated litigation, and marshal evidence likely to satisfy judges." *Id.* The "absence of discernible rules" makes litigation expensive and high-risk, and thus "places ordinary property owners beyond the ambit of constitutional protection." *Id.*

There is virtually no way to predict how a particular court will apply *Penn Central* to a given regulation. In recent years, for instance, landlords across the country brought takings claims in response to COVID-19 eviction moratoria. The courts evaluating the claims came to differing conclusions under *Penn Central*. To take just one *Penn Central* prong as an example, the Eighth Circuit held that "no landlord could have reasonably expected regulations" like the moratoria. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 734 (8th Cir. 2022). By contrast, other courts held that landlords "could not reasonabl[y] expect to be free of" regulations like the moratoria. *E.g.*, *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020). Few litigants will be likely to devote resources to constitutional claims when the outcome feels like a coin toss.

In some cases, property owners have litigated their takings claims all the way to a jury verdict, and won—only to have their victories reversed by judges seeing *Penn Central* a different way. In *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018), for instance, the owner of a mobile home park challenged a rent control ordinance under the Takings Clause. After hearing the evidence, a jury applied *Penn Central* and awarded the property owner $3.3 million in damages. On appeal, the Ninth Circuit

overturned the jury verdict and ordered the district court to enter judgment for the city. In that court's view, "no reasonable finder of fact" would conclude that the ordinance was a taking under *Penn Central*. *Id.* at 455; *see also Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 637 (9th Cir. 2020) (overturning jury verdict because "no reasonable jury could find that Bridge's evidence satisfied the *Penn Central* test"). The daylight between jurists and jurors when it comes to applying *Penn Central* is yet another deterrent to bringing a regulatory takings claim.

B. *Penn Central* incentivizes excessive regulation, exacerbating the affordable housing crisis.

By discouraging the pursuit of regulatory takings claims, *Penn Central*'s "weak level of protection against regulatory takings encourages excessive government activity." R. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 105 (2012). And that is particularly true when it comes to residential property. The "vagueness and unpredictability" of the *Penn Central* test has "encouraged regulators to pursue policies that have sharply reduced the supply of housing," an outcome that "increasingly disfavors the middle class, to say nothing of those lower on the economic scale who are still climbing the rungs of the socioeconomic ladder." Kanner, *supra*, at 681.

Multifamily housing options such as apartment buildings, condos, and townhomes are critical to meet the housing needs of middle-class and low-income families. The United States currently has a shortage of 7.3 million rental homes affordable to the lowest-

income renters, with only 34 affordable rental homes available for every 100 extremely low-income households. National Low-Income Housing Coalition, *The Gap: A Shortage of Available Homes* 6-7 (Mar. 2024) (*The Gap*).

Unfortunately, regulatory burdens have made multifamily housing development prohibitively expensive. Developers face costly regulatory hurdles every step of the way, from applying to rezone land for multifamily construction, to paying for studies and impact fees, to meeting energy-efficiency standards, to keeping up with ever-changing building codes. *Id.* at 1. A recent study by NMHC found that on average, "regulation imposed by all levels of government accounts for 40.6 percent of multifamily development costs." NMHC, *Regulation: 40.6 Percent of the Cost of Multifamily Development* 9 (2022).

Given these mounting burdens, developers are reluctant to build affordable housing. "Lower-cost rentals—the kind most in need by low- and moderate-income households—remain scarce and are rarely built without a government subsidy." W. Parker, *Apartment Construction Is Slowing, and Investors Are Betting on Higher Rents*, WALL ST. J. (Sept. 2, 2024). Instead, "[m]ost apartment developers today build high-end units for middle- and upper-income households, which have little impact on the affordable-housing shortage." *Id.*

To make matters worse, some regulations intended to increase affordable housing options have actually had the opposite effect. Consider rent control. "[D]espite years of research that shows rent control can actually reduce the overall amount of affordable

housing," governments around the country are showing a renewed interest in it. J. Ludden, *Rent Control Expands as Tenants Struggle with the Record-High Cost of Housing*, NPR (Nov. 28, 2022). Yet in a recent survey of nearly 50 multifamily housing developers, 87.5% stated that they avoid building housing in jurisdictions with rent control. *The Gap*, *supra*, at 4. Indeed, cities that have recently enacted rent control regimes have experienced immediate declines in housing supply production. For example, after St. Paul passed a rent control ordinance in 2022, the number of permits for new dwelling units in the city fell from 1,404 to 365 within three years. *See* NAA, *NAA's Rent Control Outlook* (Dec. 21, 2024) (linking to St. Paul's data).

What is more, studies show that some of rent control's greatest beneficiaries are actually high-income tenants. In one survey of housing providers, 58% knew of higher-income residents occupying rent-controlled apartments. NAA, *Examining the Unintended Consequences of Rent Control Policies in Cities Across America* 6 (Mar. 22, 2023). There were even reports that high-income tenants were subletting their rent-controlled units at market rates for a profit. *Id.* Similarly, a 2019 analysis found that the "biggest beneficiaries of rent regulation in New York aren't low-income tenants across New York City, but more affluent, white residents of Manhattan." J. Barbanel, *Wealthy, Older Tenants in Manhattan Get Biggest Boost From Rent Regulations*, WALL ST. J. (June 12, 2019). Another recent report found that one couple occupying a rent-stabilized apartment in Lower Manhattan also owned a $2 million home in East Hampton. Thanks to rent control, the couple, a

wine broker and a real estate associate at Sotheby's, were paying $931 per month in rent in a neighborhood where market rates ranged from $3,000 to $7,000 per month. C. Britschgi, *Rent Control for the Rich*, REASON (Jan. 9, 2024). Overall, wealthy renters in New York receive the biggest discounts from rent control—39% on average. By contrast, for New Yorkers in the bottom quartile of income, the discount is only about 15%. *See* Barbanel, *supra*.

Affordable housing is also threatened by exclusionary regulations born of outright NIMBYism. Manufactured homes, sometimes called mobile homes or trailers, are a crucial source of affordable housing. This option makes the dream of homeownership a possibility for many families who would otherwise be priced out of the housing market. Yet many cities have enacted zoning laws and other restrictions to keep manufactured homes out of their neighborhoods. These measures range from total bans, to minimum lot size requirements, to prohibitions on placing manufactured homes over 5 years old. MHI, *Get the Facts on Zoning* (June 12, 2023).

In fact, a study of 825 jurisdictions across 32 states revealed that 57% of them required lot sizes of over half an acre for manufactured homes. Freddie Mac, *Identifying the Opportunities To Expand Manufactured Housing* 4 (2022). Many jurisdictions demanded a minimum of two acres. *See id.* at 3. And some, like Douglas County, Georgia, just 20 miles west of downtown Atlanta, required a minimum of ten acres. Douglas Cnty., *FAQs: Planning and Zoning*, https://www.douglascountyga.gov/faq.aspx?TID.

* * *

By deterring property owners from challenging burdensome regulations under the Takings Clause, *Penn Central* has incentivized governments to layer regulation after regulation on residential property. The result is a regulatory landscape that drives up prices, cuts down the supply of affordable housing, and harms owners and renters across the board. This Court should grant review, revisit *Penn Central*, and provide clear guidance in this area.

II. THIS COURT SHOULD CLARIFY *TAHOE-SIERRA* TO SHIELD PROPERTY OWNERS FROM TOTAL REGULATORY TAKINGS.

While the problems with *Penn Central* are well known, the second question presented is no less important. Since 2002, lower courts have taken this Court's decision in *Tahoe-Sierra* to hold that a "temporary prohibition" on all economic use of a property cannot qualify as a total regulatory taking protected by the *Lucas* test. Pet. App. 32a.

That is a serious problem. While *Tahoe-Sierra* held that traditional moratoria on land development were exempt from the rule in *Lucas*, it did not purport to establish a global rule governing all total regulatory takings that were limited in time—a proposition in significant tension with this Court's precedents, past and future. Yet as this case illustrates, governments and lower courts have taken the decision as a green light to adopt all sorts of regulations forcing owners to leave their property economically idle for discrete chunks of time. This Court should grant review and clarify the limited scope of *Tahoe-Sierra*.

A. *Tahoe-Sierra* created a narrow exception to the rule for total regulatory takings.

1. In *Lucas*, this Court announced a "categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. Writing for the Court, Justice Scalia explained that a total regulatory taking—*i.e.*, when "regulation denies all economically beneficial or productive use of land"—should be analyzed like a physical taking because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1015, 1017. Put differently, "for what is the land but the profits thereof?" *Id.* (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st am. ed. 1812)) (brackets and alterations omitted). This Court therefore held that "when 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." *Id.* at 1019.

For six months, petitioner and similar businesses suffered a total regulatory taking. Governor Whitmer's order mandated that gyms remain "closed to ingress, egress, use, and occupancy by members of the public." Mich. Exec. Order No. 2020-9. With customers forbidden to so much as set foot inside, gym owners could not earn a cent from their property as long as the Order remained in place. Simply put, they were "called upon to sacrifice *all* economically beneficial uses" and leave their property "economically idle" "in the name of the common good." *Lucas*, 505 U.S. at 1019.

Logically, petitioner's six-month plight falls squarely under the *Lucas* framework. After all, *Lucas* itself concerned a two-year taking. In 1988, South Carolina passed the Beachfront Management Act, which prohibited Lucas from building on his land. The Act therefore rendered his parcels "valueless," prompting Lucas to seek just compensation under the Takings Clause. *Id.* at 1007. In 1990, while his case was working its way through the courts, South Carolina amended the law such that Lucas could apply for a "special permit" to build on his property. The total regulatory taking thus lasted only two years.

Indeed, the South Carolina Coastal Council urged this Court not to review Lucas's taking claim because of that amendment. The Court rejected the invitation, noting that Lucas was entitled to review "with respect to the 1988-1990 period." *Id.* at 1012. After all, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), had held that "temporary deprivations of use are compensable under the Takings Clause." 505 U.S. at 1011-12.

Justice Kennedy wrote separately to address the temporal issue, noting that "[t]he potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past." *Id.* at 1032-33 (Kennedy, J., concurring in the judgment). As he explained, the 1988 law "may have deprived petitioner of the use of his land in an interim period," and if that "deprivation amounts to a taking, its limited duration will not bar constitutional relief." *Id.* at 1033. Pointing to *First English*, Justice Kennedy emphasized that it is "well established that temporary takings are as protected by the Constitution as are permanent ones." *Id.*

And so this Court went on to review Lucas's claim, concluding that the Council's actions—although temporary—amounted to a total regulatory taking. While the Council might be able to "avoid having to pay compensation for a permanent deprivation," "where the regulation has already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 1030 n.17 (majority) (quoting *First English*, 482 U.S. at 321) (brackets omitted).

2. Given that background, one might wonder why the court below held that petitioner and other property owners lacked a *Lucas* claim for the six-month total deprivation of economic use they suffered under the Governor's order. The answer, according to the Michigan Court of Appeals, was found in this Court's subsequent decision in *Tahoe-Sierra*, which held that a multi-year moratorium on land development was not a total regulatory taking under *Lucas*. *See* Pet. App. 29a-32a. The court below misunderstood *Tahoe-Sierra*'s reach.[2]

---

[2] The decision below also suggested that petitioner might have been able to have used its gym for "remote fitness services" such as "online classes" during the shutdown. Pet. App. 32a n.16. But such far-fetched speculation could not defeat the total regulatory takings claim here any more than the assertion that Lucas was free to use his beachfront property as a "fishing or camping" site could defeat his. 505 U.S. at 1065 n.3 (Stevens, J., dissenting). In all events, this Court can grant review, hold that a *Lucas* claim is available so long as petitioner suffered a total deprivation of economic use from the Governor's order notwithstanding its temporary nature, and remand for fact-finding on the total deprivation question.

The only "question presented" in *Tahoe-Sierra* was "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking." 535 U.S. at 306. And while this Court answered that question in the negative, it emphasized the "narrow scope of [its] holding." *Id.* at 307.

Specifically, *Tahoe-Sierra* concerned two moratoria that prohibited "virtually all development" of land in the Lake Tahoe basin for "32 months" while an agency conducted an environmental study. *Id.* at 306. The property owners, who had purchased land in the basin with the intent to build single-family homes, argued that the moratoria amounted to a total regulatory taking under *Lucas*. Although it was undisputed that the property owners had been temporarily deprived of "all economically viable use of their land," *id.* at 316, the Court thought that "fairness and justice" would be "best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than" *Lucas*'s "categorical rule." *Id.* at 342.

Writing for the Court, Justice Stevens explained that while *Lucas* involved an "'extraordinary'" regulatory taking, land-development moratoria such as the one at issue "are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy," and hence no different "from ordinary permit delays." *Id.* at 337 & n.31. Indeed, *First English* itself had indicated that its analysis of temporary takings would not apply to "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321. In that sense, *Tahoe-Sierra*'s holding arguably fit within a long line of takings precedents.

Unfortunately, *Tahoe-Sierra* also made sweeping statements—unnecessary to the resolution of the "narrow" question presented—that called into question the very possibility of a temporary taking under *Lucas*. 535 U.S. at 307. Specifically, it opined that "the entire parcel" of an "interest in real property" is defined not just by "the metes and bounds that describe its geographic dimensions," but also by "the temporal aspect of the owner's interest." *Id.* at 331-32. And it suggested that a temporary regulatory taking can *never* amount to a 100% deprivation of value: "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332.

Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas, dissented. *Id.* at 343-54 (Rehnquist, C.J., dissenting). On the narrow question presented, Chief Justice Rehnquist agreed that *Lucas* did not require "finding that an array of traditional, short-term, land-use planning devices are takings." *Id.* at 351. But in his opinion, the moratoria at issue—which by the dissenters' calculation lasted six years—bore "no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law." *Id.* at 354. Chief Justice Rehnquist therefore concluded that "the 'temporary' denial of all viable use of land for six years is a taking" under "the *Lucas* rule." *Id.* at 351.

As for the broader language in the majority opinion, Chief Justice Rehnquist explained that both *First English* and *Lucas* "reject[ed] any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his

land." *Id.* at 347. And as a conceptual matter, he thought any attempt to draw such a distinction would be "tenuous" and invite abuse. *Id.* In his view, the "temporary" moratoria in *Tahoe-Sierra* lasted six years—much longer than the so-called "permanent" prohibition in *Lucas*. *Id.* at 346-47. And that meant that the takings analysis under a temporary-permanent dichotomy would hinge "entirely on the initial label given a regulation." *Id.* at 347. That framework would give "every incentive for government to simply label any prohibition on development 'temporary,' or to fix a set number of years." *Id.* Indeed, it would do nothing to prevent a government from "repeatedly extending [a] 'temporary' prohibition into a long-term ban." *Id.*

Justice Thomas, joined by Justice Scalia, penned a separate dissent to criticize the theory "that the temporary moratorium at issue here was not a taking because it was not a taking of the parcel as a whole." *Id.* at 355 (Thomas, J., dissenting) (quotation marks omitted). In his view, "*First English* put to rest the notion that the 'relevant denominator' is land's infinite life." *Id.* Accordingly, "a regulation effecting a total deprivation of the use of a so-called 'temporal slice' of property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking." *Id.* And the mere fact that a plot of land could someday recover its value was "cold comfort" to the landowners who were barred from building Lake Tahoe homes in the present. *Id.* at 356. "After all," Justice Thomas observed, "in the long run we are all dead." *Id.* (quoting J. Keynes, MONETARY REFORM 88 (1924)) (cleaned up).

B. The lower courts have overread *Tahoe-Sierra* to the harm of property owners.

Unfortunately, the lower courts have taken the sweeping yet unnecessary statements in *Tahoe-Sierra* about "temporary" *Lucas* takings as a core feature of takings doctrine. For example, the court below read *Tahoe-Sierra* to hold that while "a permanent deprivation of an owner's use of an entire parcel of property constitutes a taking of the whole parcel," a "temporary restriction" does not. Pet. App. 30a-31a. That misunderstanding comes with two significant problems—one practical and one precedential.

1. As a practical matter, the malleable temporary-permanent dichotomy has predictably invited the abuse Chief Justice Rehnquist feared. The recent spate of COVID-19 eviction moratoria represents just the tip of the iceberg. *See supra* at 6. Local governments have also begun to adopt eviction moratoria that subject property owners to seasonal takings each year.

Take a Tacoma ordinance passed in 2023 that prohibits evictions "between November 1 and April 1." Tacoma Mun. Code § 1.100.060. Commendably, the law is meant to protect the indigent from the hardships of eviction in "cold[] weather." *Id.* But for those five months, Tacoma landlords are powerless to evict even those tenants who are paying zero dollars in rent. *See id.* To the Tacoma city government, five months may be just a blip in the long life of a fee-simple estate. But to a Tacoma landlord, owing five months of mortgage payments while collecting zero rent could be a life-altering crisis. As this Court recently noted, "many landlords have modest means,"

and eviction moratoria can put them "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021); *see also* NAA, *Breaking Down One Dollar of Rent* (2023) (reporting that the rental housing industry "is predominantly made up of small mom-and-pop owners" and "operates on narrow profit margins").

To take another example, San Francisco forbids evictions "during the school year" if one of the tenants is a child or "educator" (or has a custodial or familial relationship with one). San Francisco Admin. Code § 37.9. And "educators" include not just teachers, but classroom aides, cafeteria workers, security guards, and administrative staff as well. *Id.* Given that San Francisco's school year runs from mid-August to mid-June, the city's landlords could easily find themselves unable to collect a single dollar from their properties for 10 months at a time. *See id.*

This is not a Bay Area aberration. Both Seattle and Tacoma have adopted similar prohibitions on school-year evictions. Tacoma Mun. Code § 1.100.060; Seattle Mun. Code § 25.205.110. And while limited to the school year in theory, such laws can force property owners "to provide housing without compensation for over a year at a time." C. McKenney, *As Affordable Housing Crumbles, Reconsider School Year Eviction Bans*, FIX HOMELESSNESS (Oct. 2, 2024), https://tinyurl.com/2wm685p8. Last year in Tacoma, for instance, after some tenants stopped paying rent in May, the property owner began eviction proceedings in July and secured judgment in late August. *Id.* But with the onset of the school year, the tenants can live rent-free "until June 23, 2025." *Id.*

While these measures may have been well intentioned, they force "individual property owners" to shoulder "'public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 273 (2024). Property owners compelled to provide free housing to teachers for months at a time should at least have the opportunity to pursue just compensation via a *Lucas* claim. But under the current regime, those claims go to die under *Penn Central*.

2. As a precedential matter, overreading *Tahoe-Sierra* to create a temporary-permanent dichotomy for all total regulatory takings threatens "the precedent's consistency and coherence with previous [and] subsequent decisions." *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part).

Looking backwards, that reading of *Tahoe-Sierra* is at odds with *First English*. In *First English*, a church challenged a Los Angeles ordinance that prohibited it from rebuilding after its property was destroyed by a flood, thereby allegedly denying the church all use of its property. 482 U.S. 304. This Court assumed without deciding that the ordinance did, in fact, deny the church all use of its property, *id.* at 322, leaving the question whether "'temporary' regulatory takings—those regulatory takings which are ultimately invalidated"—require just compensation, *id.* at 310. The Court answered yes, holding that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings." *Id.* at 318. It likened total regulatory takings to a government leasehold, which—even if just "for a period of years"—would clearly require compensation. *Id.* at 319.

A broad reading of *Tahoe-Sierra* is also hard to square with *Lucas* itself. *Lucas* reaffirmed that "temporary deprivations of use are compensable under the Takings Clause." 505 U.S. at 1012 (citing *First English*, 482 U.S. 304). And *Lucas* went on to find a *per se* taking in the context of a ban that lasted only two years. *See supra* Pt. II.A.1.

Looking forward, a distinction between permanent and temporary takings stands in tension with *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). There, this Court held that a regulation requiring employers to "allow union organizers onto their property for up to three hours per day, 120 days per year" constituted a *per se* physical taking. *Id.* at 143. It made clear that "a physical appropriation is a taking whether it is permanent or temporary," with "duration" bearing "only on the amount of compensation." *Id.* at 153. Of course, *Cedar Point* concerned "a physical rather than a regulatory taking," *id.* at 149, but a total regulatory taking is "the equivalent of a physical" one, *Lucas*, 505 U.S. at 1017; *see also Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177-78 (1871).

C. This case offers an excellent opportunity to clarify *Tahoe-Sierra*.

Given these problems, this Court should grant review and inform lower courts of *Tahoe-Sierra*'s limited reach. Nothing about "*stare decisis* requires adherence to a broad reading" of a decision when a narrow one would harmonize the decision with other precedents. *Arizona v. Gant*, 556 U.S. 332, 348 (2009). And here, this Court can do just that by limiting *Tahoe-Sierra* to its central holding—that traditional land-development moratoria are not *per se* takings.

That understanding of *Tahoe-Sierra* would be far more consistent with precedent than the reading adopted below. This Court's regulatory takings cases have long recognized an exception for time-honored land use processes, such as "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English*, 482 U.S. at 321. In *Lucas*, for instance, the Court recognized that South Carolina's ban on using coastal land might escape the rule for total regulatory takings if such a prohibition "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029. The *Tahoe-Sierra* dissenters likewise agreed that "short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law." 535 U.S. at 352 (Rehnquist, C.J., dissenting); *see also Sheetz*, 601 U.S. at 284 (Kavanaugh, J., concurring) (describing "permit conditions" as a "longstanding … practice" left untouched by takings precedents).

Traditional land-development moratoria fall within that time-tested exception. Indeed, they are "[o]ne of the oldest tools of land use regulation." Resp. Br. at 23, *Tahoe-Sierra*, 535 U.S. 302 (No. 00-1167), 2001 WL 1480565. It thus would have been remarkable to have extended the *Lucas* test—"designed to apply to only the most extraordinary circumstances—to … [that] well-established and widely-used tool." *Id.* (cleaned up). This Court thus can maintain the rule that traditional land-development moratoria, like the ones that protected Lake Tahoe's "noble sheet of blue water," are not *per se* takings. 535 U.S. at 307.

But this Court can and should reject *Tahoe-Sierra*'s unnecessary suggestion that *no* temporary regulation—no matter how unprecedented or extreme—can ever amount to a *per se* taking under *Lucas*. That gives governments a free pass for all kinds of temporary regulations—like those requiring property owners to provide free housing to teachers or shutter their gyms for months on end—that go well beyond any reasonable expectations. Indeed, unlike property that "could be developed" once a development "moratorium ended," many "gyms and fitness centers went out of business" due to "the 'temporary'" takings here. Pet. App. 46a (Viviano, J., dissenting).[3]

This petition presents the perfect opportunity for this Court to bring clarity to this area of the law. Unlike a case involving traditional regulations, the situation here is the paradigmatic example of an "extraordinary circumstance" where a government permitted "*no* productive or economically beneficial use" of property—albeit for six months as opposed to two years. *Lucas*, 505 U.S. at 1017. And while the pandemic is behind us, regulators have not been shy about experimenting with novel temporary takings such as school-year eviction bans. This Court should grant review and make clear that the Constitution does not come with a carveout for takings that are "capable of repetition, yet evading review."

---

[3] Of course, this Court need not decide whether the Governor's orders went beyond the State's police powers inherent in property rights under Michigan law. It could hold that *Lucas* claims are available for some temporary takings and remand the property-rights question to the Michigan courts. That said, the Michigan Supreme Court has already held that the Governor's orders exceeded her authority under state law. *Supra* at 3.

CONCLUSION

This Court should grant certiorari and reverse the decision below.

FEBRUARY 18, 2024

Respectfully submitted,

SOPHIA CHUA-RUBENFELD
JONES DAY
1221 Peachtree Street, NE
Suite 400
Atlanta, GA 30361

BRINTON LUCAS
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
blucas@jonesday.com

Counsel for Amici Curiae