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SUPREME COURT OF TEXAS
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No. 23-0474

IN THE
SUPREME COURT OF TEXAS

The Commons of Lake Houston, Ltd.,

Petitioner,

v.

The City of Houston, Texas,

Respondent.

On Petition for Review from the
First Court of Appeals at Houston

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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Pacific Legal Foundation (PLF) and Institute for Justice (IJ)[1] submit this brief amicus curiae in support of the Petition for Review filed by Petitioner The Commons of Lake Houston, Ltd.

Introduction and Summary of Argument

This petition provides the Court with an opportunity to clarify that regulatory takings cases are not precluded by the mere invocation of "police power."

The Court of Appeals, relying on *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984), imposed a categorical rule: if the government's actions are "substantially related to the health, safety, or general welfare of the citizens and are reasonable," compensation is *never* required. *City of Houston v. Commons of Lake Houston, Ltd.*, No. 01-21-00369-CV, 2023 WL 162737, at *11 (Tex. App. Jan. 12, 2023) (citing *Turtle Rock Corp.*, 680 S.W.2d at 805).

However, acting for the betterment of the public does not give the government license to automatically take private property rights for free. That is particularly true in this case—an as applied claim, where the Petitioner only seeks compensation and does not argue that the government acted irrationally or arbitrarily in amending its floodplain ordinance. The Texas Supreme Court has never applied the lower court's sweeping rule to foreclose a claim for compensation. Nor should it here. The

[1] Counsel for Amici Curiae disclose that no fee was paid or is to be paid to fund the preparation of this brief.

prohibition on uncompensated takings is not meant to "limit the governmental interference with property rights *per se*, but rather [secures] compensation in the event of otherwise proper interference amounting to a taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quotation and citation omitted). Regardless of intent, the government cannot "[force] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The lower court's decision is thus directly at odds with the U.S. Supreme Court's determination in *Lingle v. Chevron*, which definitively held that the substantially related test "is not a valid method of discerning whether private property has been 'taken,'" 544 U.S. at 542, and it "has no proper place in our takings jurisprudence." *Id.* at 540. The takings inquiry is "about the magnitude or character of the burden a particular regulation imposes upon private property rights," not whether the government had a legitimate police power reason for doing so. *Id.* at 542.

Although the instant action was brought pursuant to the Texas Constitution, not the U.S. Constitution, the result here can be no different. Both guarantee compensation to the owner when private property is put to public use; a constitutional provision that is then abrogated when public use becomes the specific reason that

compensation is denied. Moreover, the U.S. Constitution is the floor, not the ceiling; and while Texas can certainly provide its citizens with greater protection of private property rights, it can never provide them with less. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

Accordingly, this Court should grant review and hold that the government having a valid police power reason for its action does not categorically exempt it from the constitutional obligation to provide compensation if that action intrudes "too far" on private property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("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."). Consistent with the U.S. Constitution, *Lingle*, and the litany of other states that have followed *Lingle*, this Court should further hold that its determination in *Turtle Rock* is not applicable to takings claims. As the U.S. Supreme Court recently held, when government takes property it must compensate, even where it has a good reason for doing so. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) ("The government must pay for what it takes.").

Interest of Amici Curiae

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded 50 years ago, PLF is the most experienced

legal organization of its kind. PLF attorneys have participated as lead counsel in multiple landmark Supreme Court cases in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023); *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322 (2023); *Wilkins v. United States*, 143 S. Ct. 870 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also frequently participates as amicus curiae in cases that pertain to important property rights issues.

The Institute for Justice is a nonprofit, public-interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy personal and real property. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v City of New London*, 545 U.S. 469 (2005), in which the U.S. Supreme Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *Norwood*

v Horney, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution. Recently, IJ litigated *Baker v. City of McKinney*, 601 F. Supp. 3d 124 (E.D. Tex. 2022), where a federal district court held that the police power is not exempt from the Takings Clause of the Fifth Amendment.

Argument

I. Acting in the Public Interest Does Not Preclude a Regulatory Taking Claim

Petitioner is the developer of The Crossing at The Commons of Lake Houston, an approximately 300-acre master planned community. In 2017, the Petitioner filed a general plan for 122.5 acres of the land and platted the first two sections. It then started infrastructure work after receiving approval from the City of Houston.

Following Hurricane Harvey in 2018, the City amended its floodplain ordinance to require, inter alia, that structures within the 500-year floodplain are elevated two feet above the base flood elevation. This change substantially impacted the Commons at Lake Houston, as it lies within the 100-year and 500-year floodplains. The developable area was reduced by 72%, and less than half of the original lots could be developed, nor could any of the signature waterfront lots. The Petitioner filed suit alleging that the ordinance rendered its project infeasible and was an unconstitutional taking pursuant to the Texas Constitution.

The lower court dismissed the Petitioner's action for lack of subject matter jurisdiction. *Commons of Lake Houston, Ltd.*, 2023 WL 162737, at *12. In part, the court's decision was based upon the public benefit that was provided by the floodplain ordinance. "Because reasonable minds could conclude that the amended ordinance's elevation requirements are substantially related to the health, safety, or general welfare of the citizens and are reasonable, the 2018 Floodplain Ordinance 'must stand as a valid exercise of the city's police power' and does not constitute a taking." *Id.* at *11 (citing *Turtle Rock Corp.*, 680 at 805). This determination was in error.

Both the U.S. Constitution and the Texas Constitution impose certain limits on the government when it takes title to private property, either by eminent domain or by regulation. Namely, (1) the government must have a public use for the property that it takes; and (2) the government must pay compensation to the owner. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation") *and* Tex. Const. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.").

The reasoning is uncomplicated—if property is being put to public use, then the public should pay for it. Over the years, the Supreme Court has expressed this truism in many ways. *See, e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450

U.S. 621, 656–57 (1981) (Brennan, J., dissenting) ("When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large.… If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received[.]"); *Armstrong*, 364 U.S. at 49 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *Mahon*, 260 U.S. at 416 ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

However, the lower court's decision excises the compensation clause of the U.S. and Texas Constitutions: so long as there is a public purpose, no compensation must be paid.[2] That has never been the rule. As the U.S. Supreme Court held long

[2] Under the lower court's reading, the respective constitutions would read as follows: U.S. Const. amend. V ("nor shall private property be taken for public use~~, without just compensation~~") and Tex. Const. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use~~ without adequate compensation being made~~").

ago in *Mahon*, "the protection of private property in the Fifth Amendment *presupposes that it is wanted for public use*, but provides that it shall not be taken for such use without compensation." *Mahon*, 260 U.S. at 415 (emphasis added). The police power of the government "must be exercised within a limited ambit and is subordinate to constitutional limitations." *Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613, 622 (1935).

The respective Takings Clauses can therefore be viewed as a condition that is placed upon the government's exercise of power for the public's benefit. *If* the government takes private property for a public use, *then* the government must pay compensation for what it takes. *See Lingle*, 544 U.S. at 536–37 ("As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) ("In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.").

To hold otherwise would be to nullify the Takings Clause (i.e., *if* the government takes property for a public use, *then* it gets the property for free and does not have to pay at all). *See Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571

(Fed. Cir. 1994) ("That the purpose and function of the regulatory imposition is relevant to drawing the line between mere diminution and partial taking should not be read to suggest that when Government acts in pursuit of an important public purpose, its actions are excused from liability. To so hold would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance.").

In many respects, the above was captured within the Supreme Court's decision in *Lingle.* 544 U.S. 528. At issue was a prior Supreme Court case which defined a taking as a government action that did not substantially advance a legitimate state interest. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."). *Agins* therefore held that the valid exercise of police power, crystallized in the local government's zoning ordinance, immunized the government from takings liability. *Id.* at 261.

Here, the lower court did not rely on *Agins* but *Turtle Rock Corp.*, a Texas decision with similar language. *Commons of Lake Houston, Ltd.*, 2023 WL 162737, at *11 (citing *Turtle Rock Corp.*, 680 S.W.2d at 805) ("First, the regulation must be adopted to accomplish a legitimate goal; it must be substantially related to the health, safety, or general welfare of the people. Second, the regulation must be reasonable; it cannot be arbitrary.").

Consistent with the constitutional requirement that private property taken for a public purpose must be paid for by the public, the Court in *Lingle* explicitly abrogated *Agins*. It held that "the [*Agins*] formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 540. As *Lingle* explained,

> The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.
>
> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Lingle, 544 U.S. at 542; *Regulatory Takings—"Substantially Advances" Test*, 119 Harv. L. Rev. 297, 302 (2005) ("The Court's holding in *Lingle* was a candid recognition that the trajectory of regulatory takings law since *Agins* had gone seriously awry" and "had the Court upheld the substantially advances standard, it

might have paved the way for application of that standard to all sorts of economic legislation directed at future evils.").

The Court also put to rest the misconception that the existence of a public purpose precluded a takings claim:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use.*" It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." *First English Evangelical Lutheran Church,* 482 U.S., at 315, 107 S.Ct. 2378 (emphasis added). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 543; *see also First English Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304 (1987) (regulation prohibiting rebuilding in a floodplain could result in a taking, even if the government eventually revoked the prohibition); *San Diego Gas & Elec. Co.*, 450 U.S. at 647 (Brennan, J., dissenting from dismissal of the appeal on ripeness grounds) ("[T]he California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a taking within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court.").

Considering the above, this Court should grant review. While the Texas Supreme Court did acknowledge *Lingle* within 1 of 41 footnotes in a recent *Penn Central* case, it should take the opportunity here to clearly and explicitly hold that a regulatory takings claim is not precluded by the existence of a public purpose or the valid exercise of police power. *See City of Baytown v. Schrock*, 645 S.W.3d 174, 181 n.40 (Tex. 2022); *cf. Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 478 (Tex. 2012) (acknowledging *Lingle* but not ruling upon its applicability to Texas); *Hallco Texas, Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 61 n.6 (Tex. 2006) (same). Particularly given the common refrain from Texas lower courts to do exactly that. *Cf. Polecat Hill, LLC v. City of Longview*, 648 S.W.3d 315, 336 n.8 (Tex. App. 2021) ("Following *Agins*, the Texas Supreme Court has also applied the substantial advancement test to state regulatory-taking claims, but it has had no opportunity to address whether the test still applies in light of *Lingle*."); *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, No. 03-08-00790-CV, 2010 WL 143418, at *7 (Tex. App. Jan. 12, 2010) ("Following *Agins*, the Texas Supreme Court has also applied the substantial advancement test to state regulatory-taking claims, but it has had no opportunity to address whether the test still applies in light of *Lingle*."); *Texas Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 395 n.5 (Tex. App. 2008) ("The Texas supreme court has not addressed whether the substantial advancement test remains valid for purposes of Texas Constitutional law in light of *Lingle*."); *City*

of Sherman v. Wayne, 266 S.W.3d 34, 43 (Tex. App. 2008) ("The City points out that this formulation has been overruled by the United States Supreme Court in [*Lingle*]. The Texas Supreme Court has not yet addressed whether the substantial advancement test remains valid for Texas constitutional law purposes in light of *Lingle*."); *Park v. City of San Antonio*, 230 S.W.3d 860, 868 n.6 (Tex. App. 2007) ("The Texas Supreme Court has not addressed whether the substantial advancement test remains valid for Texas Constitutional law purposes in light of *Lingle*.").

It is also noteworthy that "[t]he Texas Supreme Court has described the legal battlefields of regulatory taking jurisprudence as 'a sophistic Miltonian Serbonian Bog.'" *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 591 (Tex. App. 2007) (citing *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978)). Candidly, the undersigned did not know what those words meant—either separately or together—and had to look them up. Which is all the more reason why the Court should resolve the standard of review for regulatory takings in Texas, as other states and other courts have done. *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1277–78 (Fed. Cir. 2009) ("[*Lingle*] itself signals the change in the law.… To the extent that other circuits have had the chance to visit the issue, those courts recognize that *Lingle* alters the calculus.… State courts which have addressed *Lingle* have come to a similar conclusion.… Commentators have likewise expressed their opinion that *Lingle* alters the takings landscape.") (citations omitted); *Washington Food Indus.*

Ass'n & Maplebear, Inc. v. City of Seattle, 524 P.3d 181, 196 (Wash. 2023); *Bottini v. City of San Diego*, 27 Cal. App. 5th 281, 309, 238 Cal. Rptr. 3d 260, 282 (Cal. Ct. App. 2018); *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 564 n.14 (Iowa 2017); *Diversified Holdings, LLP v. City of Suwanee*, 807 S.E.2d 876, 888 (Ga. 2017); *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 325 P.3d 1032, 1043 (Colo. 2014); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 610–11 (S.C. 2013); *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 891 N.E.2d 320, 324 (Ohio 2008); *Kafka v. Dep't of Fish, Wildlife & Parks*, 201 P.3d 8, 9–10 (Mont. 2008); *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 577 n.17 (Ind. 2007); *Vanek v. State Bd. of Fisheries*, 193 P.3d 283, 293 (Alaska 2008); *Richfield Landfill, Inc. v. State, Dep't of Nat. Res.*, No. 272519, 2008 WL 2439892, at *5 (Mich. Ct. App., June 17, 2008); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007); *El Paso Prod. Co. v. Blanchard*, 269 S.W.3d 362, 370 (Ark. 2007); *Korytkowski v. City of Ottawa*, 152 P.3d 53, 60 (Kan. 2007); *Wild Rice River Ests., Inc. v. City of Fargo*, 705 N.W.2d 850, 854 (N.D. 2005); *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 870 (Mass. 2005); *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 339 Or. 136, 152, 117 P.3d 990, 998–99 (Or. 2005); *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*, 702 N.W.2d 433, 447 (Wis. Ct. App. 2005).

Absent the clear repudiation of *Agins* and the expungement of police power from the consideration of takings claims, there would be little private property that the government could not simply take for free. As the Supreme Court warned long ago,

> when this seemingly absolute protection [of the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Mahon, 260 U.S. at 415. Accordingly, the Petition for Review should be granted.

Conclusion and Prayer

Amici Curiae Pacific Legal Foundation and Institute for Justice respectfully submit that this Court should grant the Petition for Review by Petitioner The Commons of Lake Houston, Ltd.; reverse the decision of the lower court; hold that the existence of a public purpose or use does not preclude a finding that an unconstitutional regulatory taking had occurred; and hold that its determination in *Turtle Rock* is not applicable to takings claims; together with such other and further relief as the Court deems reasonable, proper, and just.

DATED: August 23, 2023.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing brief was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on August 23, 2023.

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Certificate of Compliance

As required by Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the foregoing brief contains 3,873 words, excluding the parts of the brief that are exempted by Rule 9.4(i)(2)(D). I have relied on the word count of Microsoft Word for Office 365, the computer program used to prepare the document, in completing this certificate.

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