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 District Court of Appeals at Houston

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of the Petitioner The Commons of Lake Houston, Ltd.[1]

Issues Presented

1. The lower court erred in applying a bright-line flooding mitigation exception to the Texas Constitution's requirement of compensation for the taking, damaging or destruction of private property.

2. The lower court erred in applying a bright-line "police power" exception to the Texas Constitution's requirement of compensation for the taking, damaging or destruction of private property.

3. The lower court erred in failing to apply the state law standard of the Texas Constitution's takings clause, which allows for compensation when government action damages private property for public use.

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

Introduction and Summary of Argument

When a regulation dedicates private property rights to public use, without just compensation, it is contrary to the Fifth Amendment and unconstitutional. But the court below did not see it that way.

Instead, it gave categorical immunity to Respondent City of Houston from all regulatory takings claims, including as applied claims, because the City's regulation was substantially related to the public's health, safety, or welfare. When considering that almost all legislation and government action is done for the betterment of the public's health, safety, and welfare, the Court of Appeals' exemption is near tantamount to an erasing of the Takings Clause.

For this reason, and others, the "substantially related" takings test that the Court of Appeals used here was thrown into the trash bin almost 20 years ago by the U.S. Supreme Court. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–45 (2005). However, the Texas Supreme Court has yet to do the same. Therefore, this Court should abrogate the "substantially related/means-ends" test for regulatory takings and align Texas jurisprudence with that of the Supreme Court, as many other courts have

already done.[2] *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (Texas

[2] *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*, 302 Ga. 597, 610–11, 807 S.E.2d 876, 888 (Ga. 2017); *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 2014 CO 37, ¶¶ 42–45, 325 P.3d 1032, 1043 (Colo. 2014); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 298–300, 737 S.E.2d 601, 610–11 (South Carolina 2013); *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 2008-Ohio-3181, ¶¶ 20–21, 119 Ohio St. 3d 11, 15–16, 891 N.E.2d 320, 324 (Ohio 2008); *Kafka v. Dept. of Fish, Wildlife & Parks*, 2008 MT 460, 348 Mont. 80, 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. 2008); *Wensmann Realty, Inc. v. City of Eagan,* 734 N.W.2d 623, 639 (Minn. 2007); *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634, 644, 269 S.W.3d 362, 370 (Ark. 2007); *Korytkowski v. City of Ottawa*, 283 Kan. 122, 132, 152 P.3d 53, 60 (Kansas 2007); *Wild Rice River Ests., Inc. v. City of Fargo*, 2005 ND 193, ¶ 13, 705 N.W.2d 850, 854 (N.D. 2005); *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 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 (Oregon 2005); *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*, 2005 WI App 160, ¶ 40, 285 Wis. 2d 472, 501, 702 N.W.2d 433, 447 (Wis. Ct. of App. 2005).

regulatory takings law is consistent with federal law); *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238 (Tex. 2002) (Texas relies on "the United States Supreme Court's interpretation of the federal takings clause in construing our takings provision.")

The State of Texas itself would likely agree, as it recently explained in the Supreme Court case of *Devillier v. Texas*:

> The State of Texas takes property rights extremely seriously. Indeed, the Texas Constitution goes beyond the U.S. Constitution by providing that "[n]o person's property shall be taken, *damaged, or destroyed* for or applied to public use without adequate compensation being made, unless by the consent of such person." Tex. Const. art. I, §17 (emphasis added). Texas courts also decide takings claims and award full compensation under both the U.S. Constitution and the more protective Texas Constitution.

Respondent's Brief, *Devillier v. Texas*, U.S. 22-913, 2023 WL 8809537, at *1 (December 13, 2023). While Texas should certainly be applauded for providing its citizens with greater protection of private property rights, in this instance, it impermissibly provides them with less.

Accordingly, PLF submits this amicus brief in support of reversing and vacating the Court of Appeal's determination and reestablishing the Fifth Amendment's protection of private property. Specifically, this Court should hold, in accord with *Lingle*, that the substantially advances/means-ends regulatory takings test is abrogated as a matter of

Texas law; that the existence of a public purpose does not bar as applied regulatory takings claims as a matter of law; and, that a local government's adherence to a federal law or regulation does not bar as applied regulatory takings claims, as against the local regulation, as a matter of law.

Interest of Amicus 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.*, *Sheetz v. Cnty. of El Dorado, California*, 144 S.Ct. 893 (2024); *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474 (2021); *Knick v. Twp. of Scott, Pa.*, 588 U.S. 180 (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.

Argument

The Crossing at The Commons of Lake Houston is a 300-acre master planned community. The Petitioner is the developer and in 2017, it filed a general plan for 122.5 acres and platted the first two sections. The Respondent approved the water, sanitary sewer, drainage, and paving plans, and infrastructure work was started. By April 2018, Petitioner had invested millions of dollars in The Commons.

However, after Hurricane Harvey, the City made some changes to its floodplain regulation: namely, that structures within the 500-year floodplain must now be built at least two feet above the base flood elevation. This new mandate had a substantial negative impact upon The Commons. For numerous reasons, building higher buildings can add significant additional expense, to the point here, where much of this development was no longer economically feasible. The viable development area was reduced by 72% and more than half of the original lots became

too costly to build upon, including all of the signature waterfront lots. The Petitioner filed suit alleging that the ordinance was an unconstitutional taking pursuant to the Texas Constitution.

The Court of Appeals dismissed the Petitioner's action. *City of Houston v. Commons of Lake Houston, Ltd.*, No. 01-21-00369-CV, 2023 WL 162737 (Tex. App. Jan. 12, 2023). Relying exclusively upon the *Adolph* decision from the 5th Circuit Court of Appeals, it held that because Houston's flood control regulation was patterned after FEMA and National Flood Insurance Program regulations, the City was therefore entitled to categorical immunity from all regulatory takings claims, including as applied claims. *Id.* at *10 ("[W]here a local regulation states on its face that it tracks NFIP criteria, courts do not need to look any further to find that the regulation does not amount to a taking."), citing to *Adolph v. Fed. Emergency Mgmt. Agency of the U.S.*, 854 F.2d 732 (5th Cir. 1988).

The court below also held that as applied takings claims must be dismissed—again, as a matter of law—if the regulation at issue was "substantially related to the health, safety, or general welfare of the

citizens." *Id.* at *11. Here, the court followed *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). *Id.*

These holdings are two sides of the same coin. By definition, virtually all land use regulations must bear a "bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Consequently, dismissal of the claim because the government followed a particular land use regulation is simply a different way of saying that the government acted for the betterment of the public health, safety, morals, or general welfare. At their core, the Court of Appeals' twin rationales are indistinct.

The Court of Appeals erred in granting the government categorical immunity from as applied takings claims simply because the City acted in the best interests of the public. The Fifth Amendment presumes that the government's actions are not ultra vires, pursuant to a public use, and in accord with validly enacted legislation—and yet, still requires the payment of just compensation once the burden placed upon the property owner has gone too far. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("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.").

Why the government acted does not change the fact that private property rights were taken away, nor relieve the government of the constitutional duty to pay for what it took. Therefore, unlike the Court of Appeals' determination here, the Supreme Court, "[has] rejected [the public purpose] argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012).

I. *Adolph* Does Not Grant Categorical Immunity from As Applied Claims

The court below misread *Adolph,* a decision that is both factually and legally distinct from this case. *Adolph* neither provides categorical immunity for as applied takings claims under FEMA/NIPA, nor confers such immunity upon local governments. If following an existing statute created a blanket exemption to the Takings Clause, then the Takings Clause would cease to exist.

A. *Adolph* Is Factually Distinct

In *Adolph*, the owners took issue with FEMA regulations (and by

extension, a local Louisiana building ordinance) that mandated elevation requirements for new or additional structures. *Adolph*, 854 F.2d at 734. They brought a facial challenge to the entirety of the federal program. *Id.* at 737 ("[I]t is important to recognize that the plaintiffs are challenging … the entire Congressional scheme, and to hold in favor of them would require a holding that virtually the entire statute is unconstitutional. Obviously, such a holding would turn this carefully-crafted nationwide scheme on its head.").

The court held that, on its face, the land use regulation was not a categorical taking. *Id.* at 740. The result was not surprising. Facial regulatory takings claims are an "uphill battle," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987), and eschew any consideration of the regulation's character, its impact on any one property's economic use or economic value, or its impact upon a property owner's reasonable investment backed expectations. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 320 (2002). Facial determinations are disfavored as the "constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in

cases raising allegations of an unconstitutional taking of private property." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294–95 (1981) (cleaned up).

Adolph did not hold that as applied takings claims must be dismissed as a matter of law. If it did, it would have been an extraordinary decision—granting prospective blanket immunity to local regulations that did not even exist yet (and that were merely "adequate" and similar, but not identical to NIPA)[3] as against all future as applied claims under the Fifth Amendment.

Obviously, there are meaningful and important differences between facial claims and as applied claims. *Adolph*, therefore, has no bearing on this case, where Petitioner contends that under its specific facts and circumstances, the imposition of Houston's Flood Control Ordinance has worked an unconstitutional taking of its unique property. Petitioner also seeks only just compensation, not the invalidation of Houston's ordinance or federal regulations. To hold as applied claimants to *Adolph*'s facial standard would be an impossible burden and destroy the fundamental

[3] *Commons of Lake Houston*, 2023 WL 162737, at *8–9 (finding that the local legislation did not have to be identical to the NIPA regulations).

principle that the government cannot force a singular property owner to bear the full cost of public benefits. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the takings test bars the 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"). Therefore, *Adolph*'s rejection of a facial claim is not a sword with which to defeat the Petitioner's as applied claim.

B. *Adolph* Is Legally Distinct

Equally important is that *Adolph* was based upon a now abrogated principle of law. In holding that the FEMA regulation was not a facial taking, *Adolph* relied upon the fact that the regulation substantially advanced a legitimate state interest. *Adolph*, 854 F.2d at 737, adopting the decision in *Texas Landowners Rts. Ass'n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir. 1979).[4]

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[4] *Texas Landowners*, and the other cases on which *Adolph* relied, used the substantially advances/means-ends test. *Texas Landowners Rts. Ass'n*, 453 F. Supp. at 1031–32 (using reasonableness and a due process test to balance the interests of the government and the owner); *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255 (1983) (rejecting a facial claim following a review of reasonableness and the means and the ends); *Maple Leaf Invs., Inc. v. State, Dep't of Ecology*, 88 Wash. 2d 726 (1977) (a permit denial is not a

However, after *Adolph* was decided, the "substantially advances" rationale was abolished by the Supreme Court's determination in *Lingle.* 544 U.S. 528. As the Court 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.... **such a [due process] test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment**.... 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.... 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.

Id. at 542 (emphasis added); *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 [] had gone seriously awry.").

Considering the above, the Court of Appeals erred in dismissing the Petitioner's as applied regulatory takings claim based upon *Adolph* and a now defunct principle of regulatory takings law.][[[[[[[[[[[[[[[[[[[[[

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taking because of the rationale relationship between the ordinance and its goals).

C. Legislation Cannot Confer Immunity from As Applied Claims

Lastly, the singular fact that a local regulation follows from a federal regulation does not then grant the local government categorical immunity from all as applied regulatory takings claims. If it did, that would mean that federal legislation is of a higher power than the U.S. Constitution. But it is legislation that must be subject to the Constitution; not the Constitution that must bow down to legislation. Consequently, *Adolph* does not grant the government categorical immunity from as applied regulatory takings claims, regardless of whether the local ordinance was following FEMA and NIPA regulations. Two prominent Supreme Court cases make this point clear.

In *Mahon*, coal was being mined underneath the surface lands of others, with deadly and destructive consequences. 260 U.S. at 412. The digging below caused havoc above with "wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the commonwealth."

Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 496 (1922). To protect the public health and safety, Pennsylvania passed the Kohler Act which prohibited any mining that could cause the collapse of the property above; but also destroyed the coal companies' deeded mineral rights in the process. *Mahon,* 260 U.S. at 412–13.

Notwithstanding the regulation's very important public purpose, the legislation was not allowed to trump the Fifth Amendment. This is because "the question at bottom is upon whom the loss of the changes desired should fall." *Id.* at 416. The Court found a regulatory taking and issued its now famous rejoinder:

> [t]he 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…. 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.

Id. at 415–16 (cleaned up).

The second case is *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). There, the disputed regulation prohibited the development of Lucas' beachfront property in order to prevent "serious public harm." *Lucas v. S.C. Coastal Council*, 304 S.C. 376, 378 (1992). Namely, its goal was to save the beachfront and stop the related potential destruction of

existing private homes. But again, the important public purpose of the regulation did not change the fact that this was still a taking. *Lucas*, 505 U.S. at 1019. Even if the proposed use was "noxious," the Court held that just compensation still had to be paid. *Id.* at 1026 ("*A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.").[5]

Considering the above, Houston does not get categorical immunity from as applied regulatory takings claims simply because its floodplain ordinance was patterned after a NIPA regulation. If Pennsylvania was not categorically immune with regard to a regulation that stopped coal companies from destroying property and killing citizens, and if South Carolina was not categorically immune with regard to a regulation that

[5] Only if the property's use was always proscribed, regardless of whether or not there was a regulation to proscribe it, could the government avoid takings liability. *Id.* at 1030 ("The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.") (emphasis in original).

protected existing homes and valuable beachfront from destruction, then Houston cannot receive categorical immunity here with respect to an elevation requirement.

II. Acting in the Public Interest Does Not Grant Categorical Immunity from As Applied Takings Claims

The Court of Appeals also held that a regulation's reasonable relationship to the public health, safety, or welfare, meant that no just compensation need be paid—as a matter of law and including with respect to as applied claims. That is the exact opposite of what it should be. And in fact, the Court of Appeals' argument here resembles the rejected argument of the dissent in *Mahon*. *See Commons of Lake Houston, Ltd.*, 2023 WL 162737, at *11 ("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."); *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting) ("But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.")

Instead, "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." *Mahon*, 260 U.S. at 416. The Fifth Amendment presupposes public use, *id.* at 415, and as such, the Supreme Court has repeatedly stated that if private property is being put to public use, then the public must pay for it. *See, e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656–57 (1981) (Brennan, J., dissenting from dismissal of the appeal on ripeness grounds) ("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.")

The Takings Clause can thus 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).

This is because 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). To hold otherwise, as the court below did here, would be to nullify the Takings Clause. *See Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (drawing the line between takings and non-takings "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.").

For its part, the lower court relied heavily upon the Texas Supreme

Court's decision in *Turtle Rock. Commons of Lake Houston, Ltd.*, 2023 WL 162737, at *11, discussing *Turtle Rock Corp.*, 680 S.W.2d 802. Similar to *Adolph*, *Turtle Rock* excused the taking of private property without just compensation if it was substantially related to a legitimate state interest. *Turtle Rock Corp.*, 680 S.W.2d at 805. And in that respect, *Lingle* likewise puts to rest the misconception that the existence of a public purpose precludes a takings claim. *Lingle*, 544 U.S. at 543 (public purpose is "logically prior to and distinct from" whether the regulation is a taking. The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation in the event of *otherwise proper interference* amounting to a taking"); *San Diego Gas & Elec. Co.*, 450 U.S. at 647 (Brennan, J., dissenting) ("[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.").

In light of the above, the decision of the court below must be reversed. If the mere presence of public purpose, or some related federal regulation, absolves the local government from the requirements of the

Takings Clause, there would be no 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.

Conclusion and Prayer

Amicus Curiae Pacific Legal Foundation respectfully submits that this Court should reverse and vacate the decision of the Court of Appeals; hold, in accord with *Lingle*, that the substantially advances regulatory takings test is abrogated as a matter of Texas law; that the existence of a public purpose does not bar as applied regulatory takings claims as a matter of law; and, that a local government's adherence to a federal law or regulation does not bar as applied regulatory takings claims as against the local regulation as a matter of law; together with such other and further relief as the Court deems reasonable, proper, and just.

DATED: June 12, 2024.

Respectfully submitted,

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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 June 12, 2024.

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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 4,516 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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Arturo G.Michel		arturo.michel@houstontx.gov	6/12/2024 2:09:41 PM	SENT
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Patricia L.Casey		pat.casey@houstontx.gov	6/12/2024 2:09:41 PM	ERROR

Associated Case Party: Pacific Legal Foundation

Name	BarNumber	Email	TimestampSubmitted	Status
Brien Bartels		bbartels@pacificlegal.org	6/12/2024 2:09:41 PM	SENT