No. 06-0481

IN THE
SUPREME COURT OF TEXAS

THE CITY OF SAN ANTONIO,
Petitioner/Cross-Respondent,

v.

EL DORADO AMUSEMENT COMPANY, INC.,
Respondent/Cross-Petitioner.

On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas

BRIEF OF *AMICI CURIAE* OF THE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

IN SUPPORT OF PETITIONER THE CITY OF SAN ANTONIO

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Other Authorities **Page**

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Petitioner's Brief on the Merits.

STATEMENT OF JURISDICTION

Amici adopt the Statement of Jurisdiction in Petitioner's Brief on the Merits.

ISSUE PRESENTED

Whether a zoning ordinance banning the sale of alcohol -- enacted in response to a shooting and more than 100 complaints by local businesses and neighborhood residents regarding alcohol-related criminal and nuisance activity such as drunk driving, public urination, fighting, and other dangerous conduct -- constitutes a regulatory taking merely because the ordinance reduced the rent the owner could charge and diminished the market value of the property by an unspecified amount, where the owner sold the site for 84 percent of its original purchase price and recouped other investments by charging $10,000 per month in rent over many years?

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IN SUPPORT OF PETITIONER THE CITY OF SAN ANTONIO

TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae respectfully submit this brief under Texas Rule of Appellate Procedure 11 in support of the "Petition for Review" and "Brief on the Merits" filed by Petitioner City of San Antonio seeking review and reversal in part of a decision of the Fourth Court of Appeals at San Antonio.

INTEREST OF *AMICI CURIAE*

The Texas Municipal League is a non-profit association of approximately 1,080 Texas cities. The Texas City Attorneys Association, an affiliate of the Texas Municipal

League, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from approximately 1,400 municipalities across the country. IMLA serves as the legal voice for the nation's local governments.

Municipal officials are responsible for what the U.S. Supreme Court calls "the commendable task" of land use regulation. *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). *Amici* thus bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning and other community protections. Because the appellate court ruling presents a grave threat to reasonable land use planning, *Amici* respectfully request this Court to grant the petition for review and reverse the appeals court ruling in relevant part.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the City of San Antonio's Petition for Review and in its Brief on the Merits.

SUMMARY OF THE ARGUMENT

More than a century ago, in *Mugler v. Kansas*, 123 U.S. 623 (1887), the U.S. Supreme Court rejected a regulatory takings challenge to a state law banning the sale or manufacturer of intoxicating liquors throughout the entire state. Nevertheless, the court of appeals below held that the City of San Antonio "took" property used as a nightclub by

enacting a far narrower law that also prohibited the sale of alcoholic beverages. *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. Ct. App. 2006). The appellate court's ruling is both radical and incoherent, one that plainly warrants this Court's review and reversal of the appellate court judgment in relevant part.

In addition to the severe tension the lower court ruling creates with *Mugler,* it warrants reversal because it is fundamentally inconsistent with well-established takings jurisprudence, and thereby threatens reasonable land use planning in general. As reaffirmed in the recent, unanimous ruling in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), government land use controls work a regulatory taking only where the economic impact on the market value of the property is so severe as to constitute the "functional equivalent" of an actual appropriation of the land. Here, there are no findings of the value of the land at issue immediately before enactment of the challenged ordinance. After the ordinance was enacted, El Dorado Amusement Company sold the site for $418,000, a sale that by itself recouped 84 percent of its asserted initial investment, without even counting the many years of substantial profits it enjoyed by renting out the site at $10,000 per month, or $120,000 annually. And even if one were to credit the unreliable testimony of El Dorado's expert regarding a purported 36.6 percent loss in value, that alleged loss still would not support a regulatory takings claim.

To our knowledge, no other court in Texas or anywhere else in the country has found a compensable taking on facts similar to these. The ruling ignores the plain meaning of the Takings Clause, as well as decades of constitutional precedent.

An unduly broad application of the Takings Clause to the challenged government action also ignores the reciprocity of advantage to all business owners and landowners that results from municipal efforts to fight crime, enforce basic municipal protections, and provide a safe community for all citizens. Texas taxpayers should not be forced to compensate a landowner when government action helps to prevent repeated violations of criminal provisions that protect everyone's safety and thereby enhance everyone's property values.

ARGUMENT

There is no need for *amici* to repeat the scholarly analysis of regulatory takings jurisprudence presented by the City of San Antonio. Instead, we hope to assist the Court by demonstrating: (1) the challenged government action does not constitute the "functional equivalent" of an actual expropriation of land and thus should not be deemed a taking under long-settled takings precedent, and (2) efforts like San Antonio's to respond to criminal behavior and municipal code violations yield the reciprocity of advantage that benefits all landowners, and thus should not be discouraged through an inappropriately broad application of the Takings Clause.

I. The Challenged Rezoning Is Not a Taking Because It Does Not Even Come Close to Approximating a Physical Appropriation of Property.

The court of appeals held that a 1999 rezoning ordinance worked a regulatory taking of property used as a nightclub because the ordinance prohibited the sale of alcoholic beverages, thereby reducing the land's value by some amount unspecified by the court. The ordinance was enacted in response to a shooting at the property and

complaints of many alcohol-related offenses, including fights, public urination, and driving while intoxicated by patrons. In the three years prior to the shooting, there were more than 100 calls for police services at the site and many complaints from local citizens and nearby businesses who feared for their safety and for the viability of their own businesses. *See* City's Brief on the Merits at 1-3 (citing the Clerk's Record and Supplemental Clerk's Record).

The appeals court made no effort to reconcile its holding with *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the U.S. Supreme Court refused to sustain a takings challenge to a state law banning the sale or manufacturer of intoxicating liquors throughout the entire state. The ban at issue in *Mugler* undoubtedly upset the settled expectations of Kansas breweries and others, and it materially reduced the value of buildings and machinery. *Id.* at 657. Nevertheless, the court upheld the ban as part of the state's police power to promote health and safety: "[G]overnment may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113 (1877)). The U.S. Supreme Court continues to cite *Mugler* with approval. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 n.13 (1992) (citing *Mugler* with approval for rejecting a takings challenge to a "prohibition upon use of a building as a brewery [where] other uses [were] permitted"); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 126 (1978) (citing *Mugler* with approval).

In addition to these fundamental principles established more than a century ago in *Mugler*, the regulatory takings claim here fails due to insufficient economic impact on the

value of the property. El Dorado purchased the site in the early 1980s, and asserts that it paid roughly $500,000. Although El Dorado made additional investments during the next eighteen years, it also reaped considerable profits by renting the site for $10,000 per month for more than a decade. *City of San Antonio*, 195 S.W.3d at 246-47. After the challenged alcohol ban was enacted, El Dorado was able to sell the site for $418,000. *Id.* at 247. Through this sale alone, El Dorado recouped 84 percent of its purported initial investment, and that does not even consider the many years of profits it enjoyed by renting out the site at $120,000 annually for many years prior to the ban, and for sizeable amounts thereafter. *Id.* El Dorado's owner testified expenses on the property were $12,000 annually (El Dorado Merits Brief at 6), and thus its profits over these many years were more than enough to recoup its subsequent investment.

In considering economic impact under *Penn Central*, a court must "compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987). In other words, the relevant calculation compares the value of the property immediately before enactment of the challenged ordinance with the value immediately after enactment. *Accord, Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003) ("the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action," citing *Keystone*). In contrast, as noted in *Andrus v. Allard*, 444 U.S. 51 (1979), loss of future profits "provides a slender reed upon which to rest a takings claim." *Id.* at 66.

The trial court made no factual findings regarding loss in market value attributable to the challenged government action, a failure that, standing alone, precludes the imposition of takings liability on this record. Although El Dorado's expert testified that the property lost at most only 36.6 percent of its market value as a result of the alcohol ban ($660,000 purported value without the ban minus the $418,000 recouped by the sale = $242,000, or an alleged 36.6 percent value loss), the City has demonstrated that this estimate is inflated and unreliable. *See* City Brief on the Merits, at 43-48. But even using this unreliable figure, we show below there has been no taking.

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), this Court recognized that land use regulations may work a taking where they "either (1) deny landowners of all economically viable use of their property or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Id.* at 933, 935. The first prong of *Mayhew* refers to per se takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the second prong refers to non-per se takings analyzed under the multifactor test articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See Mayhew*, 964 S.W.2d at 935-36 (discussing *Lucas* and *Penn Central*).

The U.S. Supreme Court's unanimous ruling in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), provides critical guidance regarding how to apply these liability standards. In its comprehensive review of regulatory takings jurisprudence, the *Lingle* court acknowledged that "[e]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lingle*, 544 U.S. at 537 (quoting *Lucas*, 505 U.S. at 1028 n.15). Thus, a regulatory taking occurs only in the extraordinary

circumstance that regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* The court went on to explain that *all* measures of regulatory takings liability "share a common touchstone" because each seeks "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. The *Lucas* per se rule, for example, properly identifies a regulatory taking because the complete elimination of a property's value is the functional equivalent of a physical appropriation. *Id.* (citing *Lucas*).

Lingle makes clear that the multifactor *Penn Central* test also turns largely on economic impact and seeks to identify those extreme regulations that act as the functional equivalent of an expropriation. *Id.* at 540 (discussing *Penn Central*); *accord Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (a regulatory taking occurs when "a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation"); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985) (In regulatory takings cases, a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.").

The reason for this circumscribed application of the Takings Clause is plain: the Takings Clause by its terms applies only to takings of property. As noted above, prior to the U.S. Supreme Court's landmark ruling in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct

appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). This narrow, original application flows from the text of the Takings Clause itself, which applies only where private property is "taken," a term that most naturally refers to a physical appropriation of property. *See* Fred Bosselman, et al., THE TAKING ISSUE 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.")

To be sure, in the landmark *Mahon* decision, the Court held that land use regulation may constitute a taking. *Mahon*, 260 U.S. at 415. But, with due fidelity to the text and original understanding of the Takings Clause, the Court has carefully confined the doctrine of regulatory takings to restrictions that closely approximate physical appropriation. In *Mahon*, the Court found that the mining ban at issue worked a taking because "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Sixty years later the Court reaffirmed that in regulatory takings cases, a court's task is to "distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County*, 473 U.S. at 199.

Because *Lucas* instructs that a complete value loss is the functional equivalent of an expropriation, it would be odd indeed if the *Penn Central* test applied far more broadly. In fact, the history of takings jurisprudence shows that *Penn Central* also

requires an extremely severe, near-complete value loss before a regulation is deemed to be the functional equivalent of an expropriation. The *Penn Central* court cited cases in which no taking was found despite value losses exceeding 75 percent. *See Penn Central*, 438 U.S. at 131 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking despite a 75 percent value loss) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite a value loss exceeding 85 percent)); *accord*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (no facial taking where new zoning allowed only 1 to 5 homes on a 5-acre tract). In other words, even under the *Penn Central* multi-factor inquiry, land use controls constitute a taking only in the most "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

The Supreme Court of Colorado has provided an excellent analysis of the scope of the *Penn Central* standard in *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001). After reviewing the relevant precedents, the *Animas* court concluded "it is apparent that the level of interference must be very high" for a taking claim under *Penn Central* to succeed. *Id.* at 65 (emphasis added). The *Animas* court ruled that, to prevail under *Penn Central*, a claimant "must show that it falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation." *Id.* at 67.

The *Animas* court drew this "slightly-greater-than-de-minimis" standard from several sources. It observed that "the likely purpose of the fact-specific test is to provide an avenue of redress for a landowner whose property retains value that is slightly greater

than de minimis," citing *Lucas*'s discussion of the *Penn Central* factors in response to concerns that its per se rule does not cover a landowner whose property is diminished in value by 95 percent. *Id.* at 65. The *Animas* court also relied on *Euclid*, *Hadacheck*, and *Agins* as examples of cases finding no taking notwithstanding significant value losses and interference with investment-backed expectations. *Id.* The *Animas* court concluded that the *Penn Central* test provides "a safety valve to protect the landowner in the truly unusual case," *id.*, one where the land retains "a value slightly greater than de minimis." *Id.* at 66.

Just a few months ago, the Supreme Judicial Court of Massachusetts likewise rejected a takings challenge to a wetlands protection regulation that resulted in a value decrease of twenty-nine percent (from $452,700 to $319,000), emphasizing that "[t]his decrease is not significant enough to rise to the level of a taking." *Giovanella v. Conservation Comm'n of Ashland*, 447 Mass. 720, 734, 857 N.E.2d 451 (Nov. 28, 2006); *see also id.* (noting that once the court properly defined the relevant parcel, "it becomes clear that the economic impact of the wetlands protection bylaw did not rise to the level of a taking"). In reaching this conclusion, the *Giovanella* court relied on precedent rejecting takings challenges to government action that reduced value seventy-eight, ninety-two, and twenty-six percent. *Id.* at 734-35 (citing *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (no taking where regulation value on two lots decreased by seventy-eight and ninety-two per cent) and *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 & n.5 (1991) (no taking after value decreased by twenty-six percent from $19 million to $14 million)).

Many other courts have reached the same conclusion. *See, e.g., District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) ("[A] claimant must put forth striking evidence of economic effects to prevail even under the [*Penn Central*] ad hoc inquiry."); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting a takings challenge where regulation caused a fifty percent value loss); *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996) (no taking where the claimant failed to show a deprivation of all beneficial use); *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) ("[T]he only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property."); *Jengten v. United States*, 657 F.2d 1210 (Ct. Cl. 1981) (rejecting a takings challenge where regulation prohibited development on 75 percent of the claimant's land); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531 (Wisc. 1996) (rule emerging from state courts requires very substantial loss of use and value to show a regulatory taking).

Consistent with these precedents, this Court also has held that a land use regulation did not have a sufficiently severe economic impact to work a taking merely because it allegedly eliminated the land's profitability. *See Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994) (the Takings Clause "does not charge the government with guaranteeing the profitability of every piece of land subject to its authority").

Unless reversed, the ruling below would have a severe adverse impact on Texas takings jurisprudence and municipal land use planning. The appellate court's ruling threatens to open the floodgates to takings challenges, regardless of whether the property

retains significant value or whether claimant would continue to make profitable use of the property. If allowed to stand, the appellate court ruling would improperly inject the judiciary into the minutiae of the municipal land use process as landowners bring takings challenges to all kinds of land use controls that limit only a single use but permit other uses. Such an approach would violate this Court's admonition in *Mayhew* that "courts should not assume the role of a super zoning board." *Mayhew*, 964 S.W.2d at 933.

II. El Dorado's Other Complaints with the Challenged Rezoning Do Not Overcome the Fatal Deficiencies in its Takings Claim, and They Ignore the Benefits El Dorado Received from Similar Government Action to Promote Public Safety throughout the City.

El Dorado's central contention seems to be that it was "singled out" for special treatment. Three responses are in order.

First, there certainly are situations in the context of land use planning in which singling out is entirely appropriate due to the unique harm posed by particular activity at a specific site. To take an obvious example, no one has the right to build a nuclear power plant on an earthquake fault, and government officials would be completely justified in singling out a landowner for special treatment to prevent this from happening. *Cf. Lucas*, 505 U.S. at 1029 (discussing harmful use scenarios). Here, El Dorado has failed to establish that the challenged rezoning was an unreasonable response to the repeated complaints of alcohol-related criminal conduct at the El Dorado site.

Second, even where local officials single out landowner for special treatment in an unfair or arbitrary way, the proper remedy is not a takings claim. Other legal theories provide relief from arbitrary government action, including due process theories, but the

Takings Clause does not concern itself with the reasonableness of government action. As the U.S. Supreme Court made clear in *Lingle*, government action "may be so arbitrary or irrational that it runs afoul of the Due Process Clause * * * [b]ut such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle*, 544 U.S. at 542. The issues El Dorado raises regarding the procedural propriety of the City's action and alleged spot zoning have no bearing on whether the economic impact of that action on the value of the site was of sufficient magnitude to constitute a regulatory taking. Clarity of the law requires that these analytical theories be kept distinct and applied according to their appropriate standards.

Third, judicial insistence on a near-total value loss as a predicate for takings liability derives not only from the text, structure, and history of the Takings Clause, and not only from the precedent discussed above, but also from compelling functional and equitable justifications. In particular, courts long have recognized that landowners who challenge government action as a taking often enjoy a large portion of their value due to a "reciprocity of advantage" from the kind of government action they challenge. Because zoning as a general matter affords all landowners a "reciprocity of advantage," courts should be especially reluctant to conclude that adherence to a particular zoning restriction works a taking. *E.g.*, *Tahoe-Sierra*, 535 U.S. at 341 (reciprocity of advantage exists where temporary land use controls prevent development "that might be inconsistent with the provisions of the plan that is ultimately adopted"); *Keystone,* 480 U.S. at 491 ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

Here, the pre-ban value of El Dorado's land surely was based in part from the relative stability and security derived from ensuring that other businesses in the neighborhood and city are conducted in a manner that complies with the law, and in particular from promoting public safety and crime reduction. Indeed, San Antonio was recently ranked as the seventh safest U.S. city with populations over 500,000, on a top-ten list that remarkably includes three other Texas municipalities. *See* Morgan Quitno Awards: 13th Annual America's Safest Cities, *available at* http://www.morganquitno.com/cit07pop.htm (last visited February 5, 2007) This commendable ranking redounds to everyone's benefit by promoting a safe business environment, increasing tourism, and enhancing land values.

It is difficult to speculate how much El Dorado's property would have been worth if the City of San Antonio refused altogether to take reasonable efforts to prevent dangerous criminal activity. Suppose other business establishments in the neighborhood had patrons that engaged in criminal activity, but the City had done nothing in response. Land values throughout the area would have suffered, including El Dorado's.

This reciprocity of advantage also lies at the heart of the *Mugler*'s Court's insistence that courts should be especially deferential to government action designed to prevent harm, such as the rezoning here. Because government action designed to prevent harm to the community redounds to everyone's benefit, courts should be very reluctant to deem such action to be a taking, even where the action reduces the value of specific property, as was the case in *Mugler* and is the case here. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 J. of Envtl. L. 171, 193-95, 207 (2006) (explaining how

Mugler's harm-prevention rationale applies in analyzing the character of the government action under *Penn Central*, and concluding that "[l]egislators are entitled to make normative judgments about what activities are harmful to their constituents, and those judgments are entitled to respect from the courts").

As a matter of simple fairness, because El Dorado undoubtedly benefited from other municipal efforts to control crime, the Takings Clause requires it to demonstrate an extremely severe, near-total loss in value before the challenged government action will be deemed a taking. It has fallen far short of sustaining that burden.

PRAYER

Amici respectfully request that this Court grant the City's Petition for Review, reverse the court of appeals' judgment in relevant part, enter a judgment in favor of the City, and grant such other relief, general or special, at law or in equity, to which the City of San Antonio may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Amici Brief of the Texas Municipal League, the Texas City Attorneys Association, and the International Municipal Layers Association was sent by first class mail, to the following parties on this 1st day of March, 2007.

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