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## The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo's Inverse Condemnation Case against the City of Houston

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## ARTICLE

### THE CASE FOR THE RODEO: AN ANALYSIS OF THE HOUSTON LIVESTOCK SHOW AND RODEO'S INVERSE CONDEMNATION CASE AGAINST THE CITY OF HOUSTON

EMILIO R. LONGORIA\*

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## I. INTRODUCTION

On March 11, 2020, the City of Houston (the City) did the unthinkable. The City canceled the Houston Livestock Show and Rodeo for the first time since its inception in 1932.<sup>1</sup>

For those unaware, “the Rodeo,” as it is referred to in Houston, is a big deal. Somewhere along the party spectrum between Mardi Gras and a calf-fry, the Rodeo is an annual non-profit event put on by a mix of volunteers<sup>2</sup> and paid staff to “promote[] agriculture,” “educate[] and entertain[] the public,” “showcase[] Western heritage, and provide[] year-round educational support within the community.”<sup>3</sup> Not your average venue for *bulldogging* and *bronc riding*, the Rodeo is “the world’s largest entertainment and livestock exhibition,” featuring competitors from all over the globe, and it is the City’s “signature event” of the year.<sup>4</sup> In 2019, for instance, the Rodeo attracted over 2.5 million attendees,<sup>5</sup> had more than a quarter-billion dollar economic impact on the greater Houston area, and supported over 5,000 jobs.<sup>6</sup> Its regular contributions to Houston’s rich socio-cultural landscape are also noteworthy as, each year, the Rodeo awards over 800 college scholarships to student art and livestock exhibitors,<sup>7</sup> and it hosts one

1. See Mike Morris, Jasper Scherer & Dylan McGuinness, *Houston Rodeo Canceled Over Coronavirus Concerns, Prompted by Montgomery County Case*, HOUS. CHRON. (Mar. 12, 2020, 10:55 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/houston-rodeo-shut-down-coronavirus-concerns-15123010.php> [https://perma.cc/LZ7M-6ARF] (reporting on the cancellation of the Rodeo in light of growing concerns about community spread).

2. One of the distinctive features of the Rodeo is its large, devoted volunteer workforce. See Alexis Grant, *Cost of Rodeo Volunteering Big but Perks Follow*, HOUS. CHRON. (Mar. 14, 2008, 5:30 AM), <https://www.chron.com/life/rodeo/article/Cost-of-rodeo-volunteering-big-but-perks-follow-1598691.php> [https://perma.cc/J8YS-CYMH] (introducing the Rodeo’s volunteer corps).

3. *Mission Statement*, HOUS. LIVESTOCK SHOW & RODEO (Apr. 28, 2020), <https://www.rodeohouston.com/About-Us/Who-We-Are> [https://perma.cc/E986-CTT9].

4. *It’s the World’s Largest Event of Its Kind: The Annual Houston Livestock and Rodeo*, TOUR TEX. (Apr. 28, 2020), <https://www.tourtexas.com/articles/32/it%27s-the-world%27s-largest-event-of-its-kind-the-annual-houston-livestock-and-rodeo> [https://perma.cc/9RMG-VZ6G].

5. See *Attendance*, HOUS. LIVESTOCK SHOW & RODEO (Apr. 28, 2020), <https://www.rodeohouston.com/About-Us/Who-We-Are/Attendance> [https://perma.cc/7HDD-ZXDA] (denoting all grounds activities at the 2019 Rodeo totaled 2,506,263 attendees).

6. See *2019 Economic Impact*, HOUS. LIVESTOCK SHOW & RODEO (June 25, 2019), <https://www.rodeohouston.com/News/Article/ArtMID/494/ArticleID/2544/2019-Economic-Impact> [https://perma.cc/5HDK-D3KR] (“The 2019 Houston Livestock Show and Rodeo generated a total economic impact of \$227 million and total economic activity of \$391 million in Greater Houston . . .”).

7. See *Commitment*, HOUS. LIVESTOCK SHOW & RODEO (Apr. 13, 2020), <https://www.rodeohouston.com/Educational-Support/Commitment#Scholarships> [https://perma.cc/KLY6-3JKQ] (stating the Rodeo is “one of the largest scholarship providers in the [United States]”).

of the more star-studded music festivals in the area. Since its inception, for example, the Rodeo has hosted the likes of Elvis Presley, Bob Dylan, Beyoncé, Taylor Swift, and Willie Nelson.<sup>8</sup>

So, when Sylvester Turner, the Mayor of Houston (the Mayor), ordered the Rodeo to close its gates due to growing concerns over the coronavirus pandemic, more than a few feathers were ruffled. Rodeo goers *were madder than a wet hen*,<sup>9</sup> local news stations rushed to the closing Rodeo grounds to capture the teary-eyed reactions of student exhibitors,<sup>10</sup> and at least one City Council member published his strong opposition to the Mayor's decision.<sup>11</sup>

But perhaps more importantly, many lost their jobs. Forced to close, the Rodeo could no longer afford much of the unskilled paid labor used to staff its events.<sup>12</sup> The cancellation forced many of the vendors who depend on the Rodeo for their livelihood into a precarious position.<sup>13</sup> Not only were

8. See *Past Entertainers*, HOUS. LIVESTOCK SHOW & RODEO (Apr. 13, 2020), <https://www.rodeohouston.com/About-Us/History/Past-Entertainers> [https://perma.cc/PWJ6-PTU5] (listing various artists who have performed at the Rodeo).

9. See Brooke A. Lewis, *What Are You Talking About? Visitors React with Disbelief to Houston Rodeo Cancellation*, HOUS. CHRON. (Mar. 12, 2020, 10:56 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/What-are-you-talking-about-Visitors-react-15123867.php> [https://perma.cc/9S3W-W982] (providing testimony from many individuals who were disappointed about the cancellation); see also Erica Ponder, *Social Media Erupts After Rodeo is Canceled amid Coronavirus Concerns*, CLICK2HOUSTON (Mar. 11, 2020, 1:05 PM), <https://www.click2houston.com/rodeo/2020/03/11/social-media-erupts-after-rodeo-is-canceled-amid-growing-coronavirus-concerns/> [https://perma.cc/4QZ2-7T4Q] (“People get the flu daily, but we cancel this event because 25 people have this in our state . . . wow! Overreact much? I feel bad for the kids, rodeo participants and volunteers that have worked so hard to either participate or volunteer for the rodeo. Lot[s] of money and time wasted.”).

10. See KTRK Houston, *Rodeo Goer's Emotional Reaction to Cancellation*, YAHOO! (Mar. 12, 2020), <https://news.yahoo.com/rodeo-goers-emotional-reaction-cancellation-191054640.html> [https://perma.cc/K3RU-Z6Y9] (showing one Rodeo exhibitor's emotional response to the closure).

11. See Greg Travis, Houston City Council Member District G, *Press Release* (Mar. 11, 2020), <https://myemail.constantcontact.com/Council-Member-Travis-Objects-to-Rodeo-Cancellation.html?oid=1102998498508&aid=a9UGyix95Q> [https://perma.cc/TU9C-MWYF] (showing the reaction of Greg Travis, a member of Houston's city council, who released a public statement rebuking the Mayor for turning Houston in to a “nanny state,” which prevented its “residents . . . [from] determin[ing] for themselves whether or not [participating in] public activity [wa]s a worthwhile gamble”).

12. See Peter Holley, *Houston Rodeo Calls It Quits Over Coronavirus Concerns*, TEX. MONTHLY (Mar. 11, 2020), <https://www.texasmonthly.com/the-culture/houston-rodeo-calls-it-quits-over-coronavirus-concerns/> [https://perma.cc/9MYW-3NXJ] (journaling the economic impact of the Rodeo on Houston).

13. See *Houston Rodeo Vendors Scramble After Cancellation*, KHOU 11 (Mar. 11, 2020, 7:04 PM), <https://www.khou.com/video/news/health/coronavirus/houston-rodeo-vendors-scramble-after->

the vendors deprived of an opportunity to sell their goods at the Rodeo, in several cases they had encumbered themselves with large loans to pre-order the inventory they planned to sell.<sup>14</sup> But what was the City's alternative? Houston's Mayor appeared to be responding to a credible threat. At least four individuals confirmed to have contracted the coronavirus attended the Rodeo,<sup>15</sup> and the virus's proliferation rate was well documented.<sup>16</sup> In all fairness, the Rodeo needed to be closed to help "flatten the curve."<sup>17</sup>

But our forefathers long ago envisioned that this horse trade might happen. That at some point, an unlucky few would need to sacrifice their property rights for the benefit of all. And their solution was clear: if the government finds itself in the uncomfortable situation of needing to take "private property" for a "public use," it has a duty to provide those unlucky landowners with "just compensation" for the property taken.<sup>18</sup> In doing so, the Government "prevents the public from loading upon one individual more than his just share of the burdens of government . . ."<sup>19</sup> Giving "just compensation" in exchange for private property taken for public use ensures "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the 'great ob[jects] of

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cancellation/285-628a502c-7c3f-4d31-af88-696fe5ff169d [https://perma.cc/3Q7V-2468] (reporting on vendors' expected losses due to the cancellation).

14. See *id.* ("One longtime vendor that we spoke with said that [they] expect[] to lose \$100,000 and maybe more this year.").

15. Emily Foxhall, *Four Coronavirus Cases Connected to Houston Rodeo Cookoff Tent, Organizer Says*, HOUS. CHRON. (Mar. 16, 2020, 9:12 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Four-coronavirus-cases-connected-to-Houston-rodeo-15136030.php> [https://perma.cc/M9XY-LW49].

16. See Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and How to "Flatten the Curve"*, WASH. POST (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator/> [https://perma.cc/6VEU-ND35] (providing a hypothetical disease in hypothetical towns to illustrate the high contagiousness of Coronavirus).

17. See Denise Chow & Jason Abbruzzese, *What is 'Flatten the Curve'? The Chart that Shows How Critical It Is for Everyone to Fight Coronavirus Spread*, NBC NEWS (Mar. 11, 2020, 1:15 PM), <https://www.nbcnews.com/science/science-news/what-flatten-curve-chart-shows-how-critical-it-everyone-fight-n1155636> [https://perma.cc/B97A-AK5Y] ("The catchy phrase refers to a so-called epidemic curve that is commonly used to visualize responses to disease outbreaks—and illustrates why public and individual efforts to contain the spread of the virus are crucial.").

18. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); see also TEX. CONST. art. I, § 17(a) ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .").

19. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

Gov[ernment].”<sup>20</sup> Moreover, and perhaps more importantly, it guarantees “stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.”<sup>21</sup> For these reasons, this Article argues Houston’s Mayor effectuated a compensable taking under both the Fifth Amendment to the United States Constitution, by and through 42 U.S.C. § 1983,<sup>22</sup> and Article 1, Section 17 of the Texas Constitution, when he forced the Rodeo to close its gates.

Now, to those unfamiliar with federal and Texas jurisprudence surrounding the issue of eminent domain, this may seem like a no-brainer. Of course, Houston’s municipal government should provide compensation for the property rights it took when it forced the Rodeo’s closure because—but for the Mayor’s actions—the Rodeo would have operated happily! Though a lack of forced closure may have meant reduced attendance and revenue in light of concerns about the coronavirus, such are the risks of property ownership.<sup>23</sup> However, the law surrounding takings is not so simple. “[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking,”<sup>24</sup> and when courts attempt to invent one, it often leads to unjust results.<sup>25</sup> Instead, courts are required to perform a case-by-case inquiry to determine if a taking has been effectuated, which focuses on the duration, manner, and effect of

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20. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting) (alterations in the original) (internal quotation marks omitted) (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (M. Farrand ed. 1911)).

21. *Id.*

22. See 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .”).

23. See *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 490 (Tex. 2012) (“The actions of the State do not constitute a taking simply because [a party] cannot earn as much money on its investment as it originally hoped.”); see also *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (“Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.”).

24. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012).

25. See *id.* at 38 (overturning the appellate court’s holding that “government-induced flooding temporary in duration” is “automatic[ally] exempt[ed] from Takings Clause inspection”).

the government's action.<sup>26</sup> But this requirement has not existed for long. Indeed, until 1980, many Texas courts categorically prohibited takings claims against the government where the government acted pursuant to its police powers.<sup>27</sup> Pre-1980 Texas courts instead opted to steer clear of the "sophistic Miltonian Serbonian Bog" altogether.<sup>28</sup>

In a weird way, this makes sense. Courts have long held that "attempting to decide when a regulation becomes a taking [is] among the most litigated and perplexing [issues] in current law."<sup>29</sup> And, perhaps ironically, few courts want to be in the position of deciding winners and losers. So it is understandable that a court would seize the opportunity to avoid takings inquiries altogether, instead, opting for bright-line rules on the matter. However, as Texas and federal courts have learned, takings questions are unavoidable and varied.<sup>30</sup> So where then should courts draw the line? When does government action or regulation "go so far in imposing public burdens on private interests as to require compensation[?]"<sup>31</sup> The government cannot rightly be expected "to pay out of [its] own pocket for the general salvation" every time it acts as "[t]he champion of the public."<sup>32</sup> Yet, justice and fairness suggest there is a "moral obligation upon the group"

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26. *See id.* at 32–34 (stating, aside from a narrow set of exceptions, "most takings claims turn on situation-specific factual inquiries").

27. *See Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980) ("Recent decisions by this court have broadly applied the underlying rationale to takings by refusing to differentiate between an exercise of police power, which excused compensation, and eminent domain, which required compensation. That dichotomy, we have held, has not proved helpful in determining when private citizens affected by governmental actions must be compensated.").

28. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004) (citing *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex.1978) and *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (1962)) (adopting the term "sophistic Miltonian Serbonian Bog" to describe the "legal battlefield" of cases deciding when regulations become takings).

29. *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgement and dissenting in part) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978))).

30. *See Steele*, 603 S.W.2d at 792 (listing an interesting set of inverse-condemnation cases: "Thus one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances").

31. *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006).

32. *Steele*, 603 S.W.2d at 792 (citing WILLIAM PROSSER, *THE LAW OF TORTS* § 24 (4th ed., 1971)).

benefitting from the Government's actions "to make compensation in such a case."<sup>33</sup>

This Article will explore questions like these at the frontier of eminent domain law—using the Rodeo's closure as its case study. In doing so, it will attempt to clear the muddled waters of the Court's jurisprudence on compensable takings. Because of the Rodeo's location, and because of the Supreme Court's recent decision in *Knick v. Township of Scott*,<sup>34</sup> this analysis will be done using both federal and Texas law. However, since many state jurisdictions either parallel federal takings law, or have made their respective takings statutes more stringent—finding compensable takings more easily than Texas or the federal government—this analysis will apply to many other state jurisdictions as well.<sup>35</sup> Ultimately, the caselaw used does not affect this Article's conclusion. The City took the Rodeo's property when it forced the Rodeo's closure on March 11, 2020, regardless of the fact that it acted pursuant to its police powers.<sup>36</sup> Further, this Article will show, when properly read,<sup>37</sup> existing state and federal case law supports such a finding in favor of the Rodeo's regulatory takings case against the City.

By closing the Rodeo's gates, the City "singled out" the Rodeo "to bear all of the cost[s]" of the City's public health initiative "for the community benefit without distributing any [of these costs] among the members of the community."<sup>38</sup> This decision had severe and lasting consequences. Jobs

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33. *Id.*

34. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) ("Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it."); *cf.* *Williamson Cnty Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."), *overruled by* *Knick*, 139 S. Ct. at 2162.

35. *See* *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) ("We consider the federal and state takings claims together, as the analysis for both is complementary."); *see also* *Est. & Heirs of Sanchez v. Cnty. of Bernalillo*, 902 P.2d 550, 552 (N.M. 1995) (holding the same for New Mexico); *Bd. of Cnty. Comm'rs v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) (holding Oklahoma's takings laws are more stringent than the federal law like "Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine"). Therefore, the reasoning in this Article will apply to these jurisdictions as well, because these courts are more likely than Texas and federal courts to find that a compensable taking has occurred.

36. Admittedly, this does make the question a closer call.

37. As this Article will explain in detail, the case law surrounding regulatory takings is both large and unclear. Part of the goal of this Article is to show that current regulatory takings case law supports a regulatory-takings claim like the Rodeo's.

38. *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978).



were lost,<sup>39</sup> children's scholarship funds were withheld,<sup>40</sup> and countless individuals were pushed into debt.<sup>41</sup> It makes no difference that the City acted pursuant to its police powers. The City's forced closure of the Rodeo went "too far"<sup>42</sup> in regulating the Rodeo's property, and by doing so, it directly and intentionally interfered with the Rodeo's reasonable "economic expectations."<sup>43</sup> This is not a burden the Rodeo should have to shoulder alone.

What is truly more frightening? That the government may be required to compensate property owners every time it intentionally shutter a duly licensed business, or "dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy"<sup>44</sup>—or that all this could be done with an unlucky few paying the bill for all? Why should eminent domain law value the public fisc over justice and fairness? And why can takings jurisprudence not live up to the expectations America's forefather placed on it? These are all questions this Article will attempt to answer in making the case for the Rodeo.

## II. THE CITY'S TAKING

Unlike a typical condemnation case where a governmental entity is the plaintiff suing to take possession of privately-owned land, the Rodeo's property was never formally condemned by the City. Accordingly, the Rodeo would be required to initiate inverse condemnation proceedings to receive "just compensation for [the] taking of [its] property."<sup>45</sup> Sometimes

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39. See *Past Entertainers*, *supra* note 8 (listing the entertainers who lost their contracts to perform at the Rodeo).

40. Amber Elliot, *With Rodeo Cancelled, What Happens to Kids Gunning for Scholarships?*, HOUS. CHRON. (Mar. 11, 2020), <https://www.houstonchronicle.com/life/article/With-rodeo-cancelled-what-happens-to-kids-gunning-15126675.php> [<https://perma.cc/AX2F-CDU8>].

41. See KTRK Houston, *supra* note 10 (showing a video interview of an individual expressing concerns about going into debt).

42. *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006).

43. See *generally* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (identifying several factors, such as economic impact, the government must consider when imposing regulations).

44. *Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980).

45. *Agins v. Tiburon*, 447 U.S. 255, 258 n.2 (1980) ("Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property

also referred to as a “regulatory taking”<sup>46</sup> when there has been no claim of physical invasion by the governmental entity, the success of an inverse condemnation claim is deeply tied to the duration, manner, and effect of the government act, which is the basis of the inverse condemnation claim.<sup>47</sup> Therefore, the case for the Rodeo must begin with understanding *how*, specifically, the City took the Rodeo’s property.

Since 2001, the Rodeo has leased space in Houston’s NRG Park Complex from the Harris County Sports & Convention Corporation,<sup>48</sup> which is the subdivision of the Harris County government charged with “managing, operating, maintaining and developing the sports and entertainment complex located on County-owned property, known as NRG Park.”<sup>49</sup> This lease, although a governmental entity granted it, endows the Rodeo with formal property rights to use and enjoy NRG Park,<sup>50</sup> including the “exclusive” right to “hold, occupy, use, and enjoy” the NRG facilities for

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when condemnation proceedings have not been instituted.” (citation omitted) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980))); *see also Inverse Condemnation*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010) (showing inverse condemnation is defined as “[t]he taking of property by an actual interference with or disturbance of property rights, without an actual entry upon the property”).

46. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 739 (1999) (Souter, J., dissenting) (explaining a regulatory taking is a type of inverse condemnation); *see also City of Houston v. Commons at Lake Hous., Ltd.*, 587 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.], no pet.) (explaining a regulatory taking is a type of inverse condemnation, which does not involve physical invasion).

47. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477–78 (Tex. 2012) (“Notwithstanding the fact specific nature of takings cases, the Supreme Court has established a general framework against which courts apply the individualized facts of alleged regulatory takings. *Penn Central*, *Sheffield*, and *Mayhew* govern regulatory takings challenges and they set out three guiding factors. First is the economic impact of the regulation on the claimant. The second factor under *Penn Central* is the character of the governmental action. The third consideration is the extent to which the regulation has interfered with the economic expectations of the property owner.” (citations omitted) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 127; *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998))).

48. Lease Agreement Between Harris Cnty. Sports & Convention Corp., Landlord, and Houston Livestock Show & Rodeo, Inc., Tenant (May 9, 2001) [hereinafter *The Lease*] [https://www.houstonsports.org/wp-content/uploads/2020/02/HLSR\\_Stadium\\_Lease\\_Agreement.pdf](https://www.houstonsports.org/wp-content/uploads/2020/02/HLSR_Stadium_Lease_Agreement.pdf) [https://perma.cc/MQ5Z-G8VV] (containing a full copy of the lease agreement between the Rodeo and the Harris County Sports & Convention Corporation).

49. For those interested in sports, this is the same facility the Houston Texans use to host their games and the site of the Astrodome. *See Harris County Sports & Convention Corporation*, NRG PARK, <https://www.nrgpark.com/hcsc/> [https://perma.cc/S29S-D43E] (providing a general description of the Harris County Sports & Convention Corporation).

50. *See Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 707 (2010) (emphasizing the Supreme Court has repeatedly held that “state law defines property interests”); *see also Elliott v. Joseph*, 351 S.W.2d 879, 882–84 (Tex. 1961) (acknowledging a leasehold is a property interest for which a lessee can be compensated).

the term of the lease.<sup>51</sup> Like any of the other sticks in a private property owners' bundle, the Rodeo's leasehold is a compensable property interest a government entity can take.<sup>52</sup>

Usually beginning around the first week of March and continuing for the next twenty days thereafter, the Rodeo opened its gates to the public on March 3, 2020, as scheduled. Perhaps surprisingly, concerns over the coronavirus did not hamper the Rodeo's success in the days it was allowed to operate. Paid attendance was either higher than or similar to attendance the previous year,<sup>53</sup> several new attractions were unveiled,<sup>54</sup> and the Rodeo's barbecue cook-off competition went off without a hitch.<sup>55</sup> However, amid mounting pressure from local residents to close after South by Southwest's cancellation<sup>56</sup> and the World Health Organization's declaration of "global pandemic,"<sup>57</sup> Mayor Turner issued the following "Proclamation Declaring a Local State of Disaster Due to a Public Health Emergency" on March 11, 2020:

**WHEREAS**, in December 2019, a respiratory disease caused by a novel coronavirus was detected in Wuhan City, Hubei Province, China. The virus has been named "SARS-CoV-2" and the disease it causes has been named "coronavirus disease 2019" (COVID-19). Symptoms of COVID-19 include

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51. *The Lease*, *supra* note 48, at 4.

52. *See Motiva Enters., LLC v. McCrabb*, 248 S.W.3d 211, 214 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("A lessee is entitled, as a matter of law, to share in a condemnation award when part of its leasehold interest is lost by condemnation.").

53. *See Attendance*, *supra* note 5 (providing figures on attendance to the Rodeo).

54. Craig D. Lindsey, *Rodeo Houston Unveils Exciting and Extreme New Attractions for 2020*, CULTURE MAP HOUS. (Feb. 20, 2020, 10:23 AM), <https://houston.culturemap.com/news/entertainment/02-20-20-rodeohouston-social-spur-extreme-dogs-show-agvenutre-park-barbecue-cook-off/> [https://perma.cc/7DEQ-NV7G].

55. *See* Doogie Roux, *The 2020 Houston Livestock Show and Rodeo Cook-off*, HOUS. PRESS (Feb. 28, 2020, 8:01 AM), <https://www.houstonpress.com/slideshow/the-2020-rodeo-cook-off-11451824/2> [https://perma.cc/7TS9-RNPT] (showing a slideshow of the Rodeo Cook-Off's success); *see also Attendance*, *supra* note 5 (showing attendance to the Rodeo's barbecue competition also increased from 2019).

56. Tierra Smith, *Thousands Sign Petition to Cancel the Houston Rodeo amid Growing Coronavirus Concerns*, CLICK2HOUSTON (Mar. 8, 2020, 2:33 PM), <https://www.click2houston.com/rodeo/2020/03/07/heres-why-organizers-say-there-are-no-plans-to-wrap-up-rodeohouston-early-amid-slew-of-high-profile-event-cancellations/> [https://perma.cc/5TFN-VATM] (describing South by Southwest as a film, interactive media, and music festival that takes place every year in Austin, Texas).

57. Garrett M. Graff, *An Oral History of the Day Everything Changed*, WIRED (Apr. 24, 2020, 6:00 AM), <https://www.wired.com/story/an-oral-history-of-the-day-everything-changed-coronavirus/> [https://perma.cc/B3TA-F328].

fever, cough, and shortness of breath. Outcomes have ranged from mild to severe illness, and in some cases death; and

...

**WHEREAS**, I, the Mayor of the City of Houston have determined that emergency measures must be taken to either prepare for or respond to a disaster due to this public health emergency in order [to] respond quickly, prevent and alleviate the suffering of people exposed to and those infected with the virus, as well as those that could potentially be infected or impacted by COVID-19, and to prevent or minimize the loss of life; . . .

**BE IT PROCLAIMED BY THE MAYOR OF THE CITY OF HOUSTON, TEXAS:**

...

#### **Section 7. Compliance with Local Health Authority Orders.**

Any individual, group of individuals, or property subject to a Local Health Authority Order restricting the movement of that individual or group of individuals or restricting movement to, from, or within that property, shall limit ingress and egress and take such measures as specified by that Local Health Authority Order.<sup>58</sup>

Mayor Turner's Order (the Order) was issued pursuant to Texas Government Code Section 418.108, which is entitled the Texas Disaster Act (the Act). Enacted in 1987, the Act was created to allow state and local officials to "reduce vulnerability of people and communities of [Texas] to damage, injury, and loss of life and property resulting from natural or man-made catastrophes, riots, or hostile military or paramilitary action."<sup>59</sup> Once a local state of disaster is declared, the Act enables local officials to perform various otherwise impermissible actions.<sup>60</sup> The relevant one in this instance being the power to "control ingress to and egress from a disaster area under

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58. Jasper Scherer (@jasperscherer), *Proclamation Declaring a Local State of Disaster Due to a Public Health Emergency*, TWITTER (Apr. 21, 2020, 2:33 PM) <https://twitter.com/jasperscherer/status/1237855751483166721> [<https://perma.cc/Y58Q-A2HL>]. Even though Texas Government Code Section 418.108(c) requires this proclamation be published publicly before it can take effect, I was not able to find a published copy of this order with the City Secretary's office. Accordingly, I was forced to use an electronic copy of the Mayor's proclamation posted on Jasper Scherer's twitter account, a Houston Chronicle reporter.

59. TEX. GOV'T CODE ANN. § 418.002(1).

60. *Id.* at § 418.108 (providing a list of statutory powers granted to a mayor once a local state of disaster is declared).

the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.”<sup>61</sup> It was under this authority that the Mayor “ordered the Houston Livestock Show and Rodeo™ to close.”<sup>62</sup> The apparent justification being ingress and egress from the Rodeo grounds needed restriction for “the safety and well-being of [the Rodeo’s] guests and [the Houston] community.”<sup>63</sup>

The taking of the Rodeo’s property pursuant to the Mayor’s use of the Act is important for two reasons. First, it means the Mayor may have acted lawfully. In inverse condemnation claims, the lawfulness of a government’s act is important in determining whether a taking occurred.<sup>64</sup> A finding that a governmental entity acted unlawfully in appropriating private property favors a judgment that a compensable taking has occurred.<sup>65</sup> Here, the Mayor acted according to a lawful legislative authorization.<sup>66</sup> Second, the Mayor acted contrary to the Rodeo’s will. Perhaps it goes without saying, but a government cannot take property previously given willingly.<sup>67</sup> Like other Fifth Amendment rights, consent can waive the right to just compensation.<sup>68</sup> Accordingly, it is important to note the City Order forced

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61. *Id.* at § 418.108(g).

62. See *Houston Rodeo Canceled After Local COVID-19 Cases*, FOX 26 HOUSTON (Mar. 11, 2020), <https://www.fox26houston.com/news/houston-rodeo-canceled-after-local-covid-19-cases> [<https://perma.cc/WB92-UAM7>] (notwithstanding the Rodeo’s desire to continue operating, it “respectfully and dutifully complied] with the City’s order”).

63. *Id.*

64. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added) (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in the *legitimate* exercise of its police power . . .”).

65. See *Adams v. City of Weslaco*, No. 13-06-00697-CV, 2009 WL 1089442, at \*15 (Tex. App.—Corpus Christi Apr. 23, 2009, no pet.) (mem. op.) (finding an inverse condemnation occurred, in part, because the governmental entity did not act pursuant to a “legitimate exercise of . . . power”).

66. In researching this Article, I attempted to procure a copy of the Order from the City Secretary’s office. The Mayor was required to file a copy of the Order under the Act. See GOV’T § 418.108(c) (“An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary . . .”). I still have not been able to procure a copy of the Order from the City’s Secretary, so it may be possible the Mayor did not carry out the statutory requirements to declaring a local state of disaster. However, I have not confirmed this as of the publication of this paper.

67. See *Eminent Domain*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010) (stating a taking must be done “without the owner’s consent,” otherwise, it is just a consensual transfer of property).

68. See *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (noting the general proposition that one can waive aspects of their Fifth Amendment rights by consent).

the Rodeo to close against its will.<sup>69</sup> In eminent domain litigation, this distinction makes a significant difference.<sup>70</sup>

Although the City's taking did not affect an actual physical invasion of the Rodeo's property, the Mayor's Order severely disrupted the Rodeo's ordinary economic expectations for the use of its property.<sup>71</sup> Like most shows and festivals, the Rodeo has a small window to become profitable.<sup>72</sup> Unfortunately for the Rodeo, the Mayor's Order took effect during that period of time.<sup>73</sup> When the Mayor issued the Order, the Rodeo was nine days in to its twenty-day program. After which, the Rodeo was prevented from carrying out any of its contractually permitted uses—canceling the remainder of the Rodeo programming.<sup>74</sup> For example, the Rodeo was prohibited from selling retail and concessions and exhibiting livestock.<sup>75</sup> The Rodeo was also prevented from presenting or broadcasting its musical acts. Because of the Order's timing, this meant the Rodeo was deprived of operating for more than half of its economic usefulness—the effect of which cannot be overstated.<sup>76</sup> If prior economic projections were to hold true, this disruption likely caused an estimated economic loss of \$113,500,000.<sup>77</sup>

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69. See *Attendance*, *supra* note 5 (“[T]he City of Houston and the Houston Health Department ordered the Houston Livestock Show and Rodeo[] to close Wednesday, March 11, 2020.”).

70. See *Econ. Dev. & Indus. Corp. of Bos. v. United States*, 13 Cl. Ct. 590, 597 (1987) (“Use by consent cannot constitute a taking.”); see also *Patel v. City of Everman*, 179 S.W.3d 1, 8 (Tex. App.—Tyler 2004, pet. denied) (noting consent as an affirmative defense to a takings claim, which the government entity must prove); *City of Dallas v. Beeman*, 45 S.W. 626, 627 (Tex. App.—Dallas 1898, writ dism’d) (finding if a petitioner in inverse condemnation consented to governmental invasion of property, “he cannot recover damages under [Article 1, Section 17 of the Texas Constitution]”).

71. See *2019 Economic Impact*, *supra* note 6 (“The Rodeo generated nearly \$400 million in [2019] economic activity based upon direct spending of \$243 million.”).

72. Kelsey Clark, *The Economics of Music Festivals*, HUFF POST (Apr. 13, 2015, 4:22 PM), [https://www.huffpost.com/entry/the-economics-of-music-festivals\\_b\\_7056508?ncid=engmodushpmg00000006](https://www.huffpost.com/entry/the-economics-of-music-festivals_b_7056508?ncid=engmodushpmg00000006) [<https://perma.cc/P9Y3-ZFFG>].

73. See *Attendance*, *supra* note 5.

74. See *The Lease*, *supra* note 48, at 19 (listing the rights granted to the Rodeo under the Lease).

75. *Id.* at 20.

76. See *Attendance*, *supra* note 5 (noting 2,506,263 people attended the Rodeo in 2019 compared to the 851,822 people who attended in 2020).

77. David Gonzalez, *Coronavirus' Economic Impact on Houston Greater than Just Rodeo Staff*, KHOU 11 (Mar. 11, 2020, 10:30 PM), <https://www.khou.com/article/entertainment/events/rodeohouston/coronavirus-economic-impact-on-houston-greater-than-just-rodeo-staff/285-d17533de-a4c1-438e-a62c-735d77fbccce> [<https://perma.cc/XC2N-J3QH>] (dividing the economic impact of \$227 million in 2019 by two to estimate the 2020 economic impact).

## III. THE LAW

While the City's interference with the Rodeo's use and enjoyment of its property was unquestionably severe, that alone is not enough to ensure the Rodeo is compensated for the property that has been taken from it.<sup>78</sup> Indeed, eminent domain caselaw is filled with examples of serious, yet uncompensated, attempts to sue for inverse condemnation.<sup>79</sup> Considering this backdrop, understanding the current state of the law surrounding inverse condemnation claims is crucially important to evaluating the strength of the Rodeo's case against the City.<sup>80</sup> Conveniently, this can be done for federal and Texas law easily. As the Texas Supreme Court has explained, the "[caselaw] on takings under the Texas Constitution is consistent with federal jurisprudence."<sup>81</sup> Therefore, the Rodeo's cases under Texas and federal law can be considered "together, as the analysis for both [are] complementary."<sup>82</sup> Accordingly, this Article will discuss federal and state law surrounding inverse condemnation and identify where, if at all, discrepancies exist.

For those new to eminent domain, it is important to note at the outset that in contrast to other contexts where an individual sues a governmental entity,<sup>83</sup> grand fights over a governmental entity's sovereign immunity from suit are rare in the inverse condemnation setting. That is because both the Texas and Federal "[C]onstitution[s] waive[] immunity for suits brought under the Takings Clause . . . ."<sup>84</sup> However, such waivers are "predicated

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78. *See id.* (describing the coronavirus's economic impact on individuals).

79. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630–31 (2001) (denying an inverse condemnation claim where a Rhode Island regulation reduced a property's value by 94%); *see also* *Electro Sales & Servs., Inc. v. City of Terrell Hills*, No. 04-17-00077-CV, 2018 WL 1309709, at \*5 (Tex. App.—San Antonio Mar. 14, 2018, pet. denied) (mem. op.) (denying an inverse condemnation claim because property owners still received some income from renting out a property, even though their applications for rezoning were denied); *Lech v. Jackson*, 791 F. App'x 711, 719 (10th Cir. 2019) (denying an inverse condemnation claim where a SWAT team totally destroyed a house).

80. For a full discussion of the complex history of property ownership, which underlies the existing legal framework surrounding inverse condemnation claims, interested readers should refer to Professor Stuart Banner's seminal book, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011).

81. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (citing *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238–39 (Tex. 2002)).

82. *Id.* at 477 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933–38 (Tex. 1998)).

83. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (providing an example of a sovereign immunity fight under Texas law); *see also* *Lane v. Pena*, 518 U.S. 187, 192 (1996) (showing an example of a sovereign immunity fight under federal law).

84. *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011); *see also* *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019) ("We conclude that a government violates the Takings Clause when it

upon a viable allegation of taking.”<sup>85</sup> “In the absence of a properly pled takings claim . . . ,” a condemning entity “retains immunity” from suit.<sup>86</sup> “Under such circumstances,” a Texas court will sustain “a properly raised plea to the jurisdiction,” or the federal equivalent, a motion to dismiss.<sup>87</sup> Thus, a properly pled claim is key to surviving turbulence at the motion-to-dismiss stage.

At its core, “a regulatory taking occurs when the government has unreasonably interfered with a claimant’s use and enjoyment of its property.”<sup>88</sup> Therefore, a regulatory taking claim is considered properly pled when it alleges that: (1) a government has acted intentionally, (2) resulting in the uncompensated taking of private property, (3) for a public use.<sup>89</sup> Although the debate over what is, and what is not, a taking is a question of law that courts are charged with deciding each case,<sup>90</sup> the term “taking” is generally defined as “the acquisition, damage, or destruction of property via physical or regulatory means,” by a governmental entity.<sup>91</sup> The range of compensable “property” interests that can be taken are defined by each state’s property laws.<sup>92</sup> Since a regulatory taking is a type of an inverse

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takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time.”).

85. *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014) (citing *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 476).

86. *Hearts Bluff Game Ranch*, 381 S.W.3d at 476.

87. *Carlson*, 451 S.W.3d at 830; *cf. Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (outlining the elements necessary to state a takings claim in a case where failure to properly plead an inverse condemnation claim properly served as the grounds for dismissal).

88. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 644 (Tex. 2013).

89. *See State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941) (asking whether a government’s acts were intentional in the taking of a property); *see also Baird v. United States*, 5 Cl. Ct. 324, 329 (1984) (“Plaintiffs must also prove an ‘intent on the part of the defendant to take plaintiff’s property or an intention to do an act the natural consequence of which was to take its property’” to win on their inverse condemnation claim); *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 640 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (“To recover on an inverse condemnation claim, a property owner must establish that (1) the State or other governmental entity intentionally performed certain acts (2) that resulted in the taking, damaging, or destruction of the owner’s property (3) for public use.”).

90. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (“Although no precise rule determines when property has been taken . . . the question necessarily requires a weighing of private and public interests.”).

91. *Carlson*, 451 S.W.3d at 831.

92. As previously discussed, the Texas Supreme Court has already held a leasehold is a compensable property interest. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created and their



condemnation claim, the two terms are often used interchangeably in cases alleging inverse condemnation under a regulatory takings theory.<sup>93</sup> Importantly for the Rodeo's case, no categorical exception to the Texas or Federal Constitutions' Just Compensation Clause exists when the government takes property while acting pursuant to its police power.<sup>94</sup>

Once past the pleading stage, it is up to a court to decide whether a taking has occurred as a matter of law.<sup>95</sup> In doing this, "courts generally eschew any 'set formula' in determining how far is too far when performing a regulatory takings analysis, preferring [instead] to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"<sup>96</sup> This is because "whether a particular property restriction is a taking depends largely 'upon the particular circumstances [in that] case.'"<sup>97</sup> To aid courts in this process however, the United States

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dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .").

93. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 739 (1999) (Souter, J., dissenting) (using the terms "inverse condemnation" and "regulatory taking" interchangeably); see also *City of Houston v. Commons at Lake Hous., Ltd.*, 587 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (explaining a regulatory taking is a type of inverse condemnation, which does not involve physical invasion).

94. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 328 (2002) (explaining that in *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987), the Supreme Court endorsed the following rule laid out by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 658 (1981), which allows an award of just compensation for takings made pursuant to a government's police powers: "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."); see also *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669–70 (Tex. 2004) ("[T]he takings provisions of the state and federal constitutions do not limit the government's power to take private property for public use but instead require that a taking be compensated. Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking. As we have said, 'all property is held subject to the valid exercise of the police power' and thus not every regulation is a compensable taking, although some are." (footnotes omitted)).

95. See *Agins*, 447 U.S. at 261 (treating the question of whether a taking has occurred as a question of law); see also *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) (treating the question of whether a taking has occurred as a question of law).

96. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

97. *Id.* (alteration in original); see also *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case.").

Supreme Court has provided guiding factors to help determine whether a regulatory taking has occurred.<sup>98</sup> The first is reviewing “the economic impact of the regulation on the claimant.”<sup>99</sup> Second, one must analyze “the character of the governmental action.”<sup>100</sup> The third factor is reviewing “the extent to which the regulation has interfered with the economic expectations of the property owner.”<sup>101</sup> Of equal importance—but not necessarily a factor of its own—is the “the duration of the [governmental] restriction” in relation to the bundle of property rights allegedly taken.<sup>102</sup> The Texas Supreme Court has approved each of these considerations as tests for whether an inverse condemnation claim exists and has referred to, this list of considerations, in short, as the “*Penn Central* factors . . . .”<sup>103</sup>

Hardly trivial, a condemning authority “must . . . conclusively disprove[]” all the *Penn Central* factors in its favor in order to win at summary judgment.<sup>104</sup> If it does not, a regulatory takings case will go to trial. A high burden for condemning authorities, this requires trial settings where factual disputes still exist as to either “(1) the economic impact on the claimant; (2) the extent of interference with the claimant’s investment-backed expectations; and (3) the character of the government’s action.”<sup>105</sup> Considering that, in the summary judgment context, courts are required to review the record “in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion,”<sup>106</sup>

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98. *Hearts Bluff Game Ranch*, 381 S.W.3d at 477 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

99. *Id.* (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124).

100. *Id.* at 477–78 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124).

101. *Id.* at 478 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124).

102. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 327, 342 (2002).

103. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (“The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.” (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–618(2001))); *see also* *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 644 (Tex. 2013) (“The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant’s investment-backed expectations; and (3) the character of the government’s action.” (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124)).

104. *BMTP Holdings*, 409 S.W.3d at 644 (demonstrating a Texas court’s use of the federal test for whether an inverse condemnation has occurred).

105. *Id.* at 644–45 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124).

106. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

this evidentiary burden heavily favors the party asserting inverse condemnation.<sup>107</sup>

In *City of Lorena v. BMTP Holdings, L.P.*,<sup>108</sup> for example, the Texas Supreme Court reversed an appellate court's affirmance of a trial court's grant of summary judgment in favor of a city alleged to have inversely condemned property because the city failed to "conclusively disprove[]" one of the factors for inverse condemnation.<sup>109</sup> Specifically, the Texas Supreme Court held "the City . . . failed to meet its burden of establishing" the second factor, "that no issues of material fact exist[ed] with respect to [the City's] interference with [the claimant's] use and enjoyment of its property . . . ."<sup>110</sup> Using a previously decided Texas Supreme Court case, *Sheffield Development Co. v. City of Glenn Heights*,<sup>111</sup> as its lodestar, the court explained it is the alleged condemning authority's responsibility to show that no issue of material fact exists as to (1) "the economic impact on the [aggrieved property] owner;" (2) "the . . . frustration of the [aggrieved property] owner's investment-backed expectations;" and (3) the character of the government intrusion.<sup>112</sup> Failure to show one of these elements means the condemning authority has failed to meet its burden at summary judgment.<sup>113</sup>

#### IV. THE CASE

Application of the *Penn Central* factors to the Rodeo's regulatory takings case confirms that a compensable taking has occurred.<sup>114</sup>

To begin, the economic impact of the City's Order on the Rodeo was quite severe.<sup>115</sup> Like most festivals, the Rodeo only had a handful of days

107. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1137 (2019) (Breyer, J., dissenting) ("[W]e must construe the evidence in the light most favorable to Bucklew and draw every justifiable inference in his favor." (citing *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam))).

108. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013).

109. *Id.* at 644–45.

110. *Id.* at 646.

111. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2012).

112. *BMTP Holdings*, 409 S.W.3d at 645; see also *Sheffield Dev. Co.*, 140 S.W.3d at 671 (holding a denial of an inverse condemnation claim).

113. *Sheffield Dev. Co.*, 140 S.W.3d at 671–72.

114. See *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)) (discussing how courts apply the *Penn Central* factors to alleged regulatory takings).

115. *Id.* at 477 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (describing the first factor to be analyzed in a regulatory taking case).

in which it could operate in the hopes of turning a profit.<sup>116</sup> This roadmap to profitability was inherently dependent on the Rodeo's ability to amass large crowds at its site; meaning, from the outset, the Rodeo was more vulnerable than other businesses to experience serious consequences from the government shutdown Order.<sup>117</sup> In fact, it was because of this very characteristic that the Rodeo was singled out as a candidate for shutdown by the City in the first place.<sup>118</sup> However, the manner and speed in which the Order went into effect also played a part in the severity of the Order's economic impact on the Rodeo. Having the Order go into full effect immediately, the City caused a stark shear in the Rodeo's earnings capacity from one day to the next.<sup>119</sup> Hardly trivial, the Rodeo's program generated an economic impact of \$227 million dollars in 2019.<sup>120</sup> On par with popular festivals like Lollapalooza,<sup>121</sup> Coachella,<sup>122</sup> and Austin City Limits,<sup>123</sup> this meant the Order likely caused the Rodeo an economic disruption around \$113.5 million.<sup>124</sup> The economic impact was only

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116. Jake Mann, *The 3 Keys to Profitable Music Festivals*, THE MOTLEY FOOL (Jan. 18, 2014, 9:35 AM), <https://www.fool.com/investing/general/2014/01/18/the-3-keys-to-profitable-music-festivals.aspx> [<https://perma.cc/TA3Z-3JTL>] (explaining the short amount of time, usually a handful days, in which a festival has to become profitable).

117. See *Freeman v. Busch*, 349 F.3d 582, 585 (8th Cir. 2003) (showing it is irrelevant the Rodeo may have been uncharacteristically vulnerable to a shutdown because "a defendant takes a plaintiff as he finds her").

118. It stands to reason that if large crowds did not amass at the Rodeo, then the City would not have targeted it for shutdown.

119. See Holley, *supra* note 12 (discussing previous rodeo attendance, operating expenses, and employment opportunities).

120. Gonzalez, *supra* note 77.

121. Greg Kot, *Slow Lollapalooza Ticket Sales Reflect Competition, Price and Security Concerns*, CHI. TRIB. (Mar. 25, 2018, 9:40 AM), <https://www.chicagotribune.com/entertainment/music/ct-ent-lollapalooza-tickets-analysis-20180323-story.html> [<https://perma.cc/AKD7-MYVL>] (estimating Lollapalooza's economic impact at \$245 million during one festival weekend).

122. Desert Sun Staff, *Coachella, Stagecoach Music Festivals Move to October amid Coronavirus Concerns*, USA TODAY (Mar. 10, 2020, 8:54 PM), <https://www.usatoday.com/story/entertainment/music/2020/03/10/coachella-stagecoach-music-festivals-postponed-coronavirus/5016224002/> [<https://perma.cc/HKK6-T4M7>] (estimating Coachella's economic impact at \$400 million).

123. Daniel Salazar, *Austin City Limits Musical Festival's Economic Impact Grows to Nearly \$265M*, AUSTIN BUS. J. (Apr. 30, 2019, 10:50 AM) <https://www.bizjournals.com/austin/news/2019/04/29/austin-city-limits-musical-festivals-economic.html> [<https://perma.cc/7WN8-AUXD>] (estimating Austin City Limits' economic impact at \$265 million).

124. See Gonzalez, *supra* note 77 (dividing the previous economic impact of \$227 million by two to produce an estimated economic disruption for 2020).

exaggerated for the Rodeo because of its compressed timeline for profitability.<sup>125</sup>

The extent of the City's interference with the Rodeo's investment-backed expectations was equally severe.<sup>126</sup> Fully understanding the degree of this interference requires an understanding of the property rights the Rodeo owned at the time it was forced to shut down. The Rodeo did not own a fee simple in NRG Park.<sup>127</sup> Rather, the Rodeo owned a leasehold interest in NRG Park, which it received from the Harris County Sports & Convention Corporation.<sup>128</sup> As with many leaseholds, the Rodeo's Lease endowed it with less than the full range of rights, which the lessor could have transferred as the fee simple owner of NRG Park.<sup>129</sup> This meant the denominator of property rights the Rodeo owned in NRG Park, from which its investment-backed expectations could flower, was smaller than the denominator owned by the lessor before executing the leasehold.<sup>130</sup> Importantly, the Rodeo bargained for this lesser array of rights because they were the only rights the Rodeo needed to operate a rodeo and livestock exhibition.<sup>131</sup> Nothing more nor less. When the City's Order extinguished each of these rights, it extinguished the means through which the Rodeo could achieve its only investment-backed expectation—to put on a rodeo.<sup>132</sup> Of what use is a lease for facilities to put on a rodeo when a lessee is forbidden from doing just that?

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125. Kot, *supra* note 121 (estimating Lollapalooza's economic impact at \$245 million during one festival weekend).

126. *Hearst Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (describing the third factor analyzed in a regulatory takings case).

127. *See The Lease*, *supra* note 48, at 1 (recognizing Harris County Sports & Convention Corporation as the landlord and Houston Livestock Show and Rodeo, Inc. as the tenant).

128. *Id.* at 19.

129. *See id.* at 19–21 (presenting the list of uses for which the Rodeo may use NRG Park and the list of prohibited uses retained by the Harris County Sports & Convention Corporation).

130. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 331 (2002) (presenting an introduction to and brief explanation of the denominator concept of property rights analysis).

131. *See The Lease*, *supra* note 48, at 19–20 (showing the list of uses for which the Rodeo could use NRG Park).

132. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 348–49 (stating leaseholds, if taken, are compensable interests in property); *see also United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (“Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.”).

Lastly, there are open questions about the character of the Order, which suggests the City may have acted illegally in shutting down the Rodeo. Specifically, a recent Texas Supreme Court decision questioned whether the Order was reasonably tailored to the seriousness of the coronavirus threat.<sup>133</sup> Such a finding of disproportionality would heavily favor a judgment that a compensable taking occurred.<sup>134</sup> As the Texas Supreme Court reminded us: “The Constitution is not suspended when the government declares a state of disaster.”<sup>135</sup> In the coming months, the government will “be expected to demonstrate that less restrictive measures [could not have] adequately address[ed] the [coronavirus] threat.”<sup>136</sup> If the government fails in their demonstration, municipal shutdown orders, like the one here, will be held unconstitutional by state and federal courts.

Confusion and misinformation manifested “[w]hen the present crisis began [because] perhaps not enough was known about the virus to second-guess the worst-case projections motivating the lockdowns.”<sup>137</sup> “As more becomes known about the threat and about the less restrictive, more targeted ways to respond to it,” governmental restrictions on business operations “may not survive judicial scrutiny.”<sup>138</sup> While this review has not yet taken place, the Texas Supreme Court sternly pointed out it would “not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law . . . .”<sup>139</sup> Included is the government’s

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133. See Taylor Goldenstein, *Texas Supreme Court Says Coronavirus Restrictions on Business ‘May Not Survive Judicial Scrutiny’*, HOUS. CHRON. (May 5, 2020, 1:37 PM), <https://www.houstonchronicle.com/politics/texas/article/Texas-high-court-says-Abbott-s-restrictions-on-15248326.php> [<https://perma.cc/F7JE-AZPR>] (discussing Justice Blacklock’s opinion stating that “during a public health emergency, the onus is on the government to explain why its measures are necessary and why other less restrictive measures would not adequately address the threat”).

134. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added) (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in the *legitimate* exercise of its police powers . . . .”); see *Adams v. City of Weslaco*, No. 13-06-00697-CV, 2009 WL 1089442, at \*15 (Tex. App.—Corpus Christi Apr. 23, 2009, no pet.) (mem. op.) (finding an inverse condemnation occurred, in part, because the governmental entity did not act pursuant to a “legitimate exercise of . . . power”).

135. *In re Salon a la Mode*, No. 20-0340, 2020 WL 2125844, at \*1 (Tex. May 5, 2020) (orig. proceeding) (Blacklock, J., concurring) (quoting *In re Abbott*, No. 20-0291, 2020 WL 1943226, at \*1 (Tex. 2020)).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

duty to pay just compensation.<sup>140</sup> Considering this coming judicial scrutiny, the City may have acted illegally in shutting down the Rodeo.<sup>141</sup>

A review of federal and Texas takings cases, similar to the one here, also confirms the City's taking of the Rodeo's property.

In *City of Lorena v. BMTP Holdings, L.P.*,<sup>142</sup> for example, the Texas Supreme Court decided whether a City's moratorium on development affected a compensable taking.<sup>143</sup> Like the case here, the moratorium temporarily suspended the monetization of a landowner's property rights, preventing a landowner from achieving their only investment-backed expectation for purchasing a property—to “sell . . . lots.”<sup>144</sup> There, the Texas Supreme Court ultimately sided with the landowner by reversing the trial court's finding that the moratorium on development was not a regulatory taking.<sup>145</sup> In making its decision, the Texas Supreme Court highlighted the fact that there was evidence that each of the *Penn Central* factors had been satisfied.<sup>146</sup> Specifically, there was evidence of a severe economic disruption because the property at issue fell in value “83% due to the moratorium based on a comparison of the value of lots sold before the moratorium took effect to the tax appraisal value while the moratorium was in place.”<sup>147</sup> There was evidence of serious interference with investment-backed expectations because the plaintiff-developer was “unable to sell the

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140. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 306 (2002) (discussing compensation under the Takings Clause of the U.S. Constitution); see also *In re Salon a la Mode*, 2020 WL 2125844, at \*1 (noting a government must answer to suspending the people's liberties during the pandemic).

141. There is an additional ground a court could find the Order invalid. See TEX. GOV'T CODE ANN. § 418.108(c) (“An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary . . .”). I remained unable to procure a copy of the Order from the City's Secretary—it is possible the Mayor failed to carry out the statutory requirements to declaring a local state of disaster. However, I have not confirmed this as of the publication of this Article.

142. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013).

143. *Id.* at 637.

144. See *id.* at 645–46 (discussing the frustration of property owner's investment-backed expectations of selling lots because of the moratorium).

145. See *id.* at 637 (finding, for the property owner's declaratory judgment claim, the moratorium cannot apply against its approved development for a subdivision and remanding the inverse condemnation claim for further resolution of factual disputes before judicially addressing the merits of the takings claim).

146. See *id.* at 645–46 (discussing evidence BMTP presented to show (1) evidence of its economic impact, (2) evidence of its frustration of investment-backed expectations, and (3) facts showing the moratorium's intrusion is still disputed).

147. See *id.* at 645.

lots as a result of the moratorium.”<sup>148</sup> And finally, there was evidence disputing the legality of the local municipality “enforc[ing]” the moratorium against the plaintiff.<sup>149</sup>

Likewise, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>150</sup> the Supreme Court decided whether a moratorium on development affected a compensable taking.<sup>151</sup> There, the Tahoe Regional Planning Agency instituted a thirty-two-month ban on development in certain areas in and around Lake Tahoe.<sup>152</sup> Unlike in the Rodeo’s case, however, the plaintiff there asserted “a moratorium on development . . . constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution.”<sup>153</sup> Accordingly, the Supreme Court evaluated the plaintiff’s case under the *Penn Central* factors. In denying evaluation of the plaintiff’s claim under the Lucas per se takings rule, however, the Supreme Court expounded on the contours of existing regulatory takings law under *Penn Central*.<sup>154</sup>

Regulatory takings analysis, the Supreme Court wrote, “entails complex factual assessments of the purposes and economic effects of government actions,” the results of which will determine whether a taking has been effectuated.<sup>155</sup> An example of such an assessment is understanding the “character of the action” alleged to constitute a taking and how that action relates to the alleged “interference with rights in the [taken] parcel as a whole.”<sup>156</sup> Understanding this relationship explains why “a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking.”<sup>157</sup> In contrast, a regulation prohibiting the mining of anthracite coal in such a way as to cause the subsidence of the surface is a regulatory

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148. *Id.* at 646.

149. *See id.* (explaining how the municipality could not enforce the moratorium against BMTP as it had already approved the subdivision of property before the moratorium’s enactment).

150. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302 (2002).

151. *See id.* at 306 (discussing the issue before the Court of whether a moratorium on development constitutes a per se taking).

152. *Id.*

153. *Id.*

154. *See id.* at 321 (declining to apply a per se takings rule under *Lucas* for temporary moratoria).

155. *See id.* at 323 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)). “[W]e do not apply our precedent from the physical takings context to regulatory takings claims.” *Id.* at 323–24.

156. *Id.* at 327 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978)).

157. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).



taking.<sup>158</sup> The difference between the two is the taking of some of a landowner's property rights as opposed to all. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."<sup>159</sup>

Here, review of the "character of the [City's] action . . . [and] the nature and extent of the interference" it caused the Rodeo's rights to its leasehold "as a whole" strongly suggests the Rodeo's property was taken.<sup>160</sup> Unlike "set-back ordinance[s]"<sup>161</sup> or "a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent,"<sup>162</sup> the Rodeo's deprivation of property rights was complete and severe. After implementation of the Order, the Rodeo could no longer achieve its only investment-backed expectation and the purpose of its lease. Moreover, like in *BMTP*, there is evidence the Rodeo's case satisfies each of the *Penn Central* factors for regulatory takings. The Rodeo experienced millions of dollars in economic disruption.<sup>163</sup> The forced closure prevented the Rodeo from achieving its only investment-backed expectation,<sup>164</sup> and there are open questions as to the character of the City's action.<sup>165</sup> Furthermore, unlike a moratorium, which applies to all property owners equally, the Rodeo was "singled out to bear a special burden" in shutting down not "shared by the public as a whole."<sup>166</sup> In fact, during and after the Rodeo's ban many

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158. *Id.* at 325–26 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

159. *Id.* at 327 (citing *Andrus*, 444 U.S. at 65–66).

160. *Id.* (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 130–31).

161. *See* *Gorieb v. Fox*, 274 U.S. 603, 605 (1927) (discussing the constitutionality of an ordinance establishing setback lines and how it did not deprive property owner of any right under the U.S. Constitution).

162. *Tahoe-Sierra Pres. Council*, 535 U.S. at 322–23 (citing *Block v. Hirsh*, 256 U.S. 135 (1921)).

163. *See* *2019 Economic Impact*, *supra* note 6 (providing the Rodeo's economic impact in 2019 totaled \$227 million); and *Attendance*, *supra* note 5 (highlighting 2020 attendance decrease from 2019 attendance because "the City of Houston and the Houston Health Department ordered the [Rodeo] to close"); *see also* *Gonzalez*, *supra* note 77 (presenting evidence on the widespread economic impact of the Rodeo's closure).

164. *See* *The Lease*, *supra* note 48, at 19–20 (showing the list of permitted uses for which the Rodeo could use NRG Park).

165. *See* *In re Salon a la Mode*, No. 20-0340, 2020 WL 2125844, at \*1 (Tex. May 5, 2020) (orig. proceeding) (Blacklock, J., concurring) ("Government power cannot be exercised in conflict with these constitutions, even in a pandemic."); *see* TEX. GOV'T CODE ANN. § 418.108(c) ("An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary . . .").

166. *See* *Tahoe-Sierra Pres. Council*, 535 U.S. at 340–41 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987)) (drawing a distinction between the moratorium at issue in this case as opposed to the singular burden the Rodeo solely carried).

businesses were deemed essential and allowed to continue operating.<sup>167</sup> The Rodeo was not so lucky.

## V. CONCLUSION

The “question at bottom” of any inverse condemnation case “is upon whom the loss of the [government’s actions] *should* fall[?]”<sup>168</sup> Here, the answer is simple. But for the City’s possibly illegal actions, the Rodeo would have happily operated for its 88th consecutive year. Because the Rodeo was not allowed to do that, jobs were lost,<sup>169</sup> children’s scholarship funds were withheld,<sup>170</sup> and countless individuals were pushed into debt.<sup>171</sup> This is not a burden the Rodeo should have to bear alone, regardless of the fact the City acted pursuant to its police powers. Indeed, this is why the founding fathers initially conceived the Takings Clause, so that a mechanism existed to spread the cost of public initiatives across the community and to prevent “the public from loading upon one individual more than his [or her] just share of the burdens of government[.]”<sup>172</sup> By doing this, we ensure “the security of Property,” which Alexander Hamilton described to the Philadelphia Convention as one of the ‘great objects] of Gov[ernment].”<sup>173</sup>

To those fearing the potential consequences that may ensue if the Rodeo is compensated for the City’s use of its police powers, look at the fallout from the “revolutionary” condemnation cases from the past. All too often, “[a]fter each successive Supreme Court decision on property rights, we have imagined a parade of horrors that ultimately never appeared.”<sup>174</sup> After

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167. See Ross Ramsey, *Analysis: What Makes a Business Essential Depends on Where You Sit*, TEX. TRIB. (Apr. 6, 2020, 12:00 AM), <https://www.texastribune.org/2020/04/06/what-makes-business-essential-depends-where-you-sit/> [<https://perma.cc/3JXA-7E8R>] (providing a good discussion of the relativity of the designation as a non-essential business: “every business is essential to someone”).

168. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

169. See *Past Entertainers*, *supra* note 8 (indexing past performers and entertainers the Rodeo has once employed as well as the associated employment with such entertainers).

170. Elliot, *supra* note 40 (describing how the cancellation of the Rodeo impacted junior exhibitors’ ability to compete for educational funds).

171. See KTRK Houston, *supra* note 10 (revealing reactions to the Rodeo’s cancellation).

172. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

173. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting) (alterations in original) (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (M. Farrand ed. 1911)).

174. Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little*, 47 FORDHAM URB. L.J. 639, 641 (2020).

*First English*,<sup>175</sup> *Lucas*,<sup>176</sup> and *Kelo*,<sup>177</sup> professional and lay commentators alike hurried to predict “doom and gloom.”<sup>178</sup> Yet, catastrophe never came. That is because such hysteria is often overblown, and the consequences of prior court decisions regarding property rights “have proved mostly unremarkable.”<sup>179</sup> If the Rodeo is compensated here, “the end of the story is likely to be happy enough: the sky will not fall, and all can be saved.”<sup>180</sup>

In the midst of the coronavirus pandemic, we have seen several more cases like the Rodeo’s, and interested parties expect many more to come.<sup>181</sup> A finding in the Rodeo’s favor here would make it clear there is no categorical exception to the Fifth Amendment’s Just Compensation Clause when the government takes property while acting pursuant to its police power. While the Rodeo may not be the most vulnerable of us, it is a stand-in for the position we could be in. And if the preservation of property rights is truly “one of the most important purposes of government[,]”<sup>182</sup> justice and fairness demands that the Rodeo receive just compensation. We are all just one government action away from being the victims of a government taking. Why not encourage an understanding of the law surrounding eminent domain that protects “those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will[?]”<sup>183</sup> As Justice Holmes put it nearly 100 years ago, failing

175. *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987).

176. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

177. *Kelo v. City of New London*, 545 U.S. 469 (2005).

178. See Merriam, *supra* note 174, at 641–43 (describing the public reaction to decisions of inverse condemnation cases).

179. See *id.* at 641 (positing the reactions to resulting consequences of key cases relating to inverse condemnation are not justified); see also Emilio Longoria, *Invisible, but Not Transparent: An Analysis of the Data Privacy Issues that Could Be Implicated by the Widespread Use of Connected Vehicles*, 28 ALB. L.J. SCI. & TECH. 1, 38 (2017) (“[W]e have been cocksure of many things that were not so.”).

180. Merriam, *supra* note 174, at 641.

181. See *In re Salon a la Mode*, No. 20-0340, 2020 WL 2125844, at \*1 (Tex. May 5, 2020) (orig. proceeding) (Blacklock, J., concurring) (positing in the coming months, local governments will be expected to “demonstrate—both to its citizens and to the courts—that its chosen measures are absolutely necessary to combat a threat of overwhelming severity”); see also Jorge A. Vela, *Crowd Gathers at Laredo City Hall to Support Arrested Beauticians, Protest Coronavirus Mandates*, LAREDO MORNING TIMES (May 13, 2020), <https://www.lmtonline.com/local/article/Dallas-salon-owner-Laredo-s-2-home-beauticians-15267545.php> [<https://perma.cc/7Y5F-ESDF>] (providing an example of possible regulatory takings cases similar to the Rodeo’s to come).

182. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

183. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting).

to do so puts us “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.”<sup>184</sup>

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184. Pa. Coal. Co. v. Mahon, 260 U.S. 393, 416 (1922).