Supreme Court of Texas

No. 20-0309

City of Baytown,

Petitioner,

v.

Alan Schrock,

Respondent

On Petition for Review from the
Court of Appeals for the First District of Texas

Argued October 27, 2021

JUSTICE BLAND delivered the opinion of the Court.

JUSTICE YOUNG filed a concurring opinion, in which Justice Lehrmann, Justice Blacklock, and Justice Busby joined.

Our Constitutions require the government to compensate property owners when it takes their property for public use.[1] This

[1] The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. More broadly, the Texas Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation." Tex. Const. art I, § 17(a).

constitutional right waives the government's immunity from lawsuits—immunity that otherwise often insulates the public treasury from claims for damages.[2] When government action falls short of a constitutional taking, immunity bars many such claims.[3]

In this dispute over unpaid utility bills, a landlord claims that the city government's wrongful withholding of utility service to collect payment resulted in the loss of a tenant and the eventual disrepair of his property. He claims the city's action is a taking in violation of the Texas or United States Constitution. The trial court found for the city, ruling that the landlord did not establish an intentional taking of private property for public use. The court of appeals reversed, holding that fact issues exist as to whether the city's utility-enforcement actions resulted in a regulatory taking.

Our Court recently rejected a similar proposition in *City of Houston v. Carlson*.[4] Following *Carlson*, we hold that the landlord's challenge to the city's enforcement action fails to show the intentional taking or damage for public use necessary to establish a constitutional right to compensation. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's directed verdict.

I

In 1993, Alan Schrock purchased a lot in the City of Baytown for $21,000. He planned to lease out a mobile home on the property to earn

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[2] *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016).

[3] *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014).

[4] *Id.* at 833.

rental income. At some point, utility bills for the City's water service to the property went unpaid. Until 2011, the City required landlords to either guarantee payment for utility bills or to file a declaration with the City stating that the landlord would not guarantee its tenant's utility payments.[5] The City also had an ordinance prohibiting the connection of new utility service at properties encumbered by outstanding utility bills.[6]

Although Schrock had rented out the property, he did not file a rental declaration with the City until 2009, after the City had assessed Schrock $1,999.67 in past unpaid utility bills. Schrock contested the assessment, and after a hearing, the City reduced the amount he owed to $1,157.39. The City placed a lien in that amount against the property.

In 2010, the City refused to connect utilities to the property when one of Schrock's tenants requested it, which caused the tenant to cancel the lease. The City's refusal to connect service violated Texas Local Government Code section 552.0025.[7] Section 552.0025 prohibits municipalities from conditioning utility service connections on payment

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[5] Baytown, Tex., Code of Ordinances ch. 98, art. III, § 98-65(i) (1967) (amended 1991). In 2011, the City amended Section 98-65 and repealed the provision requiring a landlord to submit a rental declaration. The amended version now provides that the City shall not impose liens for delinquent charges for services provided to residential renters. Baytown, Tex., Code of Ordinances ch. 98, art. III, § 98-65(d)(4) (2011).

[6] *Id.* § 98-65(g) (1967) (amended 1991).

[7] *See* Tex. Loc. Gov't Code § 552.0025(a) ("A municipality may not require a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service.").

of outstanding utility bills incurred by other customers residing at the same address.[8]

Later that year, Schrock attempted to tender payment, but the City refused to accept his check. Schrock returned to the City offices to make payment in cash but ultimately refused to pay. In the years that followed, Schrock neither paid the assessment nor attempted to sell or lease the property. It fell into disrepair and was vandalized.

In 2012, Schrock sued the City for inverse condemnation and other claims, primarily alleging that the City's refusal to reconnect his utility service violated section 552.0025 and caused damage to his property. The City filed a plea to the jurisdiction, claiming that it is immune from Schrock's claims. After a lengthy procedural history in state and federal court, only Schrock's regulatory takings claim remained for trial.[9]

During trial, Schrock testified about his attempts to resolve the lien and to the property's deterioration, which he attributed to the City's wrongful refusal to connect utilities to the property. The assistant city manager testified about the City's efforts to collect payment for the outstanding bills.

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[8] *Id.*

[9] *See Schrock v. City of Baytown*, No. 4:12-cv-02455 (S.D. Tex. Mar. 11, 2013) (dismissing Schrock's federal takings claim, substantive due process claim, and declaratory judgment claim as unripe, finding limitations an alternative ground for dismissal of the declaratory judgment and substantive due process claims, and remanding Schrock's state law inverse condemnation claim and other state law claims); *Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, pet. denied) (mem. op.) (remanding regulatory takings claim).

After Schrock rested his case, the trial court directed a verdict for the City, concluding that Schrock had failed to adduce evidence of a taking.

The court of appeals reversed.[10] Relying on the Supreme Court's decision in *Penn Central Transportation Company v. City of New York*,[11] the court concluded that fact issues existed as to whether the City had interfered in bad faith with Schrock's investment-backed expectations, which, in turn, presented some evidence of a regulatory taking.[12] The court of appeals did not address our Court's recent decision in *Carlson*. We granted review.

II

We review a trial court's grant of directed verdict de novo,[13] using the legal sufficiency standard appellate courts apply to no-evidence summary judgments.[14] A trial court properly grants a directed verdict

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[10] 623 S.W.3d 394, 425 (Tex. App.—Houston [1st Dist.] 2019).

[11] 438 U.S. 104, 124 (1978). We have described the *Penn Central* factors as: "'(1) the economic impact of the regulation on the claimant'; '(2) the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 672 (Tex. 2004) (quoting *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 225 (1986)).

[12] 623 S.W.3d at 411, 420.

[13] *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) ("Judgment without or against a jury verdict is proper at any course of the proceedings only when the law does not allow reasonable jurors to decide otherwise."); *see also JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (noting that de novo review applies to orders deciding questions of law as to which "reasonable minds cannot differ on the outcome," including summary judgments and directed verdicts).

[14] *City of Keller*, 610 S.W.3d at 810.

when no evidence supports a vital fact or the evidence fails to state a claim as a matter of law.[15] We consider the evidence in a light favorable to the party suffering an adverse judgment, crediting all reasonable inferences and disregarding evidence and inferences to the contrary.[16]

A city is immune from suit unless its immunity is waived.[17] Under our constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an "inverse condemnation" claim.[18] To establish an inverse condemnation claim, a plaintiff must show that the government intended to or was substantially certain that its actions would take or damage the property for public use; otherwise, the doctrine of governmental immunity bars the claim.[19]

A

The parties dispute whether a claim of economic harm to property resulting from the improper enforcement of a municipal collection ordinance alleges a regulatory taking.

The City contends that Schrock's evidence fails to show that the City took or damaged his property for public use. Relying on *Carlson*, the City argues that the enforcement of municipal ordinances that do

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[15] *Id.* at 810–11, 814–16.

[16] *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215, 217 (Tex. 2011).

[17] *Carlson*, 451 S.W.3d at 830.

[18] *Id.* An inverse condemnation claim must allege an intentional government act that caused the uncompensated taking of private property. *Id.* at 831.

[19] *Harris Cnty. Flood Control Dist.*, 499 S.W.3d at 799.

not themselves regulate property use cannot constitute a regulatory taking, even when such enforcement was improper as a matter of state law. According to the City, the ordinance in this case was not a property-use regulation; instead, the ordinance was a means to collect outstanding bills for utility services provided to the property. Further, the City argues, it did not deprive Schrock of the use of his property, even though it indirectly caused the property to be without utility service and temporarily placed a lien against it.

Schrock responds that the City's improper actions caused a loss in his rental income and a diminution in the property's value even if its collection ordinance is not a land-use regulation. Thus, he argues, the court of appeals correctly applied the *Penn Central* factors to conclude that some evidence of a regulatory taking exists. He alternatively contends that the City's actions constitute either a physical taking or an exaction, entitling him to compensation. Schrock attempts to distinguish *Carlson*, which he suggests involved a flawed administrative process, arguing that in this case, in contrast, the effect of the City's ordinance was so onerous that it constitutes a taking.

B

The right to own, use, and enjoy one's private property is a fundamental right.[20] When the government takes, damages, or destroys private property for public use, it must provide compensation.[21] The Texas Constitution requires compensation in more circumstances than

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[20] *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

[21] TEX. CONST. art. I, § 17(a).

the United States Constitution—the federal requiring compensation for "taken" property, and the state for "taken, damaged, or destroyed" property—but both provide a means of redress against the government.[22]

A regulatory takings claim is one in which "the plaintiff complains that the government through regulation so burdened his property as to deny him its economic value or unreasonably interfere with its use and enjoyment."[23] Our Court observed in *Carlson* that courts historically have limited regulatory takings claims to those arising directly from land-use restrictions.[24] In that case, the City of Houston ordered several condominium owners to vacate their property because they failed to make mandated repairs.[25] The owners sued, claiming a regulatory taking based on Houston's improper application of its regulations.[26]

In holding that the owners failed to state a regulatory taking, we contrasted between an ordinance that directly regulates land use and

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[22] *See Steele v. City of Houston*, 603 S.W.2d 786, 789–90 (Tex. 1980) (reviewing history of Texas Constitution's takings clause). Despite the Constitutions' textual differences, the Court typically has evaluated federal and state takings claims using the same analysis. *See, e.g.*, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935–36 (Tex. 1998) (analyzing plaintiff's state takings claim under federal takings caselaw); *see also Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 780 (Tex. 2021) (Busby, J., concurring) (noting the distinctions). Schrock does not distinguish between the two. Accordingly, we do not differentiate between the two Constitutions for purposes of his appeal.

[23] *Harris Cnty. Flood Control Dist.*, 499 S.W.3d at 800–01.

[24] 451 S.W.3d at 832.

[25] *Id.* at 830.

[26] *Id.* at 832.

one that does not—even though it could impair use of the property as a result of its enforcement.[27] The property owners in *Carlson* failed to show a taking because the repair ordinance there did "not implicate any property-use restriction."[28]

Like Houston's ordinance in *Carlson*, the Baytown ordinance in this case did not regulate land use. The ordinance permitted the City to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied. The City's provision of utilities to the property was a service; its regulation of that service was not a regulation of the property itself.

As with the claims in *Carlson*, the true nature of Schrock's claim lies in the City's wrongful enforcement of its ordinance, not in an intentional taking or damage of his property for public use. In *Carlson*, the plaintiffs similarly alleged that Houston wrongfully applied its regulations. We reiterated there that governments generally are immune from such claims.[29] Schrock's challenge is no different from the challenge in *Carlson* to the city's alleged misapplication of its building ordinance.[30] In both cases, the alleged injury arises from a

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 833 ("Even assuming the city made a mistake, the respondents' allegations would 'amount to nothing more than a claim of negligence on the part of [the city], for which [it] is immune under the Texas Tort Claims Act.'" (quoting *Dalon v. City of DeSoto*, 852 S.W.2d 530, 538 (Tex. App.—Dallas 1992, writ denied))).

[30] Like Schrock, the plaintiffs in *Carlson* claimed a taking based on "the penalty imposed and the manner in which the city enforced its standards." *Id.* at 832. We characterized the claim as a colorable due process claim, rejecting

municipality's wrongful action unrelated to a taking of private property for public use.

While we do not foreclose the possibility that enforcement of an ordinance that does not directly regulate land use could amount to a taking, this one does not. A regulation with "a condition of use 'so onerous that its effect is tantamount to a direct appropriation or ouster'"[31] may impair a property "so restrictively, or intrude on property rights so extensively, that it effectively 'takes' the property."[32] However, "nearly every civil-enforcement action results in a property loss of some kind."[33] Property damage due to civil enforcement of an ordinance unrelated to land use, standing on its own, is not enough to sustain a regulatory takings claim.

In *Carlson*, the order requiring owners to repair their property was not an interference that was tantamount to ouster.[34] Similarly, the City's lien, which Schrock could have paid or further challenged, was not "so onerous that its effect [was] tantamount to ouster."[35] Instead, it was a conditional restriction. Schrock reasonably could have avoided the

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the notion that the takings claim arose from the improper enforcement of the ordinance. *Id.* at 832–33. Schrock's allegations are not materially distinguishable from the owners' allegations in *Carlson*.

[31] *Id.* at 831 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)).

[32] *Jim Olive Photography*, 624 S.W.3d at 771–72 (citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017)).

[33] *Carlson*, 451 S.W.3d at 832–33.

[34] *Id.* at 832.

[35] *See Lingle*, 544 U.S. at 537.

City's interference with his property by seeking review of the ordinance's improper application and a refund.[36] An enforcement action that causes an economic loss to a property owner but allows for the reversal of that loss is not a constitutional taking.[37] Because the City's enforcement actions against the property were conditional and did not result in permanent ouster, they were not a regulatory taking.[38]

Such is the conclusion under *Penn Central* as well, which answers whether a government's interference with property rights constitutes a regulatory taking by considering: (1) the regulation's economic impact on the property owner; (2) the extent to which the regulation interferes with the property owner's investment-backed expectations; and (3) the character of the government's action.[39] In this case, Schrock could have reversed the City's lien and disruption of utility service through the appeal process or payment. Thus, under *Penn Central*, Schrock did not show that the economic impact of the City's ordinance so interfered with

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[36] Baytown, Tex., Code of Ordinances ch. 98, art. III, § 98-62(i)(5). The ordinance had an appeals process, in which Schrock participated.

[37] *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 235–36 (Tex. 2011) (holding that police property seizure was not a taking because the procedure permitted owner to regain possession). Thus, "[w]hen there exists provision for compensation—or, as here, for the property's return—a constitutional claim is necessarily premature." *Id.* at 236. The City removed the property lien after Schrock challenged it.

[38] The redemptive right through compliance with the enforcement process differentiates this case from a regulatory taking. *See id.* at 235–37. When return of the property is available, it is a constraint on the government's permanent deprivation of property. *See id.* (observing that takings claims are premature when the owner may apply for the return of his property).

[39] *Sheffield*, 140 S.W.3d at 672.

his property rights that its actions appropriated the property from him.[40]

C

Finally, Schrock did not present evidence in the trial court of the alternative takings claims he raises in this Court. He did not claim a physical taking. Instead, in the trial court, he claimed that the City's actions denied him all economically viable use of the property and unreasonably interfered with his enjoyment of it. His testimony to the property's eventual state of disrepair was evidence of the degree of the City's alleged interference, not offered to prove that the City physically acquired, occupied, or possessed his property. Schrock also did not raise an exaction claim in the trial court. That is, he did not claim or offer evidence that the City conditioned his right to develop or use his

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[40] *See Lingle*, 544 U.S. at 537 (defining a regulatory taking as a condition of use "so onerous that its effect is tantamount to a direct appropriation or ouster"). The Supreme Court has limited the examination of the government's purposes to "the severity of the burden that government imposes upon private property rights," rather than an examination of the government's allegedly improper motives. *See id.* at 539; *id.* at 542 (holding that determination of whether government's action properly advances a legitimate interest "is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause"). This is because "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543. The court of appeals here heavily relied on the City's improper motives to find that Schrock raised a fact issue under *Penn Central*. But the Supreme Court in *Lingle* held that courts must focus on the challenged regulation's effect on private property, not on the propriety of the government's action. Our Court acknowledged this limitation in *VSC*. 347 S.W.3d at 238 (holding that statute's failure to provide for proper notice is a due process challenge, not a takings challenge, because "[t]he Takings Clause guarantees compensation 'in the event of *otherwise proper interference* amounting to a taking'" (quoting *Lingle*, 544 U.S. at 543)).

property on granting the City a property interest or upon fulfilling a property improvement condition.[41] These alternative grounds are not preserved for our review.

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We hold that the City's utility enforcement actions do not establish a regulatory taking of private property as a matter of law. The trial court therefore properly directed a verdict for the City on Schrock's inverse condemnation claim. We reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Jane N. Bland
Justice

OPINION DELIVERED: May 13, 2022

[41] *See Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 645 (Tex. 2004) (holding that a compensable taking occurred when the town conditioned development approval on the developer's rebuilding and improving of a public street); *see also Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

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Respondent Schrock invoked the Takings Clauses of both the United States and Texas Constitutions. As the Court notes, however, the arguments before us treat the two as substantively indistinguishable and address only the contours of the federal Takings Clause. We are thus left with just one question to answer: whether the challenged conduct constituted a taking under the Fifth Amendment. I join the Court's opinion and its judgment because I agree with the Court that no federally cognizable taking occurred here.

Whether the City's challenged actions (or other governmental actions like them) might constitute a taking under the Texas Constitution, therefore, remains an open question. This situation is not novel. Parties frequently litigate takings cases as if the two Takings Clauses were the same. For that reason (and maybe others), judicial opinions also sometimes have described the two clauses as if they were the same. I write separately today to emphasize one key point: They are *not* the same.

I

I find Justice Busby's observation in *Jim Olive Photography v. University of Houston* to be inescapably true. While our cases frequently emphasize the substantial similarities between how both constitutions protect citizens from takings, "the Texas Takings Clause provides broader protection in certain areas." 624 S.W.3d 764, 780 (Tex. 2021) (Busby, J., concurring). Specifically, "the Texas Constitution requires compensation for *more types of government action* than its federal counterpart," *id.* at 777 (emphasis added), because "the obvious textual differences between the clauses" unambiguously reflect our Framers' determination to protect more than the Fifth Amendment does, *id.* at 780.

The Fifth Amendment concludes this way: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Our State's Bill of Rights, by contrast, says this: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation . . . ." Tex. Const. art. I, § 17(a) (then adding further restrictions). The Texas Constitution, in other words, says everything that the U.S. Constitution does, but makes

two significant additions. First, it adds the verbs "damaged, or destroyed" to "taken." Second, not content with predicating a taking on property being taken "for public use," our Constitution adds that it may also count as a taking if the property is "applied to public use."

Beyond these express textual differences, the historical development of our Constitution further establishes that the federal and Texas provisions are not coterminous. The Fifth Amendment's spare use of "taken" long antedated the drafting of our Constitution. Every Texas Constitution from 1836 to 1869 used only the verb "taken," just like the Fifth Amendment.[1] Sometimes the text of our Constitution and the U.S. Constitution align, as with the Texas Constitution's Contracts Clause (in the section of our Bill of Rights that immediately precedes the Takings Clause).[2] This Court found the alignment of the Contract Clauses to be significant. The meaning of the *federal* Contracts Clause was fixed by the time our 1876 Constitution was enacted, we observed; our Framers' decision to copy that language essentially verbatim meant that they had chosen to also accept that provision's settled meaning. *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1023 (Tex. 1934). If

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[1] Like its predecessors, the 1869 Constitution provided only that "no person's property shall be taken or applied to public use without just compensation being made, unless by the consent of such person." *Ft. Worth & R.G. Ry. Co. v. Jennings*, 13 S.W. 270, 270 (1890) (quoting Tex. Const. of 1869, art. I, § 14). *See also* Tex. Const. of 1866, art. I, § 14; Tex. Const. of 1861, art. I, § 14; Tex. Const. of 1845, art. I, § 14; Repub. Tex. Const. of 1836, Declaration of Rights, cl. 13. *See also Jim Olive Photography*, 624 S.W.3d at 780 (Busby, J., concurring) (noting case law that has acknowledged the textual differences).

[2] *Compare* U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligations of Contracts . . . .") *with* Tex. Const. art. I, § 16 ("No . . . law impairing the obligation of contracts, shall be made.").

anything, the Framers' decision to *add* "damaged, or destroyed" to the Texas takings guarantee in 1876 must be even *more* intentional.[3]

The additional language—especially "damaged, or destroyed"—seems potentially relevant to cases like this one. Schrock alleges that the City essentially held his property hostage by refusing to provide him access to utilities (a City monopoly) until he discharged the obligations of third parties. The denial of utilities arguably has the systematic and predictable effect of at least "damag[ing]" and possibly "destroy[ing]" the residential property. It may not quite be "your money or your life"—but "your money or your property" is still a powerful threat. *Comply with our demand*, in other words, or watch your property disintegrate because of our action.

A city making such demands would be acting for the public, too.

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[3] Indeed, while the 1876 Constitution was still relatively young, this Court commented on the language added to Takings Clause:

> Under the provisions of other constitutions which merely provided compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly damaged by a public improvement, though no part of it was appropriated, could recover for such damage . . . . The insertion of the words 'damaged or destroyed' in the section [of the Constitution] quoted was doubtless intended to obviate this question, and to afford protection to the owner of property, by allowing him compensation, when by the construction of a public work his property was directly damaged or destroyed, although no part of it was actually appropriated.

Trinity & S. Ry. Co. v. Meadows, 11 S.W. 145, 145–46 (Tex. 1889); *see also DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965) ("It was the injustice of requiring an actual taking which explains the inclusion for the first time in the Constitution of 1876 of the requirement that compensation be paid for the damaging of property for public use.").

"Persuading" someone to pay a third party's debt to the public clearly advantages the public fisc. The City also concedes that its ordinance was a violation of state law all along. The legislature forbade municipalities from conditioning access to utilities on the payment of other people's debts. Tex. Loc. Gov't Code § 552.0025. Perhaps the legislature did so from a sense of fairness. But also—just perhaps—it sought to prevent local governments from sliding into takings.

Had the Texas Constitution been presented as an alternative rather than duplicative source of law, today's case may have turned out differently. Or maybe not. We cannot know for sure until we have a case like this one that includes arguments tailored to our *state* constitutional law. It is clearly true that the Texas Takings Clause is broader than the federal Takings Clause—but how much broader, and under what circumstances?

We cannot meaningfully answer those questions unless litigants undertake substantial additional work beyond invoking federal takings doctrines. To analyze a Texas constitutional claim, we would need comprehensive briefing from the parties (and, I would hope, from amici) on the precise scope of the right to compensation that the *Texas* Constitution affords. Antecedent questions concerning the nature of the property interests at issue, and whether they can support a claim under our Constitution, also would likely require careful attention.

But here, just as Justice Busby observed in *Jim Olive Photography*, the absence of any "conten[tion] that the [takings] analysis should be any different under the Texas Constitution" means that this Court cannot proceed. 624 S.W.3d at 782. Like the plaintiff in *Jim Olive*

Photography, Schrock noted only that Texas's "takings case law is consistent with federal jurisprudence," then treated the two Takings Clauses as indistinguishable. This pattern is almost routine. Despite this Court's recognition of differences between the two Takings Clauses, the distinction often goes undrawn. When that happens, the Court loses any basis to assess whether any material distinction exists between the two Takings Clauses under the facts of that case.[4] Indeed, in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), which plays a significant role in today's decision, it likewise appears that the plaintiffs treated the federal and state takings claims as identical. So, therefore, did the Court. *See id*. at 831 (citing *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012), for the proposition that Texas takings jurisprudence is consistent with federal jurisprudence).

As Chief Judge Sutton has put it, all too often lawyers "rais[e] the federal claims and rarely address[] in any detail, if . . . at all, a counterpart state constitutional claim. State judges referee the game. They do not play it, and they thus cannot rely on state constitutional grounds never raised." Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* 128–29 (2022). In an appropriate case, a party may well show that the Texas Constitution requires compensation in circumstances in which the United States Constitution does not.

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[4] *See, e.g.*, *Jim Olive Photography*, 624 S.W.3d at 771; *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 234 n.3 (Tex. 2011); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004).

II

One remaining question is also bound up with a takings claim under the Texas Constitution: how a plaintiff's actions may play a role in reducing or forestalling any takings liability. If future cases confirm that the Texas Constitution's broader scope is more than *de minimis*, the plaintiff's ability to mitigate property damage, or even avoid it altogether, may prove to be a key part of the analysis. Said differently, courts must give the Texas Takings Clause its full scope—and if that scope turns out to be substantial, the elements of damages and causation may be important to prevent an unintentional Takingsization of the rest of the law. Nearly any complaint about governmental action can be contorted into *some* allegation of a taking. Rigorous and serious requirements for establishing causation and damages will ensure that worthy claims, but *only* worthy claims, will both proceed and merit full compensation.

As with the question of whether the City's conduct would qualify as a taking under the Texas Constitution in the first place, however, we likewise lack briefing and analysis concerning these important subsidiary questions. Today, of course, they do not matter. Nothing turns on whether Schrock's own behavior might require reducing his damages, terminating his claim on causation grounds, or having any other effect. His federal claim could not proceed either way. But tomorrow may bring a different case—a case in which the Texas Takings Clause may do independent work. Future litigants in cases like that will need to address the contours of our state constitutional text *and* the consequences (if any) of a plaintiff's own conduct on a takings claim's

viability and remedy.

Our law, after all, recognizes several avenues to limit or preclude damages because of a plaintiff's conduct. For example, a plaintiff at fault for her own injury may have her damages reduced or foreclosed under comparative fault. *See* Tex. Civ. Prac. & Rem. Code §§ 33.001–33.002, 33.012; *Del Lago Partners, Inc v. Smith*, 307 S.W.3d 762, 772 (Tex. 2010) (discussing the adoption of the statutory proportionate responsibility regime). In some contexts, plaintiffs may have a duty to mitigate damages and may be barred from recovering whatever damages could have been prevented with care or reasonable effort. *See, e.g.*, *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 486–87, 486 n.3 (Tex. 2019) (duty to mitigate damages in contract after breach of contract); *J & D Towing, LLC v. Am. Alt. Ins. Co.*, 478 S.W.3d 649, 677 (Tex. 2016) (duty to mitigate damages in personal property tort); *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 858 (Tex. 1999) (duty to mitigate damages in a Deceptive Trade Practices Act case); *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 449 (Tex. 1967) (duty to mitigate damages in personal injury tort). We have not been able to explore the extent to which these concepts, or others related to them, may interact in the context of a Texas takings claim.

Relatedly, the doctrines of causation may limit a plaintiff's recovery. This Court has previously said, for example, "[p]roximate cause is an essential element of a takings case." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 483 (Tex. 2012). Part of the "true test" in discerning liability for a taking of property, we have held, is whether the government's acts "were the proximate cause of the taking or damaging of

such property." *State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941). Moreover, the question of "causation is an issue to be considered by [c]ourts in takings cases." *Hearts Bluff Game Ranch*, 381 S.W.3d at 482. For an inverse condemnation claim, the governmental entity sued must have been the proximate cause of the harm to property rights. *Id.* at 483–84.[5]

How might a plaintiff's *own* conduct fit within this rubric? "[T]he term proximate cause is generally defined as meaning 'that cause which, in natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which the result would not have occurred.'" *Young v. Massey*, 101 S.W.2d 809, 810 (Tex. 1937). A "new and independent, or superseding, cause may intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause." *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (internal quotation and punctuation omitted). The new cause "thus destroys any causal connection" between the original wrong and the harm. *Id.* But we have not addressed, and absent full briefing and argument cannot resolve, whether a taking can be said to be proximately caused by the defendant if the property owner—that is, the plaintiff, not some new entrant onto the scene—has failed to use objectively reasonable and

[5] "Causation is one of several threshold conditions that must be met before the merits of a takings case will even be considered." Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill Rts. J. 1181, 1191 (2012). Causation, in this context, "requires that the defendant be a government actor responsible for the harm alleged to be the taking of the private property interest." *Id.* Causation problems "commonly arise" when "there may have been a government act, but the plaintiff's own decisions may have been responsible for the injury." *Id.* at 1200–01.

available efforts that would preclude property damage in the eminent-domain context. Future cases may turn on the law of causation more generally—whether proximate cause or otherwise—and both plaintiffs and defendants should be ready to make arguments about how these doctrines affect takings claims.

The record in this case at least illustrates the kind of facts that might trigger analysis relevant to the development of our jurisprudence on damages, causation, or both. Schrock is a landlord, and this Court long has held that a "landlord's duty to mitigate requires the landlord to use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease." *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997). Similarly, a landowner "owe[s] the duty to use ordinary care to mitigate his damages" proximately caused by a defendant's obstruction of highway access. *Tex. & P. Ry. Co. v. Mercer*, 90 S.W.2d 557, 560 (Tex. [Comm'n Op.] 1936). Refusing to take reasonable efforts to avoid a loss of property rights or property damage may reduce the compensation owed or even block a claim that the government's action caused the taking or damage of such property. The Federal Circuit has found that a lessor's failure to mitigate barred any regulatory-takings claim. *See, e.g.*, *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1584 (Fed. Cir. 1995). The extent to which Texas law takes a similar view remains an open question.

Even if the City's conduct could qualify as a taking under the Texas Constitution, therefore, it is at least plausible that the City's liability would be substantially reduced or completely eliminated by Schrock's actions and inactions. Schrock was no stranger to leasing property in

Baytown.[6] By the time the utility dispute arose, Schrock had at least thirty-five other rental houses in the City. Nevertheless, Schrock failed to avail himself of the City's readily available mechanism to forestall any interference with his property rights because of a third party's debt.[7] He neglected to file a declaration with the City stating that the property here was rental property until after he received notice of the delinquent utility bills in 2009—and after he unsuccessfully challenged the City's enforcement action.[8] By all appearances, he easily could have avoided any harm to his property from the City's actions, but instead allowed a utility-bill grievance to deprive him of use of his rental property.[9]

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[6] Schrock even testified to his familiarity with the requirements of being a Baytown landlord. His investment strategy was to buy three houses in the area annually until he turned sixty-five. He planned to then start selling the houses to meet his cash needs for the remainder of his life.

[7] Schrock rented the mobile home on this property to lower-income tenants since he purchased it in 1993. Although the City's ordinance authorized the City to put a lien on a landlord's property and deny utility services if a tenant failed to pay utility bills, the ordinance provided a landlord a way to avoid such consequences: a landlord could preemptively file "with the city utility billing division a declaration in writing specifically naming the service address of the property and declaring such to be a rental property." Such a declaration would "prevent the city from using that [rental] property as security for the water, sewer and garbage collection services" and would prevent the City "from filing any lien on such property . . . ." *For over fifteen years*, Schrock neglected to file the declaration contemplated by the City's ordinance.

[8] Indeed, one of the reasons that Schrock's challenge failed was that Schrock had "no rental declaration on file for the time period in question declaring that Mr. Schrock does not wish the property to be used as security for the utility service charges for services to the property." Not until after Schrock received the City's second notice did he file the declaration contemplated by the City's ordinance.

[9] Schrock's claim that he did not know about the option to file a declaration would not automatically excuse him from filing one—especially

In any event, Schrock had even more opportunities to avoid any loss of property rights or harm to his property. In March 2009, the City notified Schrock that it would seek to impose a lien on his property if he did not pay the outstanding utility bills by a certain date. Schrock contested the outstanding bills, participating in the City's hearing process. Following the hearing, the City sent Schrock a second notice which reduced the amount of payment demanded but informed Schrock that he had fourteen days to pay before a lien would be imposed. He decided not to pay, at least not immediately. He could have paid "under protest," which would have prevented the lien. Indeed, Schrock *intended* to do so for several months after the lien was imposed. When he eventually visited the City's water department with a check to pay the original amount of the outstanding bill—with "[p]aid under protest" written in the memo line—a clerk informed Schrock of an additional unpaid bill. Because Schrock only had one check with him, which he had already filled out, Schrock left without paying anything. Seven months later, he returned to the City's water department, but *again* declined to pay, this time out of concern that he might face more delinquent bills for his other rental properties. Thus, rather than pay the delinquent utilities bill under protest and seek a refund—which would have allowed Schrock to rent the property for approximately $600 a month—Schrock allowed his property to languish in a state of increasing disrepair over less than $1,500 in dispute.

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when it is undisputed that he purchased this property for the express purpose of renting it and owned it as part of a portfolio of rental properties. *See, e.g.*, *Allstate Ins. Co. v. King*, 444 S.W.2d 602, 605 (Tex. 1969) (ignorance of a filing requirement will not excuse failure to comply).

Even that is not all. Schrock also knew that he could have asked the City to reinstate utility services. *He actually did so* in April 2012 when he asked the City to turn on water service so he could work on mold and rat problems on the property. *Schrock himself* then asked the City to turn the water service *off* a month later. And when the City removed the lien in 2013, Schrock did not ask the City to turn on municipal utility services so that he could restore the property and begin renting it again. Instead, Schrock has continued to let his property sit vacant.

Schrock was free to behave as he saw fit, of course. But whether and to what extent his actions may be laid at the City's door is a different matter. It is true that the City's own (unlawful) actions played a role. Its improper denial of water service to a tenant in 2009 and the improper lien were certainly but-for causes of some damage.[10] Given a full review of the factual circumstances here, however, Schrock had the keys to free his property from the City's shackles but refused to use them. Schrock likely could have avoided any restriction of his property rights—by filing the appropriate declaration before renting his property, paying the utility bill under protest, or asking the City to restore utility services. He chose not to. It may well be that a plaintiff situated like Schrock would only be entitled to reduced compensation or alternatively would be barred from establishing any takings claim at all.

To be clear, however, I do not resolve the role that a plaintiff's actions play in the assessment of the damages or causation elements. I

[10] Again, Schrock could have filed a declaration and avoided any effort by the City to use his property as security for the unpaid utility bills of third parties.

do not rely on any such analysis for my vote in this case. But the strong possibility that Schrock played a considerable part in his own property damage confirms my confidence in the Court's bottom-line judgment. It likewise confirms my sense that in future cases—*especially* cases in which plaintiffs assert a claim that may be viable under *only* the *Texas* Takings Clause—courts and parties should carefully address the nuances of damages and causation, not just whether the challenged governmental conduct, standing alone, would qualify as a taking.[11]

* * *

With these observations, I am pleased to join the Court's opinion and its judgment.

Evan A. Young
Justice

OPINION DELIVERED: May 13, 2022

[11] Indeed, to the extent that these inquiries may in some cases preclude the need to resolve whether novel and complex circumstances even qualify as a taking under our Constitution, they would serve the values of the constitutional-avoidance canon. As this Court has recognized, "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law," terming these legal battlefields "a sophistic Miltonian Serbonian Bog." *Sheffield Dev. Co.*, 140 S.W.3d at 671 (quotations omitted).