No. _____

In the

Supreme Court of the United States

MARCY BRITTON, PETITIONER

v.

MAYOR TIM KELLER, DANNY NEVAREZ, and CITY OF ALBUQUERQUE, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

As a threshold matter, did the lower courts err in light of this Court's recent ruling in of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, (2021) that the imposition of a servitude by the City of Albuquerque requiring Ms. Britton's property to be used and damaged in the course of supporting the City of Albuquerque's feral cat colony program was not a taking for which just compensation was required?

And if the threshold for a taking had been crossed by the City's feral cat colony program, could the lower courts conceivably correctly impose qualified immunity to release the City of Albuquerque from its responsibility for the actions of the individual Defendants acting under the color of law to inversely condemn the property of Ms. Britton for the public's benefit of operating the feral cat program without providing her just compensation?

Thus, the final question presented is: Did the lower courts err in dismissing Petitioner's Federal Takings claim and claim for inverse condemnation against Defendants with prejudice at the pleading stage, deciding that Petitioner's allegations do not state a plausible *Penn Central* regulatory takings claim?

PARTIES TO THE PROCEEDING

Petitioner is Marcy Britton. She was the Plaintiff in the United States District Court for the State of New Mexico, Case No. 1:19-cv-01113 KWR/JHR, *Britton v. Mayor Tim Keller et al.*, wherein judgment for the Defendants was entered April 16, 2020; and Plaintiff/Appellant in the United States Court of Appeals for the 10th Circuit Case Nos. 20-2054, *Britton v. Keller et al* wherein judgment for the Defendants/Appellees was entered March 15, 2021.

Respondents are Mayor Tim Keller, Danny Nevarez, and the City of Albuquerque. They were Respondents in the District Court and Respondents/Appellees in the Tenth Circuit Court of Appeals.

RULE 29.6

Corporate disclosure statement is not required in this matter.

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PETITION FOR WRIT OF CERTIORARI

This case arises out of Respondents' catch and release of feral cats program, which Petitioner, Ms. Britton, alleges has created a feral cat colony on or near her property and diminished her property value. The City of Albuquerque has maintained a "trap, neuter and release" ("TNR") program of stray feral cats and kittens. The City's TNR program traps, sterilizes and vaccinates, and releases stray feral cats and kittens at the place they were trapped or other places of the City's election. The City of Albuquerque pays for and partners with organizations to take and abandon stray feral cats at the location of their original capture or new locations, such as Petitioner's property, regardless of whether the appropriate care or sustenance exists at the location and without regard to impacts to property owners. The individual defendants are responsible, because Mayor Keller has directed the TNR program to continue and Director Nevarez orders that the cats continue to be dumped at locations around Albuquerque.

At all times material to the allegations of this Complaint, Ms. Britton owned or maintained a real property interest in certain real estate located in the City of Albuquerque, Bernalillo County, New Mexico. It is the responsibility of the City of Albuquerque under NMSA 1978 §77-1-12 that they "[s]hall make provision by ordinance for the seizure and disposition of dogs and cats running at large and not kept or claimed by any person on the person's premises."

Beginning several years ago under Mayor Richard Berry and continuing under the direction of current Mayor Tim Keller, Respondents, through the City's Animal

Welfare Department, have maintained a program that operates to fulfill the policy of "TNR" in the handling of stray feral and impounded cats and kittens. The Respondents' TNR program operates so that stray or feral cats and kittens are trapped, sterilized and vaccinated, and then abandoned at the location at which they were trapped or at a location of the City's direction where they have previous abandoned cats to establish colonies of feral cats amidst the residents homes, such abandonment is done without regard for the cruelty to animals and without regard for compliance with City Ordinances, State law, federal endangered species law and impacts to human health and welfare. In practice, the City of Albuquerque pays for and partners with organizations to take and abandon stray feral cats or even young kittens at the location of their original capture or new location unfamiliar to the cat regardless of whether the appropriate care or sustenance exists at that location and without regard to impacts to property values, or damage to private property.

The actions of Mayor Keller, Director Nevarez, and the City of Albuquerque in continuous dumping of feral cats at locations around Albuquerque as part of the City's program, including locations at Ms. Britton's property, have resulted in the establishment of feral cat colonies that amount to an extreme nuisance that exposes Ms. Britton, her neighbors and especially neighborhood children, unnecessarily to disease vectors for toxoplasmosis, rabies, plague and other diseases, leads to property damage from feline defecation, urination and physical damage from the feral cats themselves, all of which has also resulted in the diminution of Ms. Britton's property values. There are now or have been dozens, if not tens of dozens of feral cats acting

to blight Ms. Britton's property as a direct result of the actions of Respondents.

In June of 2019, Ms. Britton attempted to sell her property. While speaking to an interested party that was preparing to make an offer, the interested party saw a cat at the location, and asked if cats lived in the area. Ms. Britton made a requisite good faith disclosure regarding the feral cats that have overrun her property due to the TNR program, the potential buyer backed out, stating emphatically that she did not want to live in an area where there were feral cats loose, and being released. Ms. Britton had not attempted to sell her property prior to this occurrence and was not aware of a decrease in saleability of her property. Based upon this conversation and upon information and belief, Ms. Britton's property will now appraise for less than what she purchased the property for as a result of the blight from the City's program.

One week before the last mayoral election, in October 2018, Tim Keller contacted Ms. Britton and discussed with her the problems with the Albuquerque Animal Welfare Services and the TNR program. Mr. Keller promised Ms. Britton that he was aware of the problem and promised to stop the City's TNR program. Ms. Britton insured via her telephone conversations with Respondents that they were aware of the problem facing her community as a direct result of the TNR program, and Mayor Keller promised to end the program. Today the problem of feral cat inundation continues systematically at Ms. Britton's property and many other citizens' property around Albuquerque.

OPINIONS BELOW

The unpublished Order and Judgment of the United States Court of Appeals for the Tenth Circuit in *Britton v. Keller et al,* ca 20-2054, 851 Fed.Appx. 821 dated March 15, 2021, affirming the district court's judgment of dismissal is set forth in the appendix hereto.

The unpublished Mandate of the United States Court of Appeals for the Tenth Circuit in *Britton v. Keller et al,* ca 20-2054*,* dated April 6, 2021, affirming the district court's judgment of dismissal is set forth in the appendix hereto.

The unpublished Memorandum Opinion and Order granting Defendant's Motion to Dismiss the Federal Takings claim and inverse condemnation claim of Petitioner, and declining to exercise supplemental jurisdiction over the remaining state law claims in *Britton v. Keller et al*, 2020 WL 1889017 April 16, 2020, is set forth in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court judgment of dismissal was entered on March 15, 2021. This petition for writ of certiorari by Marcy Britton is filed within one hundred fifty (150) days from the date of the Order denying the petition for rehearing. United States Supreme Court Order 594 U.S. issued Monday, July 19, 2021. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

United States Constitution, Amendment V:

> * * * nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1331

> The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343

> **(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> **(1)** To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> **(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> **(3)** To redress the deprivation, under color of any State law, statute,

ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States … except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

NMSA 1978 Section 30-18-1

A. As used in this section, "animal" does not include insects or reptiles.

B. Cruelty to animals consists of a person:

(1) negligently mistreating, injuring, killing without lawful justification or tormenting an animal; or

(2) abandoning or failing to provide necessary sustenance to an animal under that person's custody or control.

C. As used in Subsection B of this section, “lawful justification” means:

(1) humanely destroying a sick or injured animal; or

(2) protecting a person or animal from death or injury due to an attack by another animal.

D. Whoever commits cruelty to animals is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Upon a fourth or subsequent conviction for committing cruelty to animals, the offender is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 30-18-15 NMSA 1978.

E. Extreme cruelty to animals consists of a person:

(1) intentionally or maliciously torturing, mutilating, injuring or poisoning an animal; or

(2) maliciously killing an animal.

F. Whoever commits extreme cruelty to animals is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 30-18-15 NMSA 1978.

G. The court may order a person convicted for committing cruelty to animals

to participate in an animal cruelty prevention program or an animal cruelty education program. The court may also order a person convicted for committing cruelty to animals or extreme cruelty to animals to obtain psychological counseling for treatment of a mental health disorder if, in the court's judgment, the mental health disorder contributed to the commission of the criminal offense. The offender shall bear the expense of participating in an animal cruelty prevention program, animal cruelty education program or psychological counseling ordered by the court.

H. If a child is adjudicated of cruelty to animals, the court shall order an assessment and any necessary psychological counseling or treatment of the child.

I. The provisions of this section do not apply to:

(1) fishing, hunting, falconry, taking and trapping, as provided in Chapter 17 NMSA 1978;

(2) the practice of veterinary medicine, as provided in Chapter 61, Article 14 NMSA 1978;

(3) rodent or pest control, as provided in Chapter 77, Article 15 NMSA 1978;

(4) the treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices;

(5) the use of commonly accepted Mexican and American rodeo practices,

unless otherwise prohibited by law;

(6) research facilities licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility; or

(7) other similar activities not otherwise prohibited by law.

J. If there is a dispute as to what constitutes commonly accepted agricultural animal husbandry practices or commonly accepted rodeo practices, the New Mexico livestock board shall hold a hearing to determine if the practice in question is a commonly accepted agricultural animal husbandry practice or commonly accepted rodeo practice.

NMSA 1978 Section 77-1-12

Each municipality and each county shall make provision by ordinance for the seizure and disposition of dogs and cats running at large and not kept or claimed by any person on the person's premises; provided, however, that the ordinance does not conflict with the provisions of Chapter 77, Article 1B NMSA 1978.

REASONS FOR GRANTING THE PETITION

Much like requiring that union recruiters must be allowed on to property for a certain number of hours for a certain number of days per year or periodically flooding a property, the City of Albuquerque has imposed on many of its citizens that they must support the City's program to trap, neuter and then abandon feral cat

populations to the extreme detriment of the citizen's private property right to exclude such unwanted nuisance to public health and well-being. In reality, the imposition of this nuisance on private property owners is worse than requiring that union representatives be allowed on your property at designated times for limited duration, because frankly – it would amount to herding cats – to attempt to regulate such an invasion is definitionally impossible. And at least when it comes to releasing flood waters onto private property the government agency can shut the flood gate controlling the amount and the duration that the property is inundated. Here Ms. Britton, her neighbors and many of the citizens of Albuquerque are not so fortunate as they are subjected to colonies consisting of hundreds of cats, supported and encouraged by the City's program, invading their property to cause destruction and exposure to illness.

Arguably, one feral cat defecating on your property or even the occasional cats invading private property as part of naturally occurring population may be the same as incidental damage from wildlife but is most certainly not same thing as the government taking official action to establish a nuisance population of feral cats defecating on a private property for the public's benefit of serving a public policy to dump cats to violate criminal statutes which make it a crime for any person to dump animals. The City of Albuquerque, through the inverse condemnation of perpetrating and maintaining a nuisance to serve the public policy benefit of having no-kill animal shelters dumped tens of dozens of feral cats in the neighborhood of Ms. Britton and others across Albuquerque, effectuates a taking of her private property without

providing her just compensation. Ms. Britton's right to pursue a Section 1983 case against her local government for the inverse condemnation is long recognized and clearly established, but most recently again recognized by the U.S. Supreme Court's holding in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019). The District Court erred in dismissing the case at the pleading stage before allowing the proper factual development and the Tenth's Circuit's application of this Court's taking jurisprudence was severely lacking.

I. ARGUMENT

A. Appellant's Takings Claim Does Not Fail as a Matter of Law.

Put simply, it is well understood that almost all takings jurisprudence finds at its heart a tortious act, whether that be trespass or nuisance, that the Government uses to take private property. This is not news, and it is readily recognized by the Supreme Court as recently as in the concurring opinion of Justice Thomas when he stated "I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass." *Knick* at 2180. In truth, the relationship between common-law related tort claims such as trespass and nuisance commonly form the actions the government uses to take property without providing just compensation that find an audience and resolution before the Court of Claims. Judge Block of the Court of Federal Claims described this well in his opinion in which he states that "[t]he best that can be said is that not all torts are takings, but that all takings by physical invasion have their origin in tort law and are types of governmental nuisances or, at times, trespasses."

Hansen v. United States, 65 Fed. Cl. 76, 80 (2005).

Thus, for the Mayor and the City of Albuquerque in this instance to admit that they are affirmatively perpetrating and maintaining a nuisance in open violation of a New Mexico criminal statute, unfairly requiring that Ms. Britton surrender her private property interests for the maintenance of a public interest, is purely and simply contrary to the principles understood behind the Fifth Amendment. After all, the language of the Takings Clause does not prohibit the government from taking private property altogether; rather, it prohibits the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent.*, 438 U.S. at 123, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). This is again a principle artfully recognized by Judge Block in *Hansen* in a very similar case to the present, stating that allowing a similar action by the government:

> would also permit government to escape its constitutional duty to compensate its citizens for destruction of their property. See, e.g., *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 80 U.S. 166, 177–78, 20 L.Ed. 557 (1871) (holding the government constitutionally liable for the inadvertent flooding of private property); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 3 L.Ed. 162 (Marshall, C.J.) (opining that nature and society proscribes government from taking "property from an individual, fairly and honestly acquired ... without compensation"). See generally John Adams, "A Defence of the Constitutions of Government of the United States of America," 1787, in Works of John Adams 6:8–9 (Charles Francis Adams ed 1851) ("Property is surely a right of mankind as really as liberty.").

Hansen v. United States, 65 Fed. Cl. 76, 81 (2005). In the present case, just as in *Hansen*, this District Court erred in allowing the government to escape liability for the private property that they have taken for the public's benefit to dump feral cats

in the same location, which has destroyed or consumed Ms. Britton's private property, just because they used feral animals as the instrumentality of that condemnation.

In reviewing Ms. Britton's allegation regarding the physical and economical destruction of her property, the District Court misunderstood Plaintiff's allegation and the claim of a taking, and then misapplied the law. Ms. Britton was very clear in her pleading that it is not the mere failure to control a small number of feral cats giving rise to the taking, it is the population management decisions by the City of Albuquerque Mayors that constitute the taking. It should have been abundantly clear that it is the affirmative refusal to manage the population and to actively create feral cat colonies for the policy of having no-kill shelter, thereby creating a nuisance that Ms. Britton complains of. Ms. Britton's complaint was, thus, consistent with the *Fallini* and *Colvin* decisions. "[W]hat the Fallinis may challenge under the Fifth Amendment is what the government has done, not what the horses have done," *Fallini v. United* States, 56 F.3d 1378, 1383 (Fed. Cir. 1995), which is exactly what Ms. Britton's complaint addressed as the affirmative action by the government to open the flood gates of feral cats to far greater numbers than would otherwise have blighted her property, without consideration of the associated health risks and physical damage caused by colonies of feral cats. Likewise, under *Colvin Cattle Co. v. United States*, 468 F.3d 803 (Fed. Cir. 2006), Ms. Britton does not dispute that the regulation of animals running at large is within the City of Albuquerque's purview; but rather that the dumping of feral cats to create nuisance populations is not a lawful exercise of the City of Albuquerque's police power because it violates NMSA 1978 §

30-18-1.[1] Nor, does applying *Mountain States Legal Foundation v. Hodel,* 799 F.2d 1423 (10th Cir.1986) save the District Court's reason from being found to be in error when weighed appropriately against a claim of creation and maintenance of a nuisance to further a no-kill shelter policy that constitutes a taking of private property for the public benefit without providing just compensation.

The most consistent precedent that was unavailable at the time that Tenth Circuit considered this case is also the most recent regarding the government's imposition of a servitude upon private property to serve a government program. This Court stated in *Cedar Point*:

> None of these considerations undermine our determination that the access regulation *2080 here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. See *Horne*, 576 U.S. at 366, 135 S.Ct. 2419 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection"). The access regulation amounts to simple appropriation of private property.

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079–80 (2021). Here there is no background principle of law that requires property owners to allow their property to be damaged and diminished to support a nuisance feral cat colony population as the governments preferred alternative to its responsibilities in dealing with stray

[1] Animal cruelty is defined in part as – "abandoning or failing to provide necessary sustenance to an animal under that person's custody or control." NMSA 1978 § 30-18-1

animals. Likewise, this Court has reiterated in *Cedar* Point and amply explained, in a decision that was presented repeatedly to both the District Court and the Tenth Circuit, that temporarily trespassing passing cats may still give rise to taking requiring just compensation stating:

> The distinction between trespass and takings accounts for our treatment of temporary government-induced flooding in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 133 S.Ct. 511, 184 L.Ed.2d 417 (2012). There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." *Id.*, at 38, 133 S.Ct. 511. Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. *Id.*, at 38–39, 133 S.Ct. 511. Applying those factors on remand, the Federal Circuit concluded that *2079 the government had effected a taking in the form of a temporary flowage easement. *Arkansas Game and Fish Comm'n v. United States*, 736 F.3d 1364, 1372 (2013). Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.

Id. at 2078–79.

The District Court's reasoning regarding the taking of private property not being at issue because it was done pursuant to police powers was flawed at its base level and is inconsistent with the very precedent the District Court relied on. The City of Albuquerque's TNR policy is not at all a lawful exercise of their police powers. The District Court properly recognized that in New Mexico "[t]he governing body of a municipality may adopt ordinances or resolutions **not inconsistent with the laws of New Mexico** for the purpose of: …providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience

of the municipality and its inhabitants...." *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 18, 119 N.M. 150, 157, 889 P.2d 185, 192 (emphasis added); but then completely failed to address that the City of Albuquerque's actions to abandon and dump feral cats under their control is wholly inconsistent with NMSA 1978 § 30-18-1 and is therefore not a legitimate exercise of police power.

Finally, the District Court ran squarely afoul of recognized pleading standards in a takings case to attempt to engage in a *Penn Central* analysis before any factual record had been developed, contrary to the fact that federal appellate courts routinely explain that the "standard for determining whether a regulatory taking has occurred is both fact-intensive and case-specific." *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172 (2005) (citing *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336–37, 342 (2002)); *see also Gardens v. United States*, No. 93-655, 2014 U.S. Claims LEXIS 925, at *11 (Fed. Cl. Sept. 5, 2014) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (referring to regulatory taking claims as "essentially ad hoc, factual inquiries.")) ("Regulatory takings claims are fact intensive cases."). The District Court plainly should not have engaged in *Penn Central* balancing to attempt to determine plausibility at the pleading stage without any factual development in the record.

Thus, the standards that the District Court should have utilized are particularly applicable in reviewing a takings claim instead of supplanting those standards with a faulty analysis of plausibility. Ms. Britton did make a plausible

claim that is not at all akin to claims of little green men[2] under *Iqbal* and *Twombly* and it was therefore premature for the Court to dismiss her taking claim. The Tenth Circuit has stated "plausibility" refers to the scope of allegations in a complaint. The allegations must be enough that, if assumed to be true as required at the initial dismissal stage, the plaintiff plausibly (not just speculatively) has a claim for relief, *i.e.* the plaintiff must have "nudged their claims across the line from conceivable to plausible." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 008)(McConnell, J.)(citations omitted)(*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544 at 570). The Tenth Circuit's affirmation on these grounds was therefore inconsistent with its (and this Court's) jurisprudence to grant dismissal.

Here, Ms. Britton sufficiently alleged that the City of Albuquerque had unreasonably interfered with her property interests, by creating and maintaining a nuisance population of feral cats through methods prohibited by state law ostensibly for the public's benefit. Moreover, the damage and blighting of her property by releasing a large population of feral cats is more in line with the government opening the flood gates to release water as discussed by the US Supreme Court in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 27, 133 S. Ct. 511, 515, 184 L.

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[2] A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"); see also *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"). The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. *Ashcroft v. Iqbal*, 556 U.S. 662, 696, 129 S. Ct. 1937, 1959, 173 L. Ed. 2d 868 (2009).

Ed. 2d 417 (2012). Ms. Britton plausibly alleged a taking of her private property for the public's benefit of fulfilling the City of Albuquerque's policy goals without providing just compensation through the inverse condemnation of her property by the perpetrating of a nuisance, and the District Court's decision is in conflict with jurisprudence of this Circuit and the United States Supreme Court.

B. It is Clearly Established Law that a Local Government May Be Sued Under Section 1983 for the Taking of Private Property Without Providing Just Compensation Through Inverse Condemnation.

Truth be told, undersigned counsel searched and could not find a single case from this Court or the Tenth Circuit in which a government official was granted qualified immunity for their actions to inversely condemn a private citizen's private property. And in this regard the District Court's holding is especially puzzling, given that the recent decision in *Knick* recognized an immediate right to bring a Section 1983 case for an inverse condemnation taking of private property without just compensation, without exhausting state court remedies first. It appears that the District Court missed the entire predicate wherein this Court recognized the long standing and very clearly established right to sue the government in Section 1983 for the taking of private property without providing just compensation through inverse condemnation, which is by virtue of its nature traditionally a tortious act by the government commonly sounding in trespass or nuisance. Much of the jurisprudence surrounding the government using nuisance or trespass to take the private property of citizens without providing just compensation is older or as old as our Republic itself as noted by this Court stating:

> Early opinions, nearly contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort. See, *e.g., Lindsay v. East Bay Street Commissioners,* 2 Bay 38, 61 (S.C.1796) (opinion of Waties, J.) ("But suppose they could sue, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be on a *tort;* it must be an action of trespass, in which the jury would give a reparation *in damages.* Is not this acknowledging that the act of the legislature [in authorizing uncompensated takings] is a tortious act?" (emphases in original)); *Gardner v. Village of Newburgh,* 2 Johns.Ch. 162, 164, 166 (N.Y.1816) (Kent, Ch.) (uncompensated governmental interference with property right would support a tort action at law for nuisance).
>
> Consistent with this understanding, and as a matter of historical practice, when the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions. See, *e.g., Richards v. Washington Terminal Co.,* 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914) (nuisance); *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 20 L.Ed. 557 (1871) (trespass on the case); *716 *Barron ex rel. Tiernan v. Mayor of Baltimore,* 7 Pet. 243, 8 L.Ed. 672 1833) (unspecified tort); *Bradshaw v. Rodgers,* 20 Johns. 103 (N.Y.1882) (trespass). Tort actions of these descriptions lay at common law, 3 W. Blackstone, Commentaries on the Laws of England, ch. 12 (1768) (trespass; trespass on the case); *id.,* ch. 13 (trespass on the case for nuisance), and in these actions, as in other suits at common law, there was a right to trial by jury, see, *e.g., Feltner,* 523 U.S., at 349, 118 S.Ct. 1279 ("Actions on the case, like other actions at law, were tried before juries").

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 715–16, 119 S. Ct. 1624, 1641, 143 L. Ed. 2d 882 (1999).

Arguably, Section 1983 inverse condemnation actions are the most clearly established causes of actions in our jurisprudence. So clearly established that this Court in the *Knicks* decision did not even pause to consider whether or not an inverse takings case could be brought under Section 1983, and only considered whether or not state remedies must be exhausted by a person wishing to sue an offending

municipality. Here, just as in *Knick,* Ms. Britton is suing for the clearly established violation of her right to just compensation after the taking of her property through inverse condemnation. To argue that the modality (blighting her private property with the extreme nuisance of establishing a feral cat colony over the top of her quiet enjoyment of her property) by which the municipality inversely condemned her property for the public use of avoiding euthanizing feral cats allows the government to escape liability for taking property without providing just compensation is nonsensical and misses the *Knick* forest for the trees. In fact, the majority holding in *Knick* states:

> 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. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings. And the property owner may sue the government at that time in federal court for the "deprivation" of a right "secured by the Constitution." 42 U.S.C. § 1983.
>
> We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken.

Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2170, 204 L. Ed. 2d 558 (2019). It is hard to imagine that Justice Roberts, writing for this Court forgot the rest of a paragraph that says "unless the local government takes the private property through inverse condemnation without providing just compensation in some novel way never done before, then the government official is entitled to qualified immunity." The right

to sue a local government official for failing to provide just compensation for the inverse condemnation taking of private property is clearly established and Ms. Britton's rights were clearly violated, the lower Courts' holdings are in plain error and conflict with the clear takings jurisprudence of this Court.

CONCLUSIONS

The Court should grant the Writ.

Respectfully submitted,

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

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Attorney for Petitioner Marcy Britton

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that Petitioner's petition complies with the type-volume limitation of Supreme Court Rule 33.1 and 33.2 regarding page limitation as it consists of 5,648 words using Microsoft Office Word 2010 in 12-point font in the Century family.

CERTIFICATE OF SUBMISSION

I hereby certify that the copy of the foregoing submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the clerk. I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Avast Premier version 11.1.2245 and is free of viruses.

CERTIFICATE OF SERVICE

I certify that on August 12, 2021, I filed the foregoing through the United States Supreme Court ECF System and served one hardcopy of the Petition with the Clerk of the Court. Additionally, I certify that on August 12, 2021, I caused a copy of the foregoing to be served upon counsel for Respondents via their counsel of record as follows:

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

March 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCY BRITTON,

Plaintiff - Appellant,

v.

MAYOR TIM KELLER; DANNY NEVAREZ; CITY OF ALBUQUERQUE,

Defendants - Appellees.

No. 20-2054
(D.C. No. 1:19-CV-01113-KWR-JHR)
(D. New Mexico)

ORDER AND JUDGMENT*

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

The City of Albuquerque, New Mexico (the "City"), has a "trap, neuter, release" ("TNR") program for feral cats. The program involves catching, vaccinating, and sterilizing feral cats, then releasing them. The feral cats are supposed to be released where they were caught, but Marcy Britton alleges they are sometimes released elsewhere in the city. This, she claims, has resulted in a colony of feral cats on or near her property. She sued the City, the mayor of the City, Tim Keller, and the director of the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

City's Animal Welfare Department, Danny Nevarez, under 42 U.S.C. § 1983, alleging the TNR program has worked a taking of her property. She also sued under the New Mexico Constitution and state tort law. The district court dismissed her operative, amended complaint, holding (1) the TNR program could not constitute a taking as a matter of law; (2) Ms. Britton had not alleged sufficient facts to demonstrate a taking even if it could; and alternatively holding (3) the individual defendants were entitled to qualified immunity. The district court also declined to exercise supplemental jurisdiction over the state law claims. Ms. Britton appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. Factual History[1]

The City operates a TNR program by which feral felines are trapped, sterilized, and vaccinated. Although they are supposed to be released where originally trapped, cats are sometimes released at a "new location unfamiliar to the cat regardless of whether the appropriate care or sustenance exists at that location and without regard to impacts to property values, or damage to private property." App. at 7. Mr. Keller "has directed the TNR program to continue" and Mr. Nevarez "orders that the cats continue to be dumped." *Id.*

[1] Because this appeal concerns a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the facts are those alleged in the operative complaint, which are presumed to be true in this procedural posture. *See Smallen v. The W. Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020).

Ms. Britton has "a real property interest in certain real estate located in the City." *Id.* at 6. The feral cats were released "in the vicinity of the property in question." *Id.* at 132 (quoting Ms. Britton's response to the motion to dismiss, *id.* at 97). The cats then established a feral cat colony "residing near, or at times, on, [Ms. Britton's] property," risking her exposure to diseases carried by the cats as well as damage to her property from the cats' excrement and urine. *Id.* (quoting *id.* at 97). The feral cat colony near or on Ms. Britton's property has contained "dozens, if not tens of dozens, of feral cats" over time, which enter or soil her property. *Id.* at 7. On one occasion, a party preparing to make an offer to purchase Ms. Britton's property decided not to do so because of the feral cats. Ms. Britton believes the "property will now appraise for less tha[n] she purchased [it] for as a result of" the TNR program. *Id.* at 7–8.

B. Procedural History

Ms. Britton filed suit in the United States District Court for the District of New Mexico. Her amended complaint contained two counts. In Count I, brought under 42 U.S.C. § 1983, she alleged the TNR program worked a taking of her property in violation of the United States Constitution. Ms. Britton also argued in Count I that this conduct violated the New Mexico Constitution. In Count II, she alleged trespass and nuisance under New Mexico tort law. The City moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] It argued Ms. Britton had not alleged facts sufficient to show a

[2] All relevant documents were jointly filed by the three defendants. We attribute arguments common to all defendants to the City.

violation of the Takings Clause or to show the individual defendants were liable personally for the violation, and that the individual defendants were entitled to qualified immunity. It also argued the state law claims should be dismissed on sovereign immunity grounds and because the facts were insufficient to show a nuisance. Ms. Britton opposed the motion.

The district court granted the motion to dismiss. It held "feral cat colonies do not constitute government occupation of [Ms. Britton's] property," and the government's actions in administering the TNR program could not legally constitute a taking because any injury "was incidental" to the exercise of "police powers" and did not take the "property for public use." *Id.* at 133–4. Employing the framework of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the district court alternatively held that Ms. Britton's allegations did not state a plausible regulatory taking because "the character of the regulation outweighs any economic impact, even if severe," and that her allegations did not "raise a plausible claim that government actions resulted in a reduction in value of her property." App. at 138. Additionally, the district court held the individual defendants were entitled to qualified immunity because Ms. Britton had not sufficiently pleaded their personal involvement or shown any constitutional violation was clearly established. Finally, the district court declined to exercise supplemental jurisdiction over the state law claims. The district court entered judgment dismissing the § 1983 claim with prejudice and the state law claims without prejudice. Ms. Britton timely filed a notice of appeal.

II. DISCUSSION

We review de novo a district court's grant of a motion to dismiss, taking as true the well-pleaded allegations in the complaint. *Smallen v. The W. Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020).

A. Legal Background

The Fifth Amendment to the United States Constitution proscribes taking of private property "for public use, without just compensation." U.S. Const. amend. V; *see also Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1173 (10th Cir. 2011) (noting that the Takings Clause applies against state and municipal entities via incorporation through the Fourteenth Amendment). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

But "[r]egulation of private property may be so onerous that it violates the Takings Clause of the Fifth Amendment and requires the government to provide compensation." *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1208 (10th Cir. 2009). A *per se* regulatory taking occurs where "government requires an owner to suffer a permanent physical invasion of her property" or a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 (1992) (emphasis in *Lucas*, second alteration in *Lingle*)).

Otherwise, a regulation may create a taking under standards the Supreme Court set forth in *Penn Central*. *See Ramsey Winch*, 555 F.3d at 1208. "The major factors under the

Penn Central inquiry are (1) '[t]he 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.'" *Id.* at 1210 (quoting *Penn Cent.,* 438 U.S. at 124) (alteration in original, italicization added). "The *Penn Central* inquiry focuses on the magnitude of the economic impact of the regulatory action and the extent of the regulation's interference with property rights to determine if the regulatory action constitutes a taking." *Alto Eldorado P'ship*, 634 F.3d at 1174.

B. Application

We first conclude the district court correctly determined feral cats cannot be the instrumentality of a government physical occupation for purposes of a paradigmatic taking. Because this means Ms. Britton can succeed only if she has properly alleged a regulatory taking, we then focus on Ms. Britton's argument regarding the district court's *Penn Central* analysis. Ms. Britton argues the district court erred in performing a *Penn Central* analysis on a motion to dismiss. In her view, because the *Penn Central* analysis is fact specific, a district court must wait for the factual development that occurs in discovery before undertaking it. Ms. Britton is incorrect.

1. Paradigmatic Taking

A government invasion of property constitutes a paradigmatic taking. *Lingle*, 544 U.S. at 537. But our precedent bars Ms. Britton from asserting that the cats themselves constitute a physical government invasion on her property. *See Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986) (en banc) (rejecting the "argument that . . . wild horses are, in effect, instrumentalities of the federal government

whose presence constitutes a . . . governmental occupation of the Association's property"). While the cats may have entered Ms. Britton's property, the government did not; nor did the government direct the cats to do so. Therefore, we read Ms. Britton's complaint as advancing some species of regulatory taking claim.

The cases Ms. Britton cites on this point do not help her. She asks us to liken her claim to that in *Fallini v. United States*, 56 F.3d 1378 (Fed. Cir. 1995), but that case explicitly relies on our holding in *Mountain States* that wild horses are not instrumentalities of the United States government. *Id.* at 1383 (holding that the plaintiffs' claim was time-barred because it must have accrued from governmental action—the passing of the legislation at issue—not the actions of the horses, who were "not agents of the Department of the Interior"). *Colvin Cattle Co. v. United States*, 468 F.3d 803 (Fed. Cir. 2006), the other case Ms. Britton raises, is equally unhelpful. There, the plaintiff—a private rancher—sued the United States, claiming the Bureau of Land Management's (BLM) grant of grazing rights to another rancher and its failure to remove wild horses from a parcel of public land constituted a taking of the plaintiff's stockwatering rights on that land. *Id.* at 808–09. In particular, the plaintiff claimed the BLM had failed to prevent the other rancher's domesticated cattle as well as wild horses from infringing on his water rights. *Id.* With respect to the cattle, the Federal Circuit rejected the claim both because the United States could not be held responsible for a private rancher's incursion on the plaintiff's water rights and because the BLM had required that rancher to provide his own water. *Id.* at 809. As for the wild horses, the court held they were "outside the government's control" so "they cannot constitute an instrumentality of the government

capable of giving rise to a taking." *Id.* (citing another Federal Circuit case which cited *Mountain States*). The feral cats here are likewise beyond the City's control and *Colvin* provides no support for Ms. Britton's claim.[3]

To be sure, the City has certain responsibilities related to the feral cats at issue in this case. *See* N.M. Stat. Ann. § 77-1-12 (2009). But *Mountain States* teaches this sort of regulatory authority over certain species does not make those animals instrumentalities of the government. 799 F.2d at 1428. There, the claim was that the Secretary of the Interior was required to remove wild horses from private lands on request but had failed to do so. *Id.* at 1424–25. We never addressed whether the Secretary was, in fact, acting unlawfully in failing to remove the wild horses. We simply determined there had been no taking. *Id.* at 1431. We similarly take no position as to whether the City is fulfilling its role under New Mexico law through the TNR program. That issue is not before us; the question is whether the City has violated the United States Constitution's Takings Clause, not the laws of New Mexico. We hold that it has not.

[3] We note that Ms. Britton has waived any argument that cats can be distinguished from the horses at issue in *Mountain States*, because cats are traditionally domestic animals while the horses were specifically defined by statute as wild. Ms. Britton's opening brief does not use the words "domestic" or "domesticated," nor does it use the term "wild animal" or otherwise suggest the cats are not wild animals. And she does not ask us to distinguish *Mountain States* on this ground. Although Ms. Britton does raise the domestic/wild distinction in reply, that is too late. The argument is waived. *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019) ("In this Circuit, we generally do not consider arguments made for the first time on appeal in an appellant's reply brief and deem those arguments waived.").

In doing so, we have no reason to—and therefore do not—pass on Ms. Britton's state law claims for trespass and nuisance. Those claims were premised on supplemental jurisdiction and the district court properly declined to exercise jurisdiction over them (and dismissed them without prejudice) when it determined the federal takings claim could not succeed. *See Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." (quotation marks omitted)). If the TNR program is unlawful under New Mexico law, as Ms. Britton suggests, she may press her claims in a court of competent jurisdiction. We hold only that any remedy she may have for the City's alleged violations of N.M. Stat. Ann. § 77-1-12 is not found in the Takings Clause of the United States Constitution.

2. Regulatory Taking

At oral argument, Ms. Britton suggested she might be advancing a *per se* regulatory taking theory. A *per se* regulatory taking, however, requires Ms. Britton to show either "a *permanent* physical invasion of her property" or that the regulation deprives her of "*all* economically beneficial use of her property." *Id.* at 538 (internal quotation marks omitted, first emphasis added). Ms. Britton has not alleged the cats permanently occupied her property. Nor has she alleged they deprived it of all economically beneficial use. *See* App. at 7–8 (alleging Ms. Britton's "property will now appraise for less tha[n] she purchased the property for" but not that it is valueless); Oral Argument at 1:44–1:54 (agreeing Ms. Britton was not arguing her property was deprived

of economically beneficial use). She therefore cannot succeed on a *per se* regulatory taking theory.

"[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1177 (10th Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678). Plausibility requires the plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). "This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008). "The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff may obtain relief." *Llacua*, 930 F.3d at 1177.

Thus, under the *Twombly* and *Iqbal* pleading standard, Ms. Britton needed to plead facts sufficient to plausibly suggest she could show a non-*per se* regulatory taking under *Penn Central*. Further factual development is unnecessary because the allegations in the amended complaint are taken to be true. If the factual content in the amended complaint does not allow at least a plausible inference that a regulatory taking occurred under *Penn*

Central, dismissal is appropriate. *See Taylor v. United States*, 959 F.3d 1081, 1087 (Fed. Cir. 2020) (concluding, in reviewing a motion to dismiss a takings claim, "that the [plaintiffs'] regulatory-taking claim cannot pass muster under [the *Penn Central*] standards, even without further factual inquiry").[4] Simply put, the district court did not err in assessing whether Ms. Britton's factual allegations were sufficient to state a regulatory taking claim under the governing legal standard.

Usually, we would proceed to consider the district court's analysis of Ms. Britton's amended complaint to determine whether the dismissal was, in fact, appropriate. That is unnecessary here, however, because Ms. Britton has forfeited the argument that her amended complaint could survive if the district court correctly performed the *Penn Central* analysis at the motion to dismiss phase. To the extent Ms. Britton gestures on appeal toward an argument that the district court's *Penn Central* analysis was wrong rather than merely premature, she does so insufficiently to preserve the issue for our review. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are

[4] The other circuit courts to have encountered this question, albeit in unpublished decisions, are all in agreement that the *Penn Central* analysis can be conducted at the pleading stage. *See Sierra Nevada SW Enters., Ltd. v. Douglas County*, 506 F. App'x 663, 666–67 (9th Cir. 2013) (unpublished) (applying the *Iqbal* pleading standard to a takings claim and finding it wanting under *Penn Central*); *Yur-Mar, L.L.C. v. Jefferson Par. Council*, 451 F. App'x 397, 400–01 (5th Cir. 2011) (unpublished) (same); *see also Acorn Land, LLC v. Baltimore Cnty.*, 402 F. App'x 809, 816–17 (4th Cir. 2010) (unpublished) (determining the plaintiff had met the *Iqbal* pleading standard when considering the *Penn Central* factors). We are unaware of any circuit court to have held to the contrary, and Ms. Britton does not direct our attention to any such decision.

inadequately presented, in an appellant's opening brief."). Ms. Britton's opening brief contains only one paragraph arguably on this point, consisting of three sentences. She argues her amended complaint alleged an unreasonable "interfere[nce] with her property interests" through the creation of the feral cat colony; that "the damage and blighting of her property" was in line with opening flood gates to release water; and that the district court's decision was therefore wrong. Appellant Br. at 12. At no point does she recite or attempt to apply the *Penn Central* factors.

And Ms. Britton's only citation on this point, *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), does not help her. There the Supreme Court considered a "temporary physical invasion by government." *Id.* at 38. The Court concluded that temporary flooding could be a taking, but did not conclude such flooding necessarily constituted a taking. *Id.* at 34, 38. Rather, it remanded for consideration of a multifactor balancing test applicable to temporary physical invasions, including many of the *Penn Central* factors. *Id.* at 38–41. Thus, that case establishes only that a balancing analysis must be performed even though the invasion is temporary. The district court here did perform a *Penn Central* analysis, so *Arkansas Game & Fish Commission* is inapposite. Ms. Britton has not properly presented for our review any argument that the district court's application of the *Penn Central* analysis is erroneous.

Ms. Britton next contends that the facts alleged are not themselves "fantastic," Reply Br. at 5 & n.1 ("Appellant was not making allegations akin to a visit from little green men from Mars or adventures in time travel" (citing *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting)), and that the *Penn Central* standard is fact-intensive. True enough, but

these points do not show the district court erred in evaluating whether Ms. Britton's amended complaint, taken as true, plausibly showed a regulatory taking.[5] Accordingly, her appeal cannot succeed.

III. CONCLUSION

We **AFFIRM**.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[5] "When a defendant raises the qualified-immunity defense, the plaintiff must . . . establish (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct." *Ullery v. Bradley*, 949 F.3d 1282, 1289 (10th Cir. 2020). Because Ms. Britton has not demonstrated the district court erred in concluding the TNR program did not implicate the Takings Clause, the individual defendants are also entitled to qualified immunity under the first prong of that analysis.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

March 15, 2021

Jane K. Castro
Chief Deputy Clerk

Mr. A. Blair Dunn
WARBA
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102

RE: 20-2054, Britton v. Keller, et al
Dist/Ag docket: 1:19-CV-01113-KWR-JHR

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Lara A. Christensen
Kristin J. Dalton
Kevin Morrow

CMW/lg

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
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Christopher M. Wolpert
Clerk of Court

April 06, 2021

Jane K. Castro
Chief Deputy Clerk

Mr. Mitchell R. Elfers
United States District Court for the District of New Mexico
Office of the Clerk
333 Lomas N.W.
Albuquerque, NM 87102

RE: **20-2054, Britton v. Keller, et al**
Dist/Ag docket: 1:19-CV-01113-KWR-JHR

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's March 15, 2021 judgment takes effect this date.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Lara A. Christensen
Kristin J. Dalton
A. Blair Dunn
Kevin Morrow

CMW/jjh

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARCY BRITTON,

Plaintiff,

vs. Case No. 1:19-cv-01113 KWR/JHR

MAYOR TIM KELLER,
DANNY NEVAREZ, and
CITY OF ALBUQUERQUE,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendants' Motion to Dismiss Plaintiff's Amended Complaint under Rule 12(b)(6) on Qualified Immunity and Other Grounds, filed on February 26, 2020 **(Doc. 17)**. Having reviewed the parties' pleadings and the applicable law, the Court finds that Defendants' motion is well-taken and, therefore, is **GRANTED.**

BACKGROUND

This case arises out of Defendants' catch and release of feral cats, which Plaintiff alleges has created a feral cat colony on or near her property and diminished her property value. Plaintiff alleges that the City of Albuquerque has maintained a "trap, neuter and release" ("TNR") program of stray feral cats and kittens. Defendant's TNR program traps, sterilizes and vaccinates, and releases stray feral cats and kittens at the place they were trapped. **Doc. 14 at 2.** Plaintiff alleges that the City of Albuquerque pays for and partners with organizations to take and abandon stray feral cats at the location of their original capture or new locations, regardless of whether the

appropriate care or sustenance exists at the location and without regard to impacts to property owners. **Doc. 14 at 3.**

Plaintiff argues that this has resulted in the establishment or growth of feral cat colonies that amount to an extreme nuisance that exposes Plaintiff, her neighbors and children to disease vectors, property damage as a result of cat defecation and urination, and property damage from the feral cats themselves, which has resulted in the diminution of Plaintiff's property values.

Plaintiff alleges that the individual defendants are responsible, because Mayor Keller has directed the TNR program to continue and Director Nevarez orders that the cats continue to be dumped at locations around Albuquerque.

The Amended Complaint **(Doc. 14)** asserts (1) Unlawful Taking under the United States and New Mexico Constitutions (Count I) and (2) Trespass and Nuisance (Count II).

LEGAL STANDARD

In reviewing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1159 (10th Cir. 2010). "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In ruling on a motion to dismiss, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). Mere "labels

and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly,* 550 U.S. at 555.

DISCUSSION

I. No Federal Takings Clause Violation.

Plaintiff alleges that the Defendants violated the Takings clause of the Fifth Amendment, applicable here through the Fourteenth Amendment. Plaintiff asserted an inverse condemnation claim seeking compensation for the alleged diminution in value of her property caused by the presence of feral cats on or near her property. Defendants argue that the operation of the TNR program does not amount to a Takings Clause violation. **Doc. 17 at 8.** The Court agrees.

Defendants are alleged to have exercised their police powers by regulating, *i.e.* catching, neutering, vaccinating, and releasing stray cats, which incidentally affected Plaintiff's property values. In short, Plaintiff fails to state a claim under Takings clause, because any diminution in private property value was incidental to the City of Albuquerque's exercise of its police power, which did not regulate Plaintiff's property. Plaintiff's allegations are more in line with a state tort than Takings claim.

A. General Federal Takings Clause Law.

The Fifth Amendment's Takings Clause provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. The purpose of the Takings Clause is to prevent the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

"Takings claims typically come in two forms: per se or regulatory." *Alimanestianu v. United States,* 888 F.3d 1374, 1380 (Fed. Cir. 2018). A *per se* (or "categorical") taking occurs

where there is a physical invasion or appropriation of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Further, a regulation that "denies all economically beneficial or productive use of land" also effects a *per se* or categorical taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). With a *per se* taking, the Government has a duty to pay just compensation. *Alimanestianu*, 888 F.3d at 1380.

The Supreme Court has also recognized a taking where a regulatory action does not entirely deprive an owner of property rights but nonetheless goes "too far." Under *Penn Central*, the Court considers "the character of the governmental action," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "[t]he economic impact of the regulation on the claimant." *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646.

Plaintiff seeks compensation for the alleged taking through an inverse condemnation action. "[I]nverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *U.S. v. Clarke*, 445 U.S. 253, 257 (1980) (internal citation and quotation omitted).

B. Regulated feral cat colonies are not a government occupation of Plaintiff's property.

Plaintiff argues that the feral cats, released by the City "in the vicinity of the property in question," constitutes a "physical occupation" of her property by the Government. **Doc. 24 at 8.** The Court assumes, as it must, that stray cats formed colonies on her property. **Doc. 24 at 9** ("the City is dumping cats in Plaintiff's neighborhood…"); **Doc. 24 at 8** ("cat dumping has established feral cat colonies like the one residing near, or at times on, Plaintiff's property."). Even so,

government-regulated feral cats, like regulated wild animals, are not "instrumentalities of the government whose presence constitutes a [] government occupation of Plaintiffs' property." *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir.1986) (en banc) ("Of the courts that have considered whether damage to private property by protected wildlife constitutes a "taking," a clear majority have held that it does not and that the government thus does not owe compensation."), *cited in Bradshaw v. United States*, 47 Fed. Cl. 549, 554 (2000) (government's failure to prevent regulated feral horses from causing damage to ranch, and destroying forage on federal lands on which ranch owners grazed cattle did not constitute a taking); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (citing with approval *Mountain States* and stating "[u]nder the majority rule enunciated by the Tenth Circuit, the trespass of regulated wildlife does not constitute a regulatory taking.").

These cases generally hold that the government cannot be held liable under the Fifth Amendment Takings Clause for damages or trespass to private property caused by wild or feral animals under the government's regulatory control. *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428–29 (10th Cir. 1986) (collecting cases). The act at issue in *Mountain States* went even further than here, effectively prohibiting property owners from removing feral horses from their property or stopping them from grazing. *Id.* Therefore, feral cat colonies do not constitute government occupation of her property, and the damage done by trespassing feral cats does not constitute a violation of the Fifth Amendment Takings Clause, as applied through the Fourteenth Amendment.

C. Takings Clause and Inverse Condemnation claim fails as a matter of law.

Alternatively, the Takings Clause claim also fails as a matter of law because (1) the alleged injury was incidental to the Defendants' exercise of their police powers and (2) Defendants did not regulate or take Plaintiff's property for public use.

Initially, the Court notes that the TNR policy was an exercise of the City's police powers to protect public health by regulating feral animals, reducing the stray feral cat population, and reducing the spread of disease in the community.[1] NMSA 1978, § 3–17–1 (Cum.Supp.1994) ("The governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico for the purpose of: …providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants...."), *cited in State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 18, 119 N.M. 150, 157, 889 P.2d 185, 192; NMSA 1978, § 3-18-3 ("municipalities "may regulate, restrain and prohibit the running at large of any animal within the boundary of the municipality[.]"); NMSA 1978 §77-1-12 (municipalities "[s]hall make provision by ordinance for the seizure and disposition of dogs and cats running at large and not kept or claimed by any person on the person's premises.").

"The state's power of eminent domain is separate and distinct from the state's police power." *Yawn v. Dorchester Cty*., No. 2:17-CV-440-MBS, 2020 WL 1274442, at *3 (D.S.C. Mar. 17, 2020). The police power refers to the state's "general power of governing." *Nat'l Fed'n of*

[1] In her response and complaint, Plaintiff clearly alleges that the feral cats are a public health risk. **Doc. 14 at ¶10, 26.** Plaintiff also attached a number of documents to her complaint describing the detrimental effect of releasing cats on the health and safety of the community. This fifty-one page attachment focuses mostly on the dangers feral cats pose to humans, such as the spread of diseases including toxoplasmosis and rabies. **Doc. 14-1 at 3 ¶ 9** ("TNR is exposing me and all of Albuquerque to significant health risks unnecessarily. The science on the detrimental health effects or risks is well documented."); ***Id at* 7** ("domestic cats and wild animals… pose a public health and safety hazard to people, property and the environment…. Cats, their feces, allergens, urine, har, regurgitation, carcasses, dead prey animals, associated odors, and ectoparasites such as fleas, ticks, and mites pose serous health threats to humans…. Students can be bitten or scratched by cats, with possible transmission of disease possible.").

Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012). Specifically, such power "extends to all matters affecting the public health or the public morals." *Stone v. Mississippi*, 101 U.S. 814, 818 (1879).

The Tenth Circuit reasoned that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a Taking for purposes of the Takings Clause." *Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019) (unpublished). "When the state acts to preserve the 'safety of the public,' the state 'is not, and, consistent[ ] with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate [affected property owners] for pecuniary losses they may sustain' in the process." *Id*. at *5 (quoting *Mugler v. Kansas*, 123 U.S. 623, 669 (1887)); *see also Penn Central*, 438 U.S. at 125, 98 S.Ct. 2646 (noting that laws meant to support the health, safety, morals, and general welfare of the entire community are generally upheld even if they destroy or adversely affect private property interests), *quoted in Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009); *Patty v. United States*, 136 Fed. Cl. 211, 214 (2018)("The distinction between an exercise of the police power and a constitutional Taking has been characterized ... as 'whether the governmental action operates to secure a benefit for or to prevent a harm to the public.' "); *Yawn v. Dorchester Cty.*, No. 2:17-CV-440-MBS, 2020 WL 1274442, at *4 (D.S.C. Mar. 17, 2020) ("The loss of Plaintiff's bees was unintentional; it was an unfortunate consequence to a proper exercise of Defendant's police power. Because Defendant was exercising its police power, and not its power of eminent domain, the Takings Clause is not implicated."). The TNR policy is an exercise of the Defendants' police powers to protect the public health, and not an exercise of its eminent domain powers.

Moreover, "[a]s is evident from its plain language, the Takings Clause does not require compensation unless private property—whether personal or real—has been taken, whether

physically or through regulation, for public use." *McCutchen v. United States*, 145 Fed. Cl. 42, 51 (2019), *citing AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008) ("The clause does not entitle all aggrieved owners to recompense, only those whose property has been 'taken for a public use.' "); *see also Lech v. Jackson*, 791 F. App'x 711, 716 (10th Cir. 2019) (private property damaged or destroyed pursuant to police power is not a taking for public use), *quoting Bachmann v. United States*, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017) (holding that "[w]hen private property is damaged incident to the exercise of the police power, such damage"—even when physical in nature—"is not a taking for the public use, because the property has not been altered or turned over for public benefit" (citing *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92–93, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969))).

Here, Defendants do not regulate Plaintiff's property for the benefit of the public. Nor do they regulate Plaintiff's property at all. *See, e.g., Yawn v. Dorchester Cty.*, No. 2:17-CV-440-MBS, 2020 WL 1274442, at *4 (D.S.C. Mar. 17, 2020). Rather, they regulate the population of stray cats and vaccinate them for the public health.

Moreover, the TNR policy is not "functionally equivalent" to a physical taking. *Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019), *quoting Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (describing regulatory takings as "regulatory actions that are functionally equivalent" to physical takings). The TNR policy does not regulate Plaintiff's property or the use of her property, and the release of feral cats does not constitute government intrusion into her property. Diminution in property value alone does not constitute a taking. *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1430 (10th Cir. 1986) (diminution in property value, standing alone, does not constitute a taking).

Finally, the alleged injury suffered by Plaintiff is incidental to the TNR program, which seeks to regulate the feral cat population and alleviate the health effects of feral cats on the community. "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 593–94 (1906), *quoted in in Yawn v. Dorchester Cty.*, No. 2:17-CV-440-MBS, 2020 WL 1274442, at *4 (D.S.C. Mar. 17, 2020) (insecticide spray that incidentally killed plaintiff's bees was conducted to prevent the spread of disease and protect public health, falling within state's police power, and did not constitute a compensable Taking), *citing Chae Bros., LLC v. Mayor & City Council of Baltimore*, No. CV GLR-17-1657, 2018 WL 1583468, at *8 (D. Md. Mar. 30, 2018)(stating that " 'merely ... incidental or consequential' damage to private property—even when resulting from government action—is, at most, 'compensable as a tort.' ") (quoting *Ridge Line v. United States*, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003)).

Therefore, Plaintiff's Federal Takings Clause and inverse condemnation claims as alleged fail as a matter of law, and the Court need not analyze the *Penn Central* factors.

C. Penn Central Factors.

Alternatively, even if the Court were to weigh the *Penn Central* factors, the Court concludes that Plaintiff's allegations do not state a plausible *Penn Central* regulatory takings claim. The major factors under the Penn Central inquiry are (1) "[t]he 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." *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646. *Penn Central* focuses on "the magnitude of a regulation's

economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 540, 125 S.Ct. 2074; *quoted in Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1209–10 (10th Cir. 2009).

Plaintiff alleges her property suffered diminution in value. In support of this conclusion, she cites to one instance in which she told a potential buyer about the cats. The interested party backed out because he did not want to live near cats. This is not sufficient to raise a plausible claim that government actions resulted in a reduction in value of her property. Moreover, the character of the government regulation heavily outweighs any reduction in value. The TNR program does not regulate Plaintiff's property. Rather, it is a public health measure aimed at reducing the population of stray cats and reducing the spread of diseases. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (considering "government action designed to protect health and safety" within the character prong of *Penn Central*, which outweighed severe economic injury). Therefore, the Court concludes that Plaintiff does not allege a plausible *Penn Central* regulatory takings claim, as the character of the regulation outweighs any economic impact, even if severe.

II. Individual Defendants are entitled to qualified immunity.

A. Qualified Immunity Standard.

Defendants Keller and Nevarez have asserted the defense of qualified immunity, which shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Romero v. Story*, 672 F.3d 880 (10th Cir. 2012).

When a defendant moves for dismissal on the basis of qualified immunity, the plaintiff bears a heavy two-fold burden. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). The plaintiff must put forward evidence showing (1) that the defendant violated plaintiff's constitutional rights, and (2) the right at issue was clearly established at the time of the violation. *Id*. If the plaintiff fails to establish either part of the two-part inquiry, the court must grant the defendant qualified immunity. *Id.; Leverington v. City of Colorado Springs,* 643 F.3d 719, 732 (10th Cir.2011) ("In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct.)" *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011).

B. Plaintiff failed to sufficiently plead personal involvement of Defendants in constitutional violation.

Defendants argue that Plaintiff failed to sufficiently plead (1) the individual Defendants' personal involvement in the alleged constitutional violation, (2) causation, and (3) damages. The Court agrees and adopts Defendants' reasoning, concluding that Plaintiff failed to adequately plead the personal involvement of the individual Defendants in the alleged takings violation.

Plaintiffs do not allege that the individual Defendants were personally involved in releasing stray cats on or near their property. Rather, they argue they are ultimately responsible for the continuation of a policy instituted under the prior mayor.

It is "particularly important" that "the complaint make clear exactly *who* is alleged to have done *what* to *whom,* to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Kansas Penn,* 656 F.3d at 1215 (quoting *Robbins v. Okla. Ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1250 (10th

Cir.2008)). "Section 1983 does not authorize liability under a theory of respondeat superior." *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) Instead, to establish supervisory liability, a plaintiff must show that "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds,* 614 F.3d at 1199.

Plaintiff failed to plausibly allege a causal connection between the individual Defendants' actions and the damages. Plaintiff pled and admitted that the City's policy was to catch and release stray cats back into the community. Plaintiff failed to plausibly allege a causal connection between the policy and an increase of stray cats on Plaintiff's property. Rather, the TNR policy would logically result in a decrease of feral cats. To the extent Plaintiff argues that Defendants should have captured and destroyed the feral cats, the failure to do so does not constitute a Takings claim.

Moreover, she failed to plausibly allege that she carries a greater burden than other Albuquerque residents– *i.e.*, that the city was dumping in her neighborhood more than her fair share of cats. *Penn Cent.,* 438 U.S. at 123, 98 S.Ct. 2646 (Takings clause prevents "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Finally, Plaintiff failed to plausibly allege that there were damages.

C. Constitutional Violation was Not Clearly Established.

Alternatively, the Court concludes that Plaintiff failed to satisfy her burden on the clearly established prong of qualified immunity. Here, the individual Defendants asserted qualified immunity and specifically the clearly established prong. Therefore, Plaintiff bears the burden of citing to case law and articulating the clearly established right they claim had been violated. *See*

Thomas v. Durastanti, 607 F.3d 655, 669 (10th Cir. 2010); *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007) ("[T]he record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity." (internal quotation marks omitted)). In analyzing clearly established law, the Court looks at the cases cited by Plaintiff to determine whether those cases can serve as clearly established law. *See, e.g., A.M. v. Holmes*, 830 F.3d 1123, 1154 (10th Cir. 2016) (granting qualified immunity where "neither of Plaintiff's cited sources can serve as the clearly established law governing this First Amendment retaliation claim.").

"The law is clearly established if there is a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, that has found the law to be as the plaintiff maintains." *Gadd v. Campbell*, 2017 WL 4857429, at *4 (10th Cir. 2017). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (internal quotation marks omitted). "Clearly established law should not be defined at a high level of generality." *White v. Pauly*, —— U.S. ——, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (internal quotation marks omitted). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.*

Plaintiff did not cite to any case law aside from general Takings principles and *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2168, 204 L. Ed. 2d 558 (2019). *Knick* concerns whether a plaintiff must exhaust state court remedies before pursuing a §1983 action in state court and does not appear to be relevant to this case. Moreover, Plaintiff has not cited to any case holding that release of feral animals constitutes a takings claim, and the Court could find none. Therefore, the Court cannot say that a reasonable government official would know that operating a program

to catch, neuter and vaccinate, then release, feral cats would constitute a violation of Plaintiff's rights under the Takings Clause.

The Court concludes that Plaintiff failed to carry her burden of citing to clearly established law, and the Court finds that the individual Defendants are entitled to qualified immunity. *See Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (plaintiff failed burden under qualified immunity by failing to cite to any Supreme Court or Tenth Circuit opinion that would indicate right was clearly established); citing *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."); *Gutierrez v. Cobos*, 841 F.3d 895, 906-907 (10th Cir. 2016) (plaintiff failed to meet burden where they did not cite to legal authority for clearly established law).

III. Court *sua sponte* declines to exercise supplemental jurisdiction over remaining state law claims.

Having dismissed the Federal takings claim, only state-law claims remain, including a (1) New Mexico Takings claim; (2) state law trespass claim; and (3) state law nuisance claim. This Court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The Court "may decline to exercise supplemental jurisdiction over a claim" under § 1367(a) if the Court "has dismissed all claims over which it has original jurisdiction." § 1367(c)(3). "When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011). The Court has discretion to decide *sua sponte* whether to exercise supplemental jurisdiction over remaining state law claims.

See Ames v. Miller, 247 Fed. Appx. 131, 133-35 (10th Cir. 2007) (unpublished) (affirming court's sua sponte decisions to dismiss and to decline supplemental jurisdiction over state law claims).

In dismissing state law claims for lack of supplemental jurisdiction, the Court weighs the following factors: judicial economy, convenience, fairness, and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). In the usual case, this will point toward dismissal. *Id.*

Here, fairness and comity overwhelmingly weigh towards declining supplemental jurisdiction. Plaintiff asserts novel state-law issues, and the State of New Mexico and the state courts have a strong interest in shaping that law. Where federal claims are not implicated, a federal district court should avoid second-guessing a municipality's decision in how it exercises its public health and police powers. Moreover, this case is in its early stages. It was filed November 27, 2019, and discovery and scheduling are stayed. Therefore, judicial economy and convenience are not served by exercising supplemental jurisdiction. Moreover, the statute of limitations has been tolled. *See* 28 U.S.C. § 1367(d); *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1217 (10th Cir. 2014). The Court will therefore dismiss the state law claims without prejudice to asserting them in state court.

IV. Plaintiff's Fed. R. Civ. P. 56(d) affidavit.

Plaintiff attached a Rule 56(d) affidavit to his response to the motion to dismiss. Initially, the Court notes that such affidavit is not applicable to a Fed. R. Civ. P. 12(b)(6) motion. Moreover, because the Court takes *well-pled* allegations as true, the affidavit is unnecessary in response to a Fed. R. Civ. P. 12(b)(6).

Plaintiff argues that she was not able to get discovery relating to how involved the individual Defendants were in the TNR policy. "Unless [a] plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to a

dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added); see also *Workman v. Jordan*, 958 F.2d 332, 336 ("If the [defendant's] actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery."). Even assuming the individual Defendants were personally involved in the constitutional violation, Plaintiff's claims fail on the clearly established prong of qualified immunity.

Finally, the Court dismissed the Takings claim on alternate grounds unrelated to whether the individual Defendants were personally involved in the alleged constitutional violation, therefore discovery is unnecessary.

CONCLUSION

For the reasons stated above, the federal claims against the Defendants are dismissed with prejudice, and the state law claims are dismissed without prejudice to reasserting them in state court.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss **(Doc. 17)** is **GRANTED**.

IT IS FURTHER ORDERED that the Motion to Stay Proceedings **(Doc. 19)** is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that the Federal Takings claim and inverse condemnation claim (Count I) against the Defendants is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over the remaining state law claims (Count I and II). These state law claims are therefore **DISMISSED WITHOUT PREJUDICE.** Plaintiff may reassert these state law claims in state court.

A separate judgment will be issued.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARCY BRITTON,

Plaintiff,

vs. Case No. 1:19-cv-01113 KWR/JHR

MAYOR TIM KELLER,
DANNY NEVAREZ, and
CITY OF ALBUQUERQUE,

Defendants.

JUDGMENT

THIS MATTER comes before the Court upon Defendants' Motion to Dismiss Plaintiff's Amended Complaint under Rule 12(b)(6) on Qualified Immunity and Other Grounds, filed on February 26, 2020 **(Doc. 17)**. Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this judgment, the Court (1) dismisses with prejudice Plaintiff's Federal Takings Clause claim (Count I) and (2) declines to exercise supplemental jurisdiction over the state law claims (Counts I and II) and dismisses them without prejudice.

IT IS THEREFORE ORDERED and **ADJUDGED** that the Federal Takings Clause claim (Count I) against the Defendants in this action is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED AND ADJUDGED that the state law claims (Counts I and II) in this action are **DISMISSED WITHOUT PREJUDICE** to reasserting them in state court.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE