No. 23-1363

IN THE

Supreme Court of the United States

VICKI BAKER,

Petitioner,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSORS JULIA D. MAHONEY AND ILYA SOMIN AND THE CATO INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

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Amici have a strong interest in the correct interpretation of the Takings Clause and in the fundamental property rights it protects.[1]

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief as required by Rule 37.

SUMMARY OF ARGUMENT

When the government intentionally and permanently damages private property for the sake of the public good, the Takings Clause generally requires the government to provide just compensation for the damage inflicted.

Below, the Fifth Circuit created a categorical exception to this requirement, holding that an innocent bystander is entitled to no compensation whatsoever when the property damage is caused by police action that is deemed "necessary" for public safety. But the Takings Clause contains no such exception. Rather, as this Court recently (and unanimously) reaffirmed, "[t]he Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Tyler v. Hennepin County*, 598 U.S. 631, 647 (2023) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

This Court's precedents require looking to the Taking Clause's history and tradition to ascertain its scope and proper application. And there is no historical evidence that suggests this sort of police conduct was excepted from the just compensation requirement. Indeed, the Founding generation enacted the Takings Clause *in rejection* of the crown's and colonies' common law practice of taking private property in times of emergency without providing just compensation.

Moreover, the question presented has bred irreconcilable conflict among the federal courts of appeals. The Seventh, Federal, and now Fifth Circuits

have all recognized blanket exceptions for police conduct that damages an innocent bystander's property while protecting public safety. And the Tenth Circuit, in an unpublished opinion, has concluded the same. Meanwhile, the Fourth Circuit has reached the opposite conclusion, holding that the Takings Clause includes no such exceptions. And the courts of last resort for Minnesota and Texas have reached the same conclusion when applying materially identical state constitutional provisions.

With the steady rise in SWAT actions and other high-impact police raids across the United States in recent decades, the question presented is now more important than ever. This Court should grant the petition to resolve the circuit split on this important issue and restore the Takings Clause's fundamental protections to innocent property owners like Petitioner who are otherwise unjustly made to bear the public's burden alone.

ARGUMENT

I. The Fifth Circuit's Interpretation of the Takings Clause Cannot Be Reconciled with This Court's Precedents or the Provision's Original Meaning.

The Fifth Circuit's decision below unconstitutionally left Petitioner, an innocent bystander, to bear alone the costs of a police action that was undertaken for the public's protection, and which intentionally destroyed her home. The Fifth Circuit held, contrary to the Takings Clause's foundational principles, that the government can "destroy [a property's] value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation."

Pumpelly v. Green Bay Co., 80 U.S. 166, 177–78 (1871). The interpretation below thus "pervert[ed] the constitutional provision into a restriction upon the rights of the citizen . . . and ma[d]e it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Id.* at 178.

Instead, looking to history and tradition as this Court's precedents require, it is clear that the Fifth Amendment requires governments to compensate innocent bystanders for the damage police inflict on their property during a "necessary" action undertaken for the public's benefit. See *Armstrong*, 364 U.S. at 49.

A. Nothing in the Takings Clause's history or tradition supports the finding of a blanket exception for "necessary" police raids.

The history and tradition of the Takings Clause are of central importance in determining the meaning of the provision. See *Tyler*, 598 U.S. at 637–44 (determining the applicability of the Takings Clause from "[h]istory and precedent" reaching back to Magna Carta); *Horne*, 576 U.S. at 358 ("The principle reflected in the [Takings] Clause goes back at least 800 years to Magna Carta."). And looking to that history, it is evident that no categorical exception can exempt the government from providing just compensation when it destroys an innocent bystander's private property for the sake of public safety.

The Court's approach in *Horne v. Department of Agriculture*, 576 U.S. 351 (2015), is instructive. First, the Court examined the history of the Takings Clause, noting that it was "'probably' adopted in response to 'the arbitrary and oppressive mode of obtaining supplies for

the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever.'" *Id.* at 359 (quoting 1 BLACKSTONE'S COMMENTARIES, Editor's App. 305–06 (1803)). In light of this history, the Court held that the government owed just compensation when it took personal property because the Clause "protects 'private property' without any distinction between different types." *Id.* at 358.

The same logic applies here: The Takings Clause requires just compensation when property is taken for "public use," without any distinction between a use that is merely beneficial to the public versus one that is deemed "necessary."[2] And "[n]othing in the history suggests"

2. Indeed, when this Court concluded in *National Board of YMCA v. United States*, 395 U.S. 85 (1969), that the government owed no compensation to an innocent bystander whose property was temporarily occupied by police clearing out rioters, this Court notably did *not* pronounce a blanket exemption for police conduct. Nor did it hold that it was the *necessity* of the police action that negated the just compensation requirement. Instead, the Court explained that the YMCA was not entitled to compensation because "there was no showing that any damage occurred because of the presence of the troops," and because the YMCA was the "particular intended beneficiary" of the police action—that is, the police were trying to protect the YMCA's property from the damage *rioters* were inflicting. *Id.* at 89. Thus, the property was not taken primarily for public use, "even though the [police] activity may [have] also be[en] intended incidentally to benefit the public." *Id*. at 92. Here, the inverse is true: Petitioner's home was damaged by law enforcement, not the criminal targeted by law enforcement. And Petitioner was not the "particular intended beneficiary" of the police action. Rather, her house incidentally sustained damages that the law-enforcement agents themselves inflicted during their pursuit of a fugitive—an activity that primarily benefited the public, not Petitioner.

that property taken pursuant to police powers to protect the public "was any less protected against physical appropriation than [ ] property" taken for some other public use. *Id.* at 359. Indeed, professional police forces did not exist at the Founding, and only a handful of major American cities maintained any sort of police force at the time of Reconstruction. In fact, the world's first modern police force did not emerge until 1829 in London. See Debo P. Adegbile, *Policing through an American Prism*, 126 YALE L. J. 2222, 2230 (2017). Thus, police takings such as Petitioner's were not even considered—let alone excepted from the Takings Clause—at the time of the enactment of the Fifth Amendment in 1791, or in 1868 when the Fourteenth Amendment incorporated these protections against the States.

The Fifth Circuit's decision analogized the destruction of Petitioner's home to common law exceptions to private trespass law and uncompensated takings, but each of these examples is inapposite to the Takings Clause analysis.

First, law enforcement's destruction of Petitioner's home is unlike historic firewall defenses of necessity, which concern only the private law of trespass and predate the creation of governmental firefighting forces. See City of Cincinnati, "Fire Department History" ("On April 1, 1853, Cincinnati, Ohio, established the first professional and fully paid fire department in the United States."), available at https://tinyurl.com/55y55syc. At common law, when a trespass is necessary to prevent a greater evil, private trespassers may defend themselves with the doctrine of necessity. Before the genesis of public fire departments, private individuals relied on this necessity defense to safeguard themselves from liability for trespass

when circumstances compelled a community to pull down a structure to prevent the spread of fire. See *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13 (1606) (una voce). But trespass law is not at issue here. There is no doubt that the exigent circumstances—not to mention governmental immunity—freed the City from liability for trespass to Petitioner's house. But the Fifth Amendment's just compensation requirement for the destruction the City intentionally inflicted on Petitioner's property remains.

Further, the firewall cases involved property facing *inevitable* destruction—the houses would have been destroyed by fire if they had not been pulled down to serve as firebreaks.[3] See *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844). Under such circumstances, "[t]here was no voluntary sacrifice of the property of one proprietor for the safety of other proprietors." *Id.* at 464. Accordingly, it would be a windfall to compensate the owner of a house used as a firebreak while leaving the remaining homeowners who lost their property to the fire uncompensated.

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3. A similar rationale supported this Court's decision in *United States v. Caltex (Philippines)*, 344 U.S. 149 (1952). In *Caltex*, the Court held that the owners of oil facilities destroyed by the military during its invasion of Manila in World War II were not entitled to just compensation under the Takings Clause. The opinion's reasoning, although not a model of clarity, was based at least in part on the fact that the property would inevitably be lost due to "the fortunes of war"—that is, the facilities would have been seized and used by the enemy if not destroyed by the American military. *Id.* at 150–51; see also *Nat'l Bd. of YMCA*, 395 U.S. 85 (denying just compensation in part because the property damage was caused by rioters, whom the police were seeking to expel). Moreover, *Caltex* is a unique case involving markedly different facts than those at issue here.

Here, importantly, Petitioner's home did not face inevitable destruction. Indeed, her house might well have remained completely unharmed but for the actions of the police. Petitioner alone bore the cost of law enforcement's deliberate actions to protect the public. The Fifth Amendment requires compensation for this public-good taking. See *Tyler*, 598 U.S. at 647 ("The Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong*, 364 U.S. at 49)).

Additionally, common law examples of uncompensated takings do not support the Fifth Circuit's interpretation of the Takings Clause. In fact, they show the opposite. The Founding generation's dissatisfaction with these very types of takings motivated the Takings Clause's enactment. See William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 697 n.9 (1985) ("At the time of the American Revolution, the principle that the state was obligated to compensate individuals when it took their property had not won general acceptance in England."); Derek T. Muller, *As Much upon Tradition as upon Principle: A Critique of the Privilege of Necessity Destruction under the Fifth Amendment*, 82 Notre Dame L. Rev. 481, 497–98 (2006) ("At English common law, the government as sovereign owed no compensation for any taking, destruction or otherwise, unless parliament granted it."); 1 Blackstone's Commentaries, Editor's App. 305–06 (1803).

The police's destruction of Petitioner's home is also unlike police power nuisance regulations. In his influential

1868 treatise on constitutional law, Justice Thomas Cooley emphasized that the police power could only be used to restrict "a particular use of property" without paying compensation for a taking, if that use had become a "public nuisance, endangering the public health and the public safety." Thomas Cooley, Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 595 (1868); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992) ("It is correct that many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."). Cf. Joshua Braver & Ilya Somin, *The Constitutional Case against Exclusionary Zoning* (Feb. 15, 2024), Tex. L. Rev. (forthcoming), available at https://ssrn.com/abstract=4728312, at 24–29 (discussing the original meaning of the police power exception to takings liability). Petitioner's house presented no such nuisance nor any threat to public health or safety.

Finally, Petitioner's case is not like a forfeiture of personal property that follows from a culpable owner's use of that property to commit a criminal offense. Petitioner did not use her house to commit or aid in any wrongful act. The question presented is thus limited to the destruction of an innocent bystander's property and has no bearing on *Bennis v. Michigan*, 516 U.S. 442 (1996) (holding that the forfeiture of a car on public nuisance grounds did not violate the Takings Clause). *Bennis* addressed only the forfeiture of personal property as a consequence of a joint-owner's misconduct. Petitioner was strictly an innocent bystander here.

B. This Court's precedents require a case-specific analysis, which confirms Petitioner's entitlement to just compensation.

Consistent with the above history, this Court has repeatedly affirmed that the "public interest" cannot justify creating categorical exceptions to the fundamental protections of the Takings Clause. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012). "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest," and it has routinely "rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction." *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).[4]

Instead, this Court's takings jurisprudence requires courts to engage in a case-specific analysis to determine the viability of a claim for just compensation. Specifically, the Court has outlined at least three factors for consideration when determining whether property damage amounts to a taking: the duration of the interference, the owner's reasonable investment-backed expectations, and the foreseeability of the damage inflicted. See *Ark. Game & Fish Comm'n*, 568 U.S. at 38–39. Each of these factors weighs in favor of finding a compensable taking here.

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4. Notably, permitting takings claims by innocent homeowners like Petitioner does not prevent law enforcement from engaging in SWAT operations and similar raids. Nor need police officers personally bear any expense. Under the Takings Clause, it is the public fisc that pays the price for public benefits such as these. See *Armstrong*, 364 U.S. at 49.

1. *Duration.* Even though the City occupied Petitioner's house only for the duration of the standoff, the City's interference caused permanent damage that rendered the home uninhabitable. This Court recognized in *Arkansas Game & Fish* that a temporary occupation that causes permanent damage constitutes a taking. 568 U.S. at 39; see also *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Ag.*, 535 U.S. 302, 322 (2002) ("[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.").

2. *Owner Expectations.* The character of the owner's reasonable investment-backed expectations regarding the land's use also weighs in favor of finding a compensable taking here. See *Ark. Game & Fish Comm'n*, 568 U.S. at 38. As a law-abiding citizen, Petitioner had no reason to expect that the City would destroy her private home on the eve of closing. Rather, Petitioner had a sound expectation under the history and tradition of property rights in the United States that she would be able to sell her property at the value at which she maintained it. *Horne*, 576 U.S. at 361 ("[P]eople . . . do not expect their property, real or personal, to be actually occupied or taken away.").

3. *Foreseeability.* The damage to Petitioner's home was "intended" and thus is "the foreseeable result of [the] authorized government action." *Ark. Game & Fish Comm'n*, 568 U.S. at 39; *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021). And this factor plays an even greater role in this case than it did in *Arkansas Game & Fish*, where the government's action took place outside the property. Here, the City intentionally used armored vehicles (a "BearCat" and a "T-Rex"), a grenade launcher,

and toxic gas to invade Petitioner's property and extract the fugitive. It is beyond dispute that the destruction of Petitioner's home was the inevitable and thus foreseeable result of the City's actions.

A straightforward application of this Court's takings precedents confirms that the damage to Petitioner's home is a taking for which she is constitutionally entitled to just compensation. The Fifth Circuit's inability to faithfully apply these precedents cannot be permitted to stand.

II. This Court's Plenary Review Is Necessary to Resolve a Circuit Split Deepened by the Fifth Circuit.

This Court's intervention is made even more necessary by the entrenched circuit split on the question presented. The decision below exacerbated conflict among the federal courts of appeals regarding whether an innocent bystander is entitled to just compensation when his property is destroyed by police action carried out for the public good.

The Fifth Circuit joined the Seventh and Federal Circuits in holding that an innocent property owner could not recover under the Takings Clause for damages incurred as a result of police operations carried out for the public's benefit. See *Johnson v. Manitowoc*, 635 F.3d 331 (7th Cir. 2011) (innocent landlord was not entitled to just compensation for rental property damaged by police executing a search warrant); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008) (innocent corporation was not entitled to just compensation for pharmaceuticals seized as evidence in the criminal investigation of a third

party). The Tenth Circuit has reached the same result—albeit in an unpublished opinion—in a case with facts that are materially identical to the case at bar. See *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019) (innocent homeowner was not entitled to just compensation for extensive property damage caused by police seeking to apprehend a fugitive who had barricaded himself inside).

But even among these four circuits, there is conflict over the proper interpretation of the Takings Clause. The Seventh, Tenth, and Federal Circuits have recognized a blanket law-enforcement exception, holding that no taking occurs when the government damages private property pursuant to the lawful exercise of its law-enforcement powers. See *Johnson*, 635 F.3d at 336; *Lech*, 791 F. App'x at 717; *AmeriSource Corp.*, 525 F.3d at 1154. The Fifth Circuit, on the other hand, explicitly rejected a categorical exemption for police conduct, finding instead that the "necessity" of the police's conduct in this case exempted Respondent from providing just compensation. Pet. App. 12a–24a.

In direct conflict with these decisions, the Fourth Circuit has held that no exemptions apply when the government's exercise of its police powers damages an innocent bystander's property for the sake of public health and safety. In *Yawn v. Dorchester County*, 1 F.4th 191 (4th Cir. 2021), beekeepers' hives were destroyed when the government aerially sprayed pesticides to prevent the spread of the Zika virus by mosquitoes. *Id.* at 195. The trial court rejected the beekeepers' takings claim on the ground that the aerial spraying was an exercise of the county's police powers and thus exempt from takings liability. The Fourth Circuit rejected such an exception,

noting that "[t]he [Supreme] Court has consistently 'rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction.'" *Id.* (quoting *Ark. Game & Fish*, 568 U.S. at 37). Instead, the Fourth Circuit applied the case-specific analysis dictated by this Court's precedents and concluded that the beekeepers' claim failed on the foreseeability prong given the circumstances surrounding the spraying. See also *Wallace v. City of Atlantic City*, 608 A.2d 480, 484 (N.J. Super. Ct. 1992) (rejecting arguments for a blanket exemption and finding that the innocent landlord was entitled to just compensation for property damage incurred during the police's execution of a no-knock warrant).

Finally, in applying state constitutional provisions that are materially identical to the Fifth Amendment's Taking Clause in cases involving facts that are materially identical to those at issue here, the Supreme Courts of Minnesota and Texas issued rulings in direct conflict with that of the Fifth Circuit below. Both *Wegner v. Milwaukee Mutual Insurance Company*, 479 N.W.2d 38 (Minn. 1992), and *Steele v. City of Houston*, 603 S.W. 2d 786 (Tex. 1980), involved police operations seeking to apprehend fugitives who were barricaded inside innocent bystanders' homes. In rejecting the application of the "public necessity" doctrine to takings claims, the Minnesota Supreme Court explained that "the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages." *Wegner*, 479 N.W.2d at 42. In *Steele*, the Texas Supreme Court acknowledged the possibility of governmental immunity in cases of

inevitable necessity, such as the creation of firebreaks or the shooting of a mad dog, but it held that the apprehension of a fugitive barricaded inside a third party's home did not qualify for such an exemption. 603 S.W.2d at 792.

The divergent approaches that these courts have taken to the question presented demonstrates the pervasive confusion among lower courts. This Court's intervention is necessary to restore clarity. It should grant the petition and confirm that the approach taken by the Fourth Circuit—and the Minnesota and Texas Supreme Courts in analogous cases—is correct, because nothing in the text or history of the Takings Clause or in this Court's takings precedents supports the creation of a blanket exception for "necessary" police raids that damage innocent bystanders' property.

III. The Question Presented Is Important.

Multiple circuits and state supreme courts have already addressed cases in which law-enforcement agents damage or destroy the property of innocent bystanders without providing just compensation. And these cases are, unfortunately, likely to recur. In such situations, innocent people can tragically lose their homes or other valuable property. Thus, it is important for this Court to address the issue and enable these innocent property owners to secure the "just compensation" required by the Fifth Amendment.

Additionally, the impact of decisions like those of the Fifth and Tenth Circuits will only grow as modern police tactics become increasingly militarized and police raids become more common. See generally Radley Balko, The

Rise of the Warrior Cop: The Militarization of America's Police Forces (2014). Notably, between 1980 and 2014, the number of annual SWAT raids in the United States increased from 3,000 to as many as 80,000. See Bonnie Kristian, *The Troubling Rise of SWAT Teams*, The Hill (Jan. 19, 2015), available at https://theweek.com/articles/531458/troubling-rise-swat-teams. Police raids now have a greater potential than ever before to cause significant damage to the property of innocent bystanders. Consequently, courts will face a growing number of takings claims like Petitioner's and this important question will continue to loom until it is resolved by this Court. See *Lech*, 791 Fed. App'x 711, *cert. denied*, 141 S. Ct. 160 (2020).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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