No. 23-1363

In The
Supreme Court of the United States

VICKI BAKER,

Petitioner,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a public necessity such as halting the advance of a fire, or denying resources to the enemy during war, exempts law enforcement's destruction of the home of an innocent third party from the Takings Clause.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, public interest law firm dedicated to defending the foundations of a free society. PLF represents clients in state and federal courts to give voice to Americans who believe in limited government, private property rights, and individual freedom.

PLF has represented clients in some of the most consequential property-rights cases in recent times. *See, e.g.*, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Knick v. Twp. of Scott*, 588 U.S. 180 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Sackett v. E.P.A.*, 566 U.S. 120 (2012); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). It has also filed countless amicus briefs on behalf of property owners in this Court and lower courts, including a brief in support of Petitioner in the Fifth Circuit below.

Given PLF's expertise, the brief that follows should assist this Court in resolving the question presented. Petitioner has ably formulated that question as "whether the Takings Clause applies even when the government takes property for a particularly compelling public use." Pet. at i. But PLF believes this

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[1] In accordance with Rule 37, counsel for all parties were timely notified of Amicus's intention to file this brief. Amicus additionally affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

Court should grant certiorari also to decide "whether a public necessity such as halting the advance of a fire, or denying resources to the enemy during war, exempts law enforcement's destruction of the home of an innocent third party from the Takings Clause."

SUMMARY OF ARGUMENT

Amicus agrees with Petitioner. There is no "good reason" exception to the Takings Clause. *See* Pet. at 5. Amicus further agrees this Court should grant review and reject the majority view that "good reason[s]" for taking private property can overcome the Constitution's command for just compensation. *See id.*

Amicus writes separately to ask a more precise question: does the narrow public necessity exception recognized in *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (destruction of building to stop conflagration), *United States v. Pacific Railroad Co.*, 120 U.S. 227 (1887) (wartime destruction of railroad bridges to prevent the advance of the enemy), and *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (destruction of oil terminal to prevent impending seizure by the enemy), apply to the circumstance of this case? Petitioner's broader question is worthy of certiorari and this case should be resolved on the merits in favor of Vicki Baker. In taking up that question, however, this Court should clearly hold that any Takings Clause exception to compensation for public necessity is limited to extraordinary circumstances where the property destroyed by government was already subject to impending destruction or seizure by the enemy. The wartime examples in *Caltex* and *Pacific Railroad Company* illustrate the applicable principles. *See also Nat'l Bd. of the Young Men's Christian Ass'ns v.*

United States, 395 U.S. 85 (1969). But the Fifth Circuit decision below went beyond those principles to deny compensation to Vicki Baker for the intentional destruction of her home.

The decisions that allow government destruction of private property without compensation are readily distinguishable because they deal with property in the path of an uncontainable fire or conquering army, such that the property's destruction is already inevitable, and the government merely accelerates the process for the purpose of protecting much more property elsewhere. The circumstances in which Baker's house was demolished were not of this kind.

In support of this argument, Amicus shows first why destruction of a person's house is a per se physical taking that requires just compensation. Everyone agrees that Petitioner would be entitled to compensation if the government leveled her house to build a road, airport, or school. Indeed, if a local utility installed a half-inch cable line across her roof, no one would seriously contest her entitlement to just compensation. All takings need a public purpose. As Petitioner points out, "[t]he Takings Clause *requires* a good reason for taking private property," Pet. at 5, so it is incoherent to hold—as the Fifth Circuit held—that Baker's claim for compensation fails because it was "objectively necessary" for police to destroy her house. *All* takings of private property must be "objectively necessary." Therefore, a good reason for taking someone's property is not an exemption from the Takings Clause; it's a requirement.

Second, this Court's prior decisions about conflagrations and wartime destruction of property are distinguishable. They are also a poor lens through

which to understand this case. Even if extreme exigencies of impending doom sometimes warrant an exception to the plain text of the Takings Clause, the same cannot be said for routine policing. The alternative is unthinkable. In America, the government does not have a generalized power to destroy an innocent person's home and leave them to clean up the mess without compensation.

Finally, the decision in *Cedar Point*, 594 U.S. 139, does not suggest otherwise. Amicus litigated *Cedar Point* from start to finish. In the end, this Court held that California affected a per se physical taking when it required landowners to grant access to union organizers three hours a day, 120 days of the year. *Id.* at 149. Read correctly, *Cedar Point* is about government-authorized access to property. *Cedar Point* reaffirmed that "a simple, *per se* rule" applies in cases of physical takings—namely, "[t]he government must pay for what it takes." *Id.* at 148.

Responding to the dissent, the majority acknowledged in dicta that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights" and gave, as an example, the common law "privilege [which] allowed individuals to enter property in the event of public or private necessity." *Id.* at 160–61. This is mere truism. No one disputes that the police have the right to pursue suspects, and the police in this case surely could have pursued their suspect onto Baker's land and into her house.

Instead, local authorities destroyed Baker's house and personal property. The plain text of the Takings Clause requires that she be compensated. Because

there is no general public necessity exception to the Takings Clause, the plain text is all this Court needs in this case.

ARGUMENT

I. Total destruction of a person's house is a per se taking

When private property is pressed into public service, the plain text of the Fifth Amendment requires the government to pay just compensation. U.S. Const. amend. V, cl. 5 ("nor shall private property be taken for public use, without just compensation"). The textbook state action triggering compensation is a straight condemnation where the government initiates a lawsuit seeking transfer of ownership by court order. The flip side of course is inverse condemnation, where the property owner files an action against a government entity alleging that some government action has already worked a taking of the property but without payment of compensation. Inverse condemnation cases typically are a fact specific inquiry of how far government action or regulation goes. If government "goes too far" the government action "will be recognized as a taking" and compensation will be required. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.").

Total destruction of a person's house goes too far. Under this Court's precedents, installation of a half-inch cable line goes too far. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982). Denying someone all economically viable use of her

property goes too far. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). And requiring temporary access to farmland for the purpose of union organizing goes too far. *Cedar Point*, 594 U.S. at 149. Here, by contrast, the government went further still when it physically destroyed Vicki Baker's house and her right of use. As long held, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectively destroy or impair its usefulness, it is a taking." *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872). Rather than water destroying Pumpelly's farm, the government in this case saturated Baker's house with explosives, thereby rendering its continued use as a residence impossible. Under these circumstances, the normal rule requires payment of compensation. *Id.* at 179 ("there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken").

This is not new. This Court has long recognized a "nearly infinite variety of ways in which government actions or regulations can affect property interests" and therefore give rise to a compensable taking. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). There is no doubt, for example, that had the government purposely flooded Baker's house, it would constitute a taking and require compensation. *See, e.g.*, *United States v. Cress*, 243 U.S. 316, 328 (1917) ("Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their

value, there is a taking within the scope of the Fifth Amendment."). It makes no constitutional difference that the police in this case saturated Baker's house with explosives instead of water or sand.

For inverse condemnation cases, this Court has looked to the substance of what is happening in the real world and consistently held that government action short of outright condemning property nevertheless requires compensation. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requiring compensation where the federal government exercised its commerce power over navigation to require public access to a private marina); *Loretto*, 458 U.S. at 436 (requiring compensation where a city used its police power to require the owners of apartment buildings to allow the installation of cable television equipment).

With these principles in focus, the controlling legal doctrine lines up nicely with common sense. When local authorities must destroy a person's house for local law enforcement, they must pay just compensation. Put differently, the same "simple, *per se* rule" applied in *Cedar Point* applies here: "The government must pay for what it takes." 594 U.S. at 148.

II. Emergencies do not justify a departure from the text of the Takings Clause except in the most extreme circumstances

The only viable exception to the plain text of the Takings Clause is reserved for the most extreme circumstances of conflagration or wartime exigency. This is not spin; it is a fair summation of this Court's decisions. As the dissent below observed: "All the Supreme Court's cases countenancing the public

necessity exception share th[e] characteristic of inevitable loss." *Baker v. City of McKinney*, 93 F.4th 251, 257 (5th Cir. 2024) (Elrod, J., dissenting from denial of rehearing).

This Court first recognized the doctrine of inevitable destruction in *Bowditch v. City of Boston*, when it refused to compensate a building owner for property damage after firemen exploded his building to stop a fire from spreading. 101 U.S. 16 (1879). Although the Court decided *Bowditch* based on state law, later cases involving claims for Fifth Amendment takings relied on *Bowditch* to deny compensation for destruction of private property privileged by necessity. *See* 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, 495 (2006) (collecting cases).

Many of the early inevitable destruction cases similarly involved building demolitions in urban areas to create firebreaks and fight major conflagrations. *See* Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 396–97 (2015). While building demolition "to create firebreaks was a common tactic for fighting the vast urban fires of the nineteenth century," modern firefighting strategies have reduced the need for using urban firebreaks. *Id.* at 397.

The cases involving inevitable destruction by fire harmonize with those decided in the wake of wartime destruction. After the Civil War, for example, this Court held that the federal government did not have to compensate railroad companies for bridges demolished by the Union Army in the face of

advancing Confederate forces. *United States v. Pac. R.R. Co.*, 120 U.S. 227 (1887).

The federal government expanded on these cases in the wake of World War II. Thus, in *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), this Court denied compensation under the Fifth Amendment to oil companies whose terminal facilities in Manila were demolished by the U.S. Army to prevent the facilities from falling into the hands of Japanese troops invading the Philippines. *Id.* at 150–56; *see also* Steven J. Eagle, *Regulatory Takings* § 6-5 (5th ed. 2012) (noting that Japanese troops were expected to overrun the refinery within hours, so any fair market value at the time of appropriation was merely "conjectural"). The Court noted that it "has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign." *Caltex*, 344 U.S. at 155–56.

Justice Douglas, joined by Justice Black, dissented in *Caltex*, pointing out that the property destroyed was not a public nuisance, but instead the government appropriated it to help in the war defense. *Id.* at 156 (Douglas, J., dissenting). The dissent proposed that "the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse rather than the individual, should bear the loss." *Id.* While the dissent did not carry the day in *Caltex*, it reminds us that the Court's decision was meant to be an extreme exception to the general per se rule that the government must pay for what it takes.

The doctrine of inevitable loss draws a principled and administrable line between the plain text of the

Takings Clause and this Court's prior decisions in this area. On one side of that line are widespread emergencies like uncontained fires and advancing enemy armies. In such extreme circumstances, the government can take a person's property without compensation when it is clear that the property would have been destroyed anyway had the government taken no action for the good of the broader society. This case is on the other side of the line—where local authorities determined that local law enforcement should subdue a suspect by destroying an innocent person's house. The loss of Vicki Baker's house was not inevitable. There was no indication that the suspect who invaded her property was going to destroy it himself. Rather, local authorities determined that they would deal with the situation by essentially bombing Baker's home and wiping it from the map. This kind of taking requires compensation, even under this Court's longstanding decisions dealing with the most extreme circumstances of fire and war.

III. *Cedar Point* dicta do not authorize the total destruction of a person's home without compensation

In its briefing below, the City argued that *Cedar Point* authorizes the destruction of a person's house without compensation because *Cedar Point* mentions background principles of common law that allow officials to conduct searches and pursue suspects on private land. *See* Br. of Appellant City of McKinney, *Baker v. City of McKinney*, No. 22-40644, 2022 WL 18027448, at *17–19 (5th Cir. Dec. 22, 2022). But *Cedar Point* does not support the arguments against compensation for Vicki Baker.

Responding to the state's arguments and those in a three-Justice dissent, the majority acknowledged in dicta that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point*, 594 U.S. at 160. It gave, as examples, the common-law "privilege [which] allowed individuals to enter property in the event of public or private necessity[,]" the "privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances[,]" and "government searches that are consistent with the Fourth Amendment and state law," all of which "cannot be said to take any property right from landowners." *Id.* at 161.

But this is mere truism. No one disputes that police have the right to pursue suspects, and the police in this case surely could have pursued their suspect onto Baker's land and made an arrest in her house. No one disputes that police could have served a search warrant or removed evidence for use in a prosecution. Access is not the issue in this case. Read correctly, *Cedar Point* is about government's access to property. It follows that the common-law privileges discussed in dicta do not undermine Petitioner's position. Instead, the Court was only pointing out that some kinds of government access to land do not implicate the Takings Clause because government has always enjoyed that type of access to land. This tells us nothing useful about government's total destruction of a person's house.

In any event, the dissent from denial or rehearing below explains why these "longstanding background restrictions on property rights" are still subject to the

Takings Clause under this Court's last century of jurisprudence. *See Baker*, 93 F.4th at 251–56 (Elrod, J., dissenting from denial of rehearing). Yes, common law traditions have sometimes allowed uncompensated destruction of property, but only in rare and desperate circumstances, such as creating fire breaks or arresting the advance of an enemy invasion. But this Court "has never held that anything that would have been privileged by public necessity at common law is non-compensable under the Fifth Amendment." *Id.* at 255. Rather, the common law must be consistent with the Takings Clause. *See id.* All this Court's decisions since ratification of the Takings Clause have involved property destroyed by the government when destruction of the property was already inevitable, and the government merely sped along the process in the hopes of saving many other people's property. *See id.* at 257.

And the last 100 years of takings jurisprudence suggests, instead, that the most intuitive approach to the Takings Clause is the correct one—that compensation is required when government regulation requires a private property owner to bear burdens which ought in fairness be borne by the whole of society. *See id.* at 255–57.

It is obvious that Baker deserves to be compensated for having sacrificed her house and personal property for the sake of the public good. And it would be a perversion of the decision in *Cedar Point* to conclude that it somehow precludes recovery.

* * *

It is a cornerstone of American constitutionalism that government has no power to confiscate private

property for public use without compensating the owner. Naturally, governmental agencies would prefer not to pay. That policy reality does not outweigh constitutional text. *See* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. Colo. L. Rev. 497, 546 (2004) ("Predictions of doom for governmental entities required to carry greater compensation burdens do not ameliorate the unconstitutionality, illegality, and moral perfidy of wrongful deprivations of private property by irresistible public power.").

CONCLUSION

Certiorari should be granted, the decision below should be reversed, and the Court should hold that there is no general public necessity exception to the Takings Clause.

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Respectfully submitted,

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