

No. _____

**In The
Supreme Court of the United States**

VICKI BAKER,

Applicant,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

**Application for an Extension of Time to File Petition for a Writ of
Certiorari to the United States Court of Appeals for the Fifth Circuit**

JEFFREY H. REDFERN

Counsel of Record

SURANJAN M. SEN

ROBERT J. MCNAMARA

WILLIAM ARONIN

INSTITUTE FOR JUSTICE

901 North Glebe Road, Suite 900

Arlington, Virginia 22203

(703) 682-9320

jredfern@ij.org

ROBERT E. JOHNSON

INSTITUTE FOR JUSTICE

16781 Chagrin Boulevard, #256

Shaker Heights, Ohio 44120

(703) 682-9320

Counsel for Applicant

To the Honorable Samuel Alito, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicants respectfully request that the time to file their petition for a writ of certiorari be extended for 45 days, which would have the petition due Friday, June 28, 2024. The Court of Appeals issued its opinion on October 11, 2023 (Appendix A) and denied a petition for rehearing on February 14, 2024 (Appendix B). Absent an extension of time, the petition would be due on May 14, 2024. This application is being filed more than 10 days before the petition is due. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). This request is unopposed.

Background

This is a case seeking just compensation, under the Fifth Amendment, for the intentional destruction of private property. On July 25, 2020, a fugitive barricaded himself inside the home of plaintiff Vicki Baker, who was out of town at the time. The McKinney police department surrounded her home and eventually assaulted it with armored personnel carriers, explosives, and tear gas. Upon entering the house, the police found that the fugitive had died by his own hand.

The assault did about \$60,000 of damage to Mrs. Baker's house, and the City of McKinney refused to compensate her (as did her insurer, citing a common homeowners' policy carveout for damage caused by the government). Mrs. Baker sued the City of McKinney in federal district court, alleging that the intentional destruction of private property for the purpose of removing a dangerous criminal from the

streets is a taking within the meaning of the Fifth Amendment. The district court agreed, granting Mrs. Baker summary judgment on the question of liability. A jury then awarded her \$59,656.59 in damages. The City appealed.

Before the Fifth Circuit, the City of McKinney argued that it could not be liable because the “police power” is categorically exempt from the Fifth Amendment. The Fifth Circuit panel rejected that argument but reversed on an alternate ground—that “public necessity” is an (apparently narrower) exception to the Fifth Amendment, which applied in this case. Mrs. Baker petitioned for rehearing and rehearing en banc. She argued that it was improper for the panel to reverse on a ground not raised by the City and that, in any event, that “public necessity” has never been a defense to takings liability.

The Fifth Circuit denied the petition for rehearing en banc, by a vote of 11-6. Judges Elrod and Oldham dissented, arguing that public necessity was not an exception to the Takings Clause and that the panel should not have decided the issue without the benefit of an adversarial presentation.

Reasons Why an Extension of Time Is Warranted

Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case because counsel have conflicting obligations during the relevant time period:

- Briefing in the D.C. Circuit
- Briefing in the Nebraska Supreme Court
- Briefing in the Texas Court of Appeals

- Briefing in the Pennsylvania Commonwealth Court (intermediate appellate)
- Summary Judgment briefing in the Central District of California
- Summary Judgment briefing in the Western District of Washington
- Motion to Dismiss briefing in the Southern District of Mississippi
- Preparing for oral argument in the Second, Fifth (en banc), and Sixth Circuits
- Preparing for Motion to Dismiss argument in the District of Minnesota
- Depositions in the Western District of Texas
- Preparing for trial in the District of Delaware

Conclusion

Applicant requests that the time to file a petition for writ of certiorari in the above-captioned case be extended 45 days to and including Friday, June 28, 2024.

April 4, 2024

Respectfully submitted,



JEFFREY H. REDFERN

Counsel of Record

SURANJAN M. SEN

ROBERT J. MCNAMARA

WILLIAM ARONIN

INSTITUTE FOR JUSTICE

901 North Glebe Road, Suite 900

Arlington, Virginia 22203

(703) 682-9320

jredfern@ij.org

ROBERT E. JOHNSON

INSTITUTE FOR JUSTICE

16781 Chagrin Boulevard, #256

Shaker Heights, Ohio 44120

(703) 682-9320

Counsel for Applicant

APPENDIX A

Vicki Baker,

v.

City of McKinney, Texas.

Opinion
U.S. Court Court of Appeals
for the Fifth Circuit
October 11, 2023

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 11, 2023

Lyle W. Cayce
Clerk

No. 22-40644

VICKI BAKER,

Plaintiff—Appellee,

versus

CITY OF MCKINNEY, TEXAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:21-CV-176

Before SMITH, HIGGINSON, and WILLET, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge:*

When an armed fugitive held a 15-year-old girl hostage inside plaintiff-appellee Vicki Baker’s home, City of McKinney (the “City”) police officers employed armored vehicles, explosives, and toxic-gas grenades to resolve the situation. The parties agree the officers only did what was necessary in an active emergency. However, Baker’s home suffered severe damage, much of her personal property was destroyed, and the City refused to provide compensation.

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Baker brought suit in federal court alleging a violation of the Takings Clause of the Fifth Amendment to the United States Constitution, which states that private property shall not “be taken for public use, without just compensation.” The district court held that as a matter of law, the City violated the Takings Clause when it refused to compensate Baker for the damage and destruction of her property. The City timely appeals.

We conclude that, as a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons. Baker has maintained that the officers’ actions were precisely that: necessary, in light of an active emergency, to prevent imminent harm to the hostage child, to the officers who responded on the scene, and to others in her residential community. Accordingly, and despite our sympathy for Ms. Baker, on whom misfortune fell at no fault of her own, we REVERSE.

I.

Baker was a long-time resident of McKinney, Texas when she made plans to sell her house and retire. She had already moved to Montana at the time of the events in question, July 25, 2020, and her adult daughter, Deanna Cook, was staying in Baker’s McKinney home to prepare it for final sale. Baker’s dog was also present at the home.

On the morning of July 25, Cook saw a Facebook post that Wesley Little was on the run with a 15-year-old female “runaway.” Cook recognized Little because he “did some work inside of [Baker’s] home more than a year before the incident occurred.” Baker had fired him at that time because of comments that made Cook uncomfortable.

That same morning, McKinney police spotted Little driving a Corvette with the 15-year-old girl. Officers began pursuit, but “[i]t was a very

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fast Corvette,” and Little evaded police. He arrived at the Baker residence shortly thereafter with the 15-year-old girl and knocked on the door. Cook answered, and Little asked to come in and to put his car in the garage. Cook recognized the girl and, though frightened, formulated a plan to help: She agreed to let Little into the house, but then told him, falsely, that she had to go to the supermarket. Once away from the house, she called Baker and described the situation, and Baker called the police.

City police arrived soon after and, in the words of one of the officers, “set up perimeter on the home and essentially tr[ie]d to secure it. And what we[] [were] doing [was] for the well-being of not only the 15-year-old girl, but the community as a whole.” Officers employed a BearCat, which is an “armored personnel carrier,” and engaged in “loud hailing” using an intercom system. Soon after, Little released the girl and she exited the house. The girl told police that “he’s in the ceiling; she had pulled down the attic so he could get up there; they had a lot of long guns, some pistols; and that he was obviously high on methamphetamine.”

Little somehow “communicated to” police that he “had terminal cancer, wasn’t going back to prison, knew he was going to die, was going to shoot it out with the police.” Police proceeded to use explosive devices, the BearCat, a T-Rex (similar to the BearCat), toxic gas grenades, and a drone to try to resolve the situation. After some time, the drone was able to reach a vantage point to see that Little had taken his own life.

It is undisputed that police acted unimpeachably that day, and no party in this case has ever suggested otherwise. At trial, Baker’s attorney made it a point on direct examination to underline that “there was some really good police work here,” it “was a successful operation,” “[e]veryone followed procedure,” and “[e]veryone did what they were supposed to do,” along with other affirmations that the officers acted irreproachably. Her

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attorney reiterated that the severe damage done to Baker's home "was necessary. No issue there." And in briefing, Baker makes clear she does not dispute that "it was necessary to destroy her house." In light of the way Baker has argued this case, we do not ourselves evaluate whether the damage to her home was "necessary"; we grant the parties' shared contention that it was.

Nevertheless, the damage to Baker's home was severe. As the district court explained, quoting Baker's motion for summary judgment, "[m]uch of the damage went beyond what could be captured visually." Specifically,

The explosions left Baker's dog permanently blind and deaf. The toxic gas that permeated the House required the services of a HAZMAT remediation team. Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet), and bricks needed to be replaced—in addition to the windows, blinds, fence, front door, and garage door. Essentially all of the personal property in the House was destroyed, including an antique doll collection left to Baker by her mother. In total, the damage... was approximately \$50,000.

Baker filed a claim for property damage with the City, but the City replied in a letter that it was denying the claim in its entirety because "there is no liability on the part of the City or any of its employees." Baker's insurance "would not cover any damage caused by the City's police, including the structural damage." Baker received numerous donations from businesses and others who had heard of her plight. She has maintained that if she should ever receive compensation from the City, she would pay back everyone who volunteered to help her.

On March 3, 2021, Baker filed suit against the City in federal court in the Eastern District of Texas for violations of the takings clauses of the United States and Texas Constitutions. She alleged liability under the Fifth

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Amendment directly because it “is self-executing” under *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019), and she also alleged liability under the Fifth Amendment via the vehicle of 42 U.S.C. § 1983. She contended the district court has jurisdiction over her federal constitutional claims under the federal-question statute, 28 U.S.C. § 1331, and supplemental jurisdiction over the state takings claim under 28 U.S.C. § 1367.

The City filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It argued that Baker has no cause of action under the Fifth and Fourteenth Amendments and that the City did not take Baker’s property under the Fifth Amendment; that Baker’s complaint failed to sufficiently allege *Monell* liability under § 1983;¹ that the district court lacks supplemental jurisdiction over the Texas Constitution claim; and that the Texas Constitution claim fails because “it is a sheer attempt to allege tort recovery in a claim wearing takings claim clothing.” The district court denied the City’s motion in full.

Baker filed a motion for partial summary judgment on her claims that the City is liable under the Fifth Amendment and the Texas Constitution. The district court granted it, holding that the City is liable directly under the Fifth Amendment and the Takings Clause of the Texas Constitution. The district court also held that “because the Fifth Amendment is self-executing, Baker’s claim under the Fifth Amendment Takings Clause is not dependent upon the § 1983 vessel. Accordingly, the Court need not determine whether Baker established an official policy under *Monell*.” (footnote omitted). But the district court explained in a subsequent order,

because Baker also brought a claim under §1983, the Court considered this claim as well, ultimately finding an issue of fact

¹ See *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

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that the Court declined to resolve at summary judgment. Further, the Court did not determine the amount of just compensation to which Baker is entitled. Accordingly, damages and the City's liability under § 1983 are issues that have been reserved for jury determination at trial.

At a pre-trial conference, the City "lodge[d] an objection on the *Monell* issues," claiming they have not "been adequately pled or presented in this case" and that the only thing left to try is the question of damages. The district court rejected this argument, stating that § 1983 "most certainly was pled. Without question, it's pled in the alternative."

At that same conference, the district court also noted that the City made an offer to Baker for "the full amount of damages" to settle the case. Baker refused because, her attorney said, "she wanted a change in policy or some assurance that people in her position in the future wouldn't be subjected to similar denial of compensation, and the City wasn't willing to offer that so that was why she proceeded."

Two weeks before trial, Baker filed a motion *in limine* to exclude evidence of donations or insurance proceeds she received to help repair her home. She cited the collateral source rule, which is a fixture of tort law, and equitable considerations. The district court agreed with Baker and granted the motion in full.

Trial was held from June 20 to 22, 2022. On June 21, the City submitted a motion for judgment as a matter of law along with a supplemental brief arguing that (1) Baker did not adequately plead a plausible § 1983 claim against the City and (2) Baker failed to show that her alleged constitutional injury was caused by an official city policy or custom, or by a city policymaker. The district court denied the motion.

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The jury found that the City was acting under color of state law when it refused to compensate Baker for her lost property and that the City's refusal proximately caused Baker's damages of \$44,555.76 for her home and \$15,100.83 for her personal property. Because the district court had already found that the Fifth Amendment is self-executing, that the City's refusal to compensate Baker was a violation of the Fifth Amendment, and that the City's refusal was a violation of the Texas Constitution, Baker was given the option to elect whether to pursue the judgment under the Fifth Amendment directly, under § 1983, or under the Texas Constitution. Baker chose § 1983.

The City submitted a motion for a new trial on July 20, 2022. The court denied it on August 26, 2022. The City timely filed a notice of appeal on September 23, 2022, challenging all the district court's unfavorable decisions and orders stretching back to its denial of the City's 12(b)(1) and 12(b)(6) motions.

II.

We begin with jurisdiction. The City contends that under our court's decision in *Devillier v. State*, 53 F.4th 904 (5th Cir. 2023), *cert. granted*, 92 U.S.L.W. 3063 (U.S. Sept. 29, 2023) (No. 22-913), federal courts lack jurisdiction over Baker's Fifth Amendment takings claim. This contention fails foremost because *Devillier* made no jurisdictional holding. *See id.* at 904. The district court was therefore correct to hold that it had federal-question jurisdiction in this case pursuant to 28 U.S.C. § 1331.²

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

² The City also contends that the district court lacked supplemental jurisdiction over Baker's Texas Constitution claim pursuant to 28 U.S.C. § 1367. This contention fails because it is explicitly predicated on the claim that the district court lacked federal-question jurisdiction.

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III.

We turn now to the merits of Baker’s Fifth Amendment claim.

a.

The City invites our court to adopt a broad rule: because Baker’s property was damaged or destroyed pursuant to “the exercise of the City’s police powers,” there has been no compensable taking under the Fifth Amendment. We decline.

First, the City’s broad rule runs afoul of our precedent. As we explained in *John Corp. v. City of Houston*:

Appellants argue strenuously that their claims do not include a takings claim because they nowhere allege that the City used its power of eminent domain to take property for public use. Instead, Appellants assert that the city relied on its police powers to destroy their property. Such a distinction between the use of police powers and of eminent domain power, however, cannot carry the day. The Supreme Court’s entire “regulatory takings” law is premised on the notion that *a city’s exercise of its police powers can go too far, and if it does, there has been a taking.*

214 F.3d 573, 578 (5th Cir. 2000) (emphasis added). Indeed, the mere fact that Baker’s property has been damaged or destroyed pursuant to the City’s police power cannot decide this case.

Second, twentieth-century Supreme Court precedents cast doubt on the City’s proposed rule. As the Court said in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), if “the uses of private property were subject to unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.’” (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“But that cannot be accomplished in

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this way under the Constitution of the United States.”)). Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), the Court noted that a given regulation might be “within the State’s police power. . . . It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.”

Third, the Court has noted that takings cases “should be assessed with reference to the ‘particular circumstances of each case,’ and not by resorting to blanket exclusionary rules.” *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 37 (2012) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). The City’s proposed rule is an exceptionally broad exclusionary rule. And it is broader than any rule necessary to decide this case.

Fourth, the Court has increasingly intimated that history and tradition, including historical precedents, are of central importance when determining the meaning of the Takings Clause. *See Tyler v. Hennepin County*, 598 U.S. 631, 637-44 (2023) (determining the applicability of the Takings Clause from “[h]istory and precedent” reaching back to the Magna Carta); *Horne v. Department of Agriculture*, 576 U.S. 350, 357-61 (2015); *see also Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting) (“In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause”).

The City’s arguments for its broad rule are ahistorical. It relies primarily on recent precedents from our sister circuits, especially *Lech v. Jackson*, 791 F. App’x 711 (10th Cir. 2019) (unpublished). *See also Johnson v. Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed Cir. 2008). The City is correct that these precedents have endorsed the rule the City now invites our court to adopt.

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But with respect to our sister circuits, their opinions do not rely on history, tradition, or historical precedent, and moreover, the rule they adopt is inconsistent with our court’s precedent. *Compare Lech*, 791 F. App’x at 717 (“[We] hold 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.”) *with John Corp.*, 214 F.3d at 578 (“[A] city’s exercise of its police powers can go too far, and if it does, there has been a taking.”).

Our own analysis of history and precedent, undertaken below, further explains why we decline to adopt the City’s broad rule. But first, we turn to Baker’s arguments.

b.

Much of Baker’s briefing is devoted to explaining why we should reject any categorical “police power” exclusion from Takings Clause liability. In the absence of such an exclusion, she claims, “like every other time the government’s agents destroy property, a Takings analysis applies.” And “[i]n this case, that analysis is straightforward: The damage was intentional and foreseeable, it was for the public use, and no recognized exception to liability applies.”

Baker attends more closely to historical precedent than does the City. She specifically relies on *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (11 Wall.) 166, 181 (1871), for the proposition that “where real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” *Pumpelly* was an inverse condemnation case in the context of a dam, which Wisconsin had legislated to be built, that flooded the plaintiff’s property. In that case, the Supreme Court said,

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It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make 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 177–78.

But while we agree with Baker that *Pumpelly* further undercuts the City’s proposed rule, it provides only limited help for Baker herself. To repeat, *Pumpelly* was a flooding case that dealt with a dam constructed pursuant to Wisconsin legislation. The facts of *Pumpelly* are facially distinct from those at bar, where officers damaged or destroyed Baker’s property by necessity during an active emergency—an emergency that began as a hostage situation involving a child and evolved into a potential shootout in a residential neighborhood with a heavily armed fugitive.

What Baker needs, in other words, is historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded under the Takings Clause. But Baker provides no such authority.

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c.

When we turn to “[h]istory and precedent,” *Tyler*, 598 U.S. at 639, we find that historically oriented legal scholarship has widely converged on the thesis that a “necessity” or “emergency” privilege has existed in Takings Clause jurisprudence since the Founding.³

³ See, e.g., William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 *Hastings L.J.* 1061, 1092 (1994) (“American courts and commentators consistently referred to a line of English cases making it ‘well settled at common law’ that in cases of calamity (e.g., fire, pestilence, or war) individual interests, rights, or injuries would not inhibit the preservation of the common weal. Thus, private houses could be pulled down or bulwarks raised on private property without compensation when the safety and security of the many depended upon it.”); Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 *U. Haw. L. Rev.* 60, 67 (2022) (“[T]he common law defense of public necessity bars the rights of property owners to obtain recourse or compensation when government destroys private property for the public good.”); Brian Angelo Lee, *Emergency Takings*, 114 *Mich. L. Rev.* 391, 391, 393 (2015) (“Remarkably, however, courts have repeatedly held that if the government destroys property to address an emergency, then a ‘necessity exception’ relieves the government of any obligation to compensate the owner of the property that was sacrificed for the public good. . . . Indeed, courts and scholars have said that [this] principle has been well-established law for centuries.”); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 *B.C. L. REV.* 127, 127 (2013) (“When government takes private property for a public purpose, the Fifth Amendment of the U.S. Constitution requires just compensation. Courts, however, have long recognized an exception to takings law for the destruction of private property when necessary to prevent a public disaster.”); 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, 483–85 (2006) (describing the “privilege of necessity destruction” which reaches to back to the common law and allows that “the government may destroy property in times of necessity during law enforcement, such as burning down a home to capture a barricaded criminal” without providing compensation); Note, *Necessity Takings in the Era of Climate Change*, 136 *HARV. L. REV.* 952, 953 (2023) (“Since the earliest days of the Republic, U.S. courts have sanctioned violations of private property rights without compensation under conditions of public necessity. The quintessential application of this doctrine has been in the destruction of private property to create a firebreak But the principle . . . has expanded beyond classical paradigms . . . to include activities [such as] law enforcement.”).

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For example, in *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788), the Pennsylvania Supreme Court considered a claim for compensation for 227 barrels of flour that had been moved by the government to a depot and later lost to the British. The court asked whether “by reason, by the law of nations, and by precedents analogous to the subject before us,” compensation could be awarded. The court answered no, on the ground that “the rights of necessity, form a part of our law.” *Id.* at 362. It explained,

Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure 2 Black. Com. 36. So, if a man is assaulted, he may fly through another’s close. 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground. Dyer. 8. Brook. trespass. 213. 5 Bac. Abr. 175. . . . Houses may be razed to prevent the spreading of fire, because for the public good. Dyer. 36. Rud. L. and E. 312. See Puff. lib. 2. c. 6. sec. 8. Hutch. Mqr. Philos. lib. 2. c. 16. We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon’s History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

Id. at 363. Given this principle of necessity, the court explained, “there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation” *Id.*

Sparhawk is a 1788 case. It is therefore directly on point to understanding the common law rights to just compensation against which the Fifth Amendment Takings Clause was ratified in 1791. And it articulates what appears to have been a guiding rationale for this common law necessity exception: the fear that if the state risks liability for the damage or destruction

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of property during a public emergency, then the state may not be so quick to damage or destroy it, and such hesitancy risks catastrophe.

The idea that public emergency allows the government to damage or destroy property without compensation remained prominent after *Sparhawk*. For example, in 1822, a committee of the 17th Congress considered a petition for compensation from a Louisianan whose property was inundated due to American military action during the British invasion of Louisiana in 1814. *See Property Destroyed During the Invasion of Louisiana by the British in 1814–’15, 17th Cong., 1st Session, No. 587 (1822)*.⁴ As the congressional committee described, “the enemy had landed near the city of New Orleans, [and] in order to prevent him from bringing up his cannon and other ordnance to the city, General Morgan, commanding the Louisiana militia, caused the levee to be cut through at or near the plantation of the petitioner.” *Id.* “In consequence, the petitioner suffered great losses in the destruction of his” property, to the tune of \$19,250. *Id.* The congressional committee stated

that this injury done the petitioner was done in the necessary operations of war, and that the United States are not liable for the individual losses sustained by that inundation; and therefore [the committee] recommend[s] the adoption of the following resolution: *Resolved*, That the prayer of the petitioner ought not to be granted.

Id.

Cases closer to the ratification of the Fourteenth Amendment demonstrate the longevity of the necessity privilege.⁵ For example, in *Field v.*

⁴ Available at <https://memory.loc.gov/cgi-bin/ampage?collId=llsp&file-Name=036/llsp036.db&Page=835>.

⁵ *See also N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring) (noting the “ongoing scholarly debate on whether courts should

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City of Des Moines, 39 Iowa 575, 577–78 (1874), a plaintiff sought to recover against the city of Des Moines after it razed his house to prevent further spreading of a fire. The Iowa Supreme Court explained,

In *Dillon on Municipal Corporations*, Sec. 756, the learned author states the common law doctrine as clearly and succinctly as it is any where to be found. He says: “The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex*. Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an extensive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains.” The ground of exemption from liability in such cases is that of *necessity*, and if property be destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible.

Id. (emphases in original). Much the same analysis is found in numerous cases from the mid-nineteenth century. *See, e.g., McDonald v. City of Red Wing*, 13 Minn. 38, 40 (1868) (listing cases); *The Mayor, & C. of N.Y. v. Rufus L. Lord*, 18 Wend. 126, 132–33 (N.Y. 1837).

And when this same issue reached the Supreme Court in *Bowditch v. City of Boston* in 1879, only eleven years after the ratification of the Fourteenth Amendment, the Supreme Court explained:

At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part

primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868’ or when the Bill of Rights was ratified in 1791”).

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of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: ‘For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action.’ There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied. ‘The rights of necessity are a part of the law.’ *Respublica v. Sparhawk*, 1 Dall. 357, 362. See also *Mouse’s Case*, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4 T. R. 794; 1 Zab. (N. J.) 248; 3 id. 591; 25 Wend. (N. Y.) 173; 2 Den. (N. Y.) 461.

In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. Burlem. 145, sect. 6; id. 159, c. 5, sects. 24–29; Puffendorf, B. 2, c. 6.

101 U.S. 16, 18–19 (1879).

Bowditch was a case about Massachusetts law, but its lessons have permeated the Federal Takings Clause context. Justice Holmes, for example, said:

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. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980.

Pa. Coal Co., 260 U.S. at 415–16 (1922).

Indeed, whatever we might think about the principle underlying the necessity privilege, its basis in history and tradition is longstanding and long recognized. This recognition has extended to more recent precedents, as

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well. *See, e.g., United States v. Caltex*, 344 U.S. 149, 154-55 (1952) (“[T]he common law ha[s] long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved. . . . [And the] terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war.”); *Lucas*, 505 U.S. at 1029 n.16 (“[The State may be absolved] of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.” (citing *Bowditch*, 101 U.S. at 18–19 and *United States v. Pac. R.R.*, 120 U.S. 227, 238–39 (1887))); *see also Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980) (“The defendant City of Houston may defend its actions by proof of a great public necessity. . . . Uncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence or other great public calamity.”).

d.

In sum, history, tradition, and historical precedent reaching back to the Founding supports the existence of a necessity exception to the Takings Clause. Today, we make no attempt to define the bounds of this exception. We hold only that in this case, the Takings Clause does not require compensation for Baker’s damaged or destroyed property because, as Baker herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons. We need not determine whether the necessity exception extends further than this.

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e.

We conclude by acknowledging two considerations that favor Baker’s position, despite all we have said.

First, while scholars have converged on the empirical, historical thesis that a necessity exception to the Takings Clause has existed since the Founding, they have also tended to converge on the view that it wrongs individuals like Baker.⁶ Second, and closely related, the Supreme Court has often stated that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *quoted in Tyler*, 598 U.S. at 647. This statement’s relevance to Baker, who is faultless but must “alone” bear the burdens of a misfortune that might have befallen anyone, is manifest. As a lower court, however, it is not for us to decide that fairness and justice trump historical precedent, particularly Supreme Court precedent, where it has long recognized a necessity exception that excludes those like Baker from the protection of the Fifth Amendment’s Takings Clause. Such a decision would be for the Supreme Court alone.

IV.

Because Baker opted to pursue relief under § 1983, we do not reach whether she succeeds under the Texas Constitution.

⁶ In particular, see Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127 (2013), and 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 (2006).

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We REVERSE the district court's summary judgment order finding that the City's damaging or destroying Baker's house and personal property was a compensable taking under the Fifth Amendment. We therefore VACATE the § 1983 judgment in her favor and REMAND for further proceedings.

APPENDIX B

Vicki Baker,

v.

City of McKinney, Texas.

**Order Denying Petition for
Rehearing and Rehearing**

En Banc

February 14, 2024

United States Court of Appeals
for the Fifth Circuit

No. 22-40644

VICKI BAKER,

Plaintiff—Appellee,

versus

CITY OF MCKINNEY, TEXAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:21-CV-176

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, six judges voted in favor of rehearing (JONES, ELROD, GRAVES, HO, DUNCAN, and OLDHAM), and eleven voted against rehearing

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(RICHMAN, SMITH, STEWART, SOUTHWICK, HAYNES, HIGGINSON, WILLETT, ENGELHARDT, WILSON, DOUGLAS, and RAMIREZ).

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JENNIFER WALKER ELROD and ANDREW S. OLDHAM, *Circuit Judges*,
dissenting from denial of rehearing en banc:

“The Fifth Amendment[] . . . 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). So Vicki Baker understandably invoked that Amendment to recover from the City of McKinney the tens of thousands of dollars of property damage she suffered as a result of McKinney police efforts to protect the community from a fugitive that sought cover in her home.

The panel expressed “sympathy” for Baker. But it denied her claim based on the novel holding that history and tradition recognize a “necessity” exception to the otherwise broad protections of the Takings Clause. We are unsure whether such a privilege exists. Even if it does, we find the panel’s reasoning unsatisfactory—perhaps unsurprisingly because the panel reached its ostensibly originalist conclusion without the benefit of briefing on the historical evidence.¹ We therefore respectfully regret this court’s decision to deny rehearing en banc.

I

On July 25, 2020, Wesley Little went on the run with a fifteen-year-old girl. Little evaded police and then turned up unannounced at Vicki

¹ As the panel recognized, the Supreme Court has increasingly emphasized the importance of history and tradition in determining the meaning of the Takings Clause. *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 639–42 (2023); *Horne v. Dep’t of Agric.*, 576 U.S. 350, 357–59 (2015). Analysis of this kind is a tall order. “[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 856 (1989). Here, the panel engaged in the historical analysis of an issue of first impression without the benefit of the parties’ views of what historical evidence might be relevant and how to interpret it.

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Baker's residence. Baker was not there to greet Little because she had moved to Montana, but her adult daughter Deanna Cook was occupying the residence to prepare it for sale.

When Little knocked on the door, Cook knew something was amiss because she had seen a Facebook post that morning explaining Little was a wanted man. So Cook sprang into action: She let Little into the home but told him she had to go to the supermarket. Once Cook left the house, she called Baker to describe the situation. Baker then called the police, who quickly arrived and "set up a perimeter on the home" to secure it.

The officers on scene made contact with Little using an intercom system, and before long he released the girl. But Little refused to give himself up. In fact, he explained he "had terminal cancer, wasn't going back to prison, knew he was going to die, [and] was going to shoot it out with the police." The officers knew a shootout would endanger both police and members of the general public, so they sensibly elected to shower the home with explosive devices and toxic gas grenades in hopes of forcing Little into surrender. Eventually, drone footage revealed Little had taken his own life, but not before Baker's property had been damaged to the tune of approximately \$60,000.

Baker recognized the officers' conduct was beyond reproach. Still, her property was destroyed by state actors engaged in conduct designed to benefit "the community as a whole." So Baker filed a claim for property damage with the City. The City denied her claim on the ground that "there [was] no liability on the part of the City or any of its employees." When Baker's insurer likewise refused to indemnify her losses, she resorted to suing the City in federal court, contending it took her property without just compensation in violation of the Fifth Amendment. Baker moved for partial summary judgment on the question of the City's liability, and the district

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court granted her motion. A jury then determined Baker was entitled to \$59,656.59 in damages. On appeal, a panel of this court reversed the district court's liability determination.

II

A

The panel did not quibble with Baker's contention that the "plain text" of the Fifth Amendment suggests she is entitled to compensation. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); see U.S. CONST. Amend. V ("[N]or shall private property be taken for public use, without just compensation."). Nor could it have. McKinney police destroyed Baker's property, and it did so for the public purpose of protecting the community of McKinney from a violent fugitive. It has been settled law for over 150 years that the destruction of property constitutes a taking. As the Supreme Court in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (11 Wall.) 166 (1871), explained:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law,

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instead of the government, and make 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 177–78.

The panel, though, concluded Baker could not rely on the plain text of the Fifth Amendment. In the panel’s view, Baker needed to do something more—she needed to point to some “historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded [in recovering] under the Takings Clause.” Panel Op. at 11. But ordinarily when the plain text of a constitutional provision establishes an individual right—here, the right to compensation for confiscated property—it is *the government’s burden* to demonstrate a historically grounded exception. See *Bruen*, 597 U.S. at 17 (“[W]e hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, . . . *the government* must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”) (emphasis added).

By placing the onus on Baker to ground her right to compensation in a historical analogue—rather than requiring the City to establish some historically based exception to the compensation requirement—the panel flipped the burden that typically governs in cases involving individual rights. Thus, we fear the panel’s approach risks turning the right to private property into “a second-class right.” *Id.* at 71.

B

Even if we could accept the panel’s inversion of the ordinary burden with respect to constitutional rights, we would still have questions about its holding. In its *sua sponte* plumbing of the historical evidence, the panel discovered that “a necessity or emergency privilege has existed in Takings

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Clause jurisprudence since the Founding.” Panel Op. at 12 (quotation omitted). And the panel proffered several citations to support its conclusion. *See id.* at 13–17 (citing, *inter alia*, *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788) and *Field v. City of Des Moines*, 39 Iowa 575 (1874)).

Just one problem: none of the panel’s citations establishes that a municipal government is absolved from the United States Constitution’s just compensation requirement merely because the government destroyed property out of law enforcement necessity. We (1) explain the basis for the panel’s holding. Then we (2) explain our skepticism.

1

At common law, any citizen could destroy property for the public use in a time of urgent necessity without subjecting themselves to liability—the so-called public necessity privilege. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 196 (1965) (“One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”).

The paradigmatic example of the privilege involved municipal fires. The destruction wrought by municipal fires before the rise of modern fire codes was often great, *see Respublica*, 1 U.S. at 363 (noting half of London was burnt in the great fire of 1666), and the razing of buildings was the principal means to stop the spread. But razing buildings is tortious. So absent some privilege, an individual—whether a public official or a private citizen—who razed a building would be individually liable in tort. Obviously, a rule that stuck individuals with liability for interventions taken to halt conflagrations would deter public promoting behavior from all but the most heroic, no matter how much good could have been achieved through a well-calculated intervention. And it would seem unfair to hold people liable for doing what was necessary to cope with an emergency. So common law courts fashioned

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a rule to allow individuals to tear down property when doing so was reasonably necessary to prevent the spread of a fire. *See Field*, 39 Iowa at 577–78 (citing, *inter alia*, *Mouse’s Case*, 12 Coke Rep. 63 (1608)); *see also Bowditch v. Boston*, 101 U.S. 16 (1879) (finding a public necessity privilege in Massachusetts law).

Analogizing to this fire exception, courts applied the privilege in other contexts, especially war. Consider for example *Respublica*. That case arose after the Pennsylvania Board of War ordered various property held by the citizenry removed to a secure location to prevent it from falling in the hands of invading British troops. 1 U.S. at 357–58. When the impending invasion did not occur as rapidly as expected, the Board resolved to return the property to its lawful owners. But before that process was complete, the British captured the storehouse, and with it 227 barrels of flour owned by the plaintiff. *Id.* at 358. The plaintiff sued the comptroller general, alleging he was entitled to compensation for the property the War Board effectively confiscated. But the Supreme Court of Pennsylvania disagreed, noting the taking “happened flagrante bello; and many things are lawful in that season, which would not be permitted in a time of peace.” *Id.* at 362.

In sum, the public necessity privilege operated at *common law* actions to privilege actions taken during certain emergencies that would otherwise have been tortious.

2

The panel held—on the basis of the *tort law* public necessity privilege—that citizens are not entitled to just compensation under the Takings Clause when their property is damaged by law enforcement officers, so long as the officers’ conduct was reasonably necessary to prevent an imminent public emergency. We have doubts about that holding for three reasons.

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First, the cases on which the panel relied most heavily—*Field and Respublica*—did not interpret the Takings Clause at all. That is because both of those cases involved claims predicated exclusively on state law, and they all arose before the Supreme Court’s decision in *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), which incorporated the Takings Clause against the states. Thus, for obvious reasons neither of those cases so much as referenced the Fifth Amendment.

It is true that cases addressing the pre-constitutional scope of a right are often relevant to the breadth of constitutional guarantees. *See, e.g., Bruen*, 597 U.S. at 34 (“Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*”) (citation omitted) (emphasis in original). But it is unclear how to think about the interaction between common law limitations on property rights and the Takings Clause because it appears that Clause effected a reversal of the pre-constitutional English common law rule that the government could take property without supplying any compensation. *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.”) (citing *British Cast Plate Mfrs. Co. v. Meredith*, 100 Eng. Rep. 1306 (1792)); *see also* 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, 497–498 (2006) (“At English common law, the government as sovereign owed no compensation for any taking, destruction or otherwise, unless parliament granted it.”).

The Supreme Court has suggested the public necessity privilege has some implication for proper interpretation of the Takings Clause. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992). But the Court has

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never held that anything that would have been privileged by public necessity at common law is non-compensable under the Fifth Amendment.²

And for good reason. The public necessity privilege makes sense enough if the burden of a public-serving intervention has to fall on either the victim of property destruction or the heroic intervenor. But the Supreme Court has told us the Takings Clause was designed precisely to ensure the burden of a public-serving interference with an individual's right to the enjoyment of his property is borne not by the individual alone but rather "by the public as a whole." *Armstrong*, 364 U.S. at 49. And today, unconstitutional takings are most often remedied through suits against governmental entities, not individual officials. In fact, it is disputed whether individual officials may be individually liable in damages for violating the Takings Clause at all. *See Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) ("[W]e can find [no case] that suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment."). *But see O'Connor v. Eubanks*, 83 F.4th 1018, 1026 (6th Cir. 2023) (Thapar, J., concurring). So it is unclear whether or to what extent the public necessity privilege should inform our takings jurisprudence.³

² To the extent the Supreme Court has embraced a necessity exception to the Takings Clause, the Court has certainly never held that exception encompasses law enforcement necessity. *See Muller, supra* at 499–500 ("The federal issue of [law enforcement necessity] takings has been lightly skirted or flatly ignored, and the nagging question of the Fifth Amendment remains unaddressed in these cases where necessity has been invoked.").

³ If individual officials can be liable in damages for violations of the Takings Clause, the public necessity privilege may supply a basis for immunizing officials from liability. *Cf. Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) ("There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public

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Second, and relatedly, it seems to us that exempting some kinds of takings from the just compensation requirement on the basis of the public necessity privilege is fundamentally at odds with the purpose of the Takings Clause. In fact, common law courts justified the privilege by baldly exclaiming “that a private mischief is to be endured rather than a public inconvenience.” *Field*, 39 Iowa at 577 (citation omitted). Or alternatively, that “[*s*]alus populi suprema est lex” —the welfare of the people shall be the supreme law. *Ibid*. But of course all takings are calculated to eliminate a public inconvenience or to serve the public welfare; that is the logic of the public use requirement. Thus, if the bare maxim that the welfare of the people shall be the supreme law could be invoked to render a taking non-compensable, compensation would never be required.

Consider for example *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In that case the Court held that the Hawaii legislature was permitted to take property on the ground that the welfare of the public would be served by eliminating the “social and economic evils of a land oligopoly.” *Id.* at 241–42. Could the legislature also have invoked the necessity privilege to avoid the compensation requirement? After all, the legislature thought the taking was necessary precisely because the pre-existing distribution of property inconvenienced the public, and it is apparently a maxim of the law “that a private mischief” —like losing title to one’s land— “is to be endured rather than a public inconvenience.” *Field*, 39 Iowa at 577 (citation omitted).

Fanciful as that reasoning may sound, it could at least plausibly be grounded in common law precedent. Consider *The Case of the King’s Prerogative in Salt-Peter*, 12 Coke Rep. 12 (1606). There, Lord Coke held the King could enter private lands to dig for saltpeter—a necessary component

use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; *but the officer is not a trespasser.*” (emphasis added)).

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of gunpowder. And he justified that holding in part by analogy to the fire exception. In Coke's view, men "shall suffer damage" for the Commonwealth, "as for saving of a City or Town a house shall be plucked down if the next be on fire." *Id.* at 13 (quotation omitted). That principle, Coke explained, suggests men shall suffer the Crown's "taking of saltpeter" because it "is a purveyance of it for the making of gunpowder necessary for the defense and safety of the realm." *Ibid.* (quotation omitted). In other words, Coke apparently thought the principle that a man must suffer the loss of his home when necessary to stop the spread of a fire could be extended such that a man must also suffer the King's officers entering his land to take his property when necessary for the safety of the country.

The Pennsylvania Supreme Court employed similar reasoning in *Respublica*. Like Coke, the Court explained the legislature could impress "articles that were necessary to the maintenance of the Continental army," and they could do so without providing just compensation. *Respublica*, 1 U.S. at 363.

There is no conceivable reading of the Fifth Amendment under which the government could confiscate private property to supply the military without compensating the owner. As George Tucker explained, the confiscation of private property to supply the Continental army is probably the thing that gave rise to the Takings Clause in the first place. *See* St. George Tucker, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (1803) (noting the Takings Clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . without any compensation whatever"). Surely the fact that common law courts extended the necessity principle so far as to privilege takings that unequivocally require compensation under our

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Constitution raises some questions about the constitutional viability of a public necessity exception to the Takings Clause.

Third, even assuming the panel's principal citations help to establish the scope of the Takings Clause, they would not necessarily establish the broad law enforcement necessity exception the panel read into them.

Field held only that a plaintiff was not entitled to compensation after an officer of a municipal government tore down his house amidst a conflagration raging through the city. *See* 39 Iowa at 577–78. But the fire exception differs materially from the panel's law enforcement necessity exception. That is because if public officials declined to preemptively destroy some buildings amidst a conflagration, those buildings were likely to go up in flames anyways, and more with them. Victims could hardly claim an entitlement to compensation when public officials did to their buildings what the fire was already likely to do. In fact, one might say when an official destroyed property to halt a conflagration, the destruction was really caused by the fire, and the intervening official merely hastened it.

Similarly, the holding of *Respublica* was merely that under Pennsylvania law as it existed in 1788, the Pennsylvania Congress was permitted, in times of war, to “direct the removal of any articles that were . . . useful to the enemy, and in danger of falling into their hands.” *Id.* at 363. That makes sense. If a citizen is likely to lose his property to an invading enemy, he cannot really complain when his elected representatives take it first.

All the Supreme Court's cases countenancing the public necessity exception share this characteristic of inevitable loss. Consider *United States v. Caltex*, 344 U.S. 149 (1952). There, the Supreme Court held the government had no obligation to compensate a plaintiff whose property was destroyed by the army amidst a military invasion. *Caltex* referenced the

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public necessity privilege, but it by no means elevated that privilege to the status of a constitutional principle. Instead, the basis of the Court’s holding was that the government is privileged to order the destruction of property in wartime “to prevent the enemy from realizing any strategic value from an area which he was soon to capture.” *Id.* at 155.⁴ In other words, the Court explained that when government destroys property an invading enemy was likely to seize anyways, it is not really the government that causes the loss. Rather, the loss is caused by the invading enemy, and so it “must be attributed solely to the fortunes of war, and not to the sovereign.” *Id.* at 155–56. For that reason, the Takings Clause supplies no remedy.⁵

McKinney police, in contrast, did not merely hasten a loss that would have inevitably befallen Baker. But-for their intervention, Baker’s home would have remained in her possession, and in pristine condition to boot. It therefore appears to us this case differs substantially from the paradigmatic

⁴ The Court was careful to limit its holding. It explained that “[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.” *Id.* at 156.

⁵ *Caltex* cited *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), but that was not a public necessity case. In that case the Court considered whether the United States had a constitutional obligation to compensate a corporation for property the army destroyed to prevent the spread of Yellow Fever in Cuba during the Spanish-American War. The Court held the Fifth Amendment required no compensation, but it did not do so on the basis of some public necessity privilege. Rather, the Court explained that the “corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy’s property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted.” *Id.* at 306. And even if the corporation’s property was not properly regarded as enemy’s property, the taking might nonetheless have been justifiable on the ground that property that endangers the public health effects a public nuisance. *See, e.g., Mugler v. Kansas*, 8 S. Ct. 273, 287 (1887) (“The right to compensation for private property taken for public use is foreign to the subject of preventing or abating public nuisances.”).

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example of a public necessity at common law, and from any exception to the Takings Clause the Supreme Court has ever embraced.

III

In sum, while McKinney police acted shrewdly, their actions also left Baker \$60,000 in the hole. There is no doubt the McKinney community was better off because its officers ravaged Baker's home. But it is at least peculiar to say that because the officers' conduct benefited the community, the community can avoid compensating Baker for the inconveniences she incurred on its behalf. The panel apparently thought that was the result the law required. If the panel was right, so be it. But there can be no denying that the text of the Fifth Amendment and the Supreme Court's precedents at least *suggest* otherwise. *See, e.g., Armstrong*, 364 U.S. at 49. Thus, it should have been the City's burden to establish its conduct was excepted from the strictures of the just compensation requirement. And even assuming the panel was entitled to shoulder that burden on the City's behalf, we are not sure the panel carried it.

* * *

This case undoubtedly presents difficult questions.⁶ The panel's answers left Vicki Baker to bear a \$60,000 burden on behalf of her community. Respectfully, we are not sure the panel got it right, so we would give Baker a chance to make her case before our en banc court.

⁶ Because not all damage results in a taking and because there are a variety of exceptions to the Takings Clause, reconsideration of the panel's interpretation does not risk opening the floodgates to suits for minor damage. Nor does it risk a flood of liability against individual officers.