Nos. 25-1163 and 25-1158

In the Supreme Court of the United States

CARLOS PENA, PETITIONER,
v.
CITY OF LOS ANGELES, CALIFORNIA, RESPONDENT.

AMY HADLEY, PETITIONER,
v.
CITY OF SOUTH BEND, INDIANA, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH AND SEVENTH CIRCUITS

BRIEF OF PROFESSORS JAMES W. ELY, JR., JULIA D. MAHONEY, AND SHELLEY ROSS SAXER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

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SUMMARY OF ARGUMENT

The Takings Clause directs that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Abandoning that categorical demand, several courts of appeals have nonetheless crafted a law-enforcement "necessity" exception to the Takings Clause.[2] Under that

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[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.

[2] Amici have submitted this brief in *Pena* v. *City of Los Angeles*, No. 25-1163, and *Hadley* v. *City of South Bend, et al.*, No. 25-1158. *Hadley* applied a broader police power exception previously adopted by the Seventh Circuit. However, this brief—particularly Section I—demonstrates that neither exception has any basis in this Nation's history and tradition.

exception, just compensation is not required when police destroy property as part of necessary law-enforcement operations to apprehend a fugitive or execute a search.[3] However, this Court's precedents demand that atextual limitations on constitutional rights be consistent with historical practice. The law-enforcement "necessity" exception at issue here has no basis in the Takings Clause's text or in this Nation's history and tradition, and it contravenes the foundational principle that individuals ought not shoulder alone the cost of benefits provided to the general public.

The government cannot identify a historical exception for police activity; indeed, organized police forces did not exist at the time of the Fifth Amendment's ratification. Nor would the Founders have recognized such an exception. They adopted the Takings Clause to target Revolutionary War-era takings that imposed on one person the cost of benefits enjoyed by society at large. The law-enforcement necessity exception violates that foundational principle

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[3] This exception creates a circuit split with at least the Eleventh Circuit, which has held that "there is no exception for any reason [to the Takings Clause]—when a physical taking occurs . . . [t]he government must pay for what it takes." *Alford* v. *Walton Cnty.*, 159 F.4th 844, 859 (11th Cir. 2025) (internal quotation omitted). The circuits have also split insofar as several have adopted an even broader "police power" exception. *See AmeriSource Corp.* v. *United States*, 525 F.3d 1149 (Fed. Cir. 2008); *Johnson* v. *Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *Lech* v. *Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019); *Slaybaugh* v. *Rutherford Cnty.*, 114 F.4th 593 (6th Cir. 2024) (search and arrest exception).

by forcing innocent property owners to bear alone the costs of protecting the public when law-enforcement officers destroy property to apprehend a fugitive.

Absent a clear historical exception for law-enforcement operations, the government must justify any asserted exception through a sufficiently close historical analogue. The Ninth Circuit relied on historical cases involving the necessary destruction of property to stop fire, disease, or hostile armies to support a law-enforcement necessity exception. That analogy fails for at least three reasons. First, many cases applied the public necessity defense to shield private persons and government officials from liability for trespass, but not to spare the government from its constitutional duty to pay just compensation. This history therefore falls far short of establishing any clear license to deny compensation for law enforcement's necessary destruction of property. Second, historical cases invoking necessity—along with this Court's own wartime cases—are distinguishable because the property at issue faced inevitable destruction. Such cases cannot support an exception that applies to innocent property owners whose property was intentionally and deliberately destroyed by law enforcement in order to apprehend a fugitive. Third, lower courts' reliance on wartime cases is misplaced because those cases expressly limit their holdings to the military context, given war's unique destructive power. For all these reasons, the law-enforcement necessity exception lacks a basis in this Nation's history and tradition.

The lower courts' departure from the Takings Clause's original meaning also carries grave consequences for property owners throughout the country. Today, innocent individuals like Pena and Hadley must suffer tens of thousands of dollars in property damage inflicted by the government for the public's benefit, with no compensation from either the government or insurance. Many Americans simply cannot bear such expenses. Nor should they have to under the Constitution. The Founders adopted the Takings Clause to ensure that all Americans would jointly bear the cost of government action undertaken for the public good.

ARGUMENT

I. The Text and History of the Takings Clause Do Not Support a Law-Enforcement Necessity Exception.

The Takings Clause contains no exception for necessary law-enforcement operations, and no such exception for police action existed at the Founding. The Founders adopted the Clause to prevent individuals like Petitioners from bearing alone the cost of government operations taken for the benefit of the entire public. Despite the Clause's text and history, the Ninth Circuit below joined the Fifth Circuit in finding "that law enforcement's reasonable and necessary destruction of property to protect public safety falls outside the scope of the Takings Clause." *Pena* v. *City of Los Angeles*, 158 F.4th 1033, 1038 (9th Cir. 2025). As explained below, this exception violates this Court's history-and-tradition test for atextual limitations on constitutional rights, because it did not

exist at the Founding and contravenes the Takings Clause's fundamental principle that individuals should not bear alone the costs of public benefits.

The law-enforcement necessity exception is atextual because the Takings Clause contains no qualification to its command that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Therefore, under this Court's precedent, any exception to the clear constitutional text must be consistent with this Nation's history and tradition, so as to reflect the original understanding of the Clause. *See United States* v. *Rahimi*, 602 U.S. 680, 690–91 (2024) (Second Amendment); *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (First Amendment); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (Takings Clause). Moreover, the government bears the burden of identifying clear historical evidence to support any limitation on a constitutional right. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 24 (2022) ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition."). Respondents cannot satisfy that burden because any law-enforcement necessity exception was unknown at the Founding and closely resembles the very abuses the Founders sought to abolish.

First, courts in the early Republic did not recognize any law-enforcement necessity exception—or any other law-enforcement carveout—to the Takings Clause. *See* Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. HAW. L. REV. 60, 89 (2021). The

necessity exception only arose in various state courts in the latter half of the twentieth century before its adoption by select federal courts of appeals in this century. *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, 498, 499 n.124 (2006). Indeed, such exception could not have existed historically because American cities first developed modern police forces decades after the Fifth Amendment's ratification. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 449, 459–60 (2010).

Second, the exception conflicts with the Clause's underlying equitable principles as understood at the Founding. The Founders adopted the Takings Clause to prevent individuals like Petitioners from shouldering burdens that "in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); *see VanHorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 310, 28 F. Cas. 1012 (Mem) (C.C.D. Pa. 1795) (Paterson, Circuit Justice) (reasoning that the principles of the Pennsylvania state constitution require that "no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value"). Again, "the right to compensation . . . prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other

members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893).

The just compensation principle was well-established before ratification of the Takings Clause. *See* James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 1–13 (1992). Rooted in Magna Carta and English common law, the principle effectively protected colonial-era Americans from bearing alone the costs of public benefits. *See id.* at 3, 16. Colonial legislatures that expropriated private property frequently provided compensation, and, even before the Takings Clause's ratification, several States—including Massachusetts and Vermont—enshrined the principle in their state constitutions. *Id.* at 5, 15.

The Founders criticized a series of Revolutionary War-era violations of this otherwise well-established principle. Most notable was the practice of impressment, by which both sides obtained necessary "supplies for the army, and other public uses, . . . without any compensation," forcing individual merchants to bear the burden. *See Horne* v. *Dep't of Agric.*, 576 U.S. 350, 359 (2015) (quoting 1 Blackstone's Commentaries, Editor's App. (St. George Tucker) 305–06 (1803)).[4] One early American legal commentator

[4] Several states, including South Carolina and Virginia, followed the just compensation principle and required compensation for impressed or requisitioned goods. *See* Ely, Jr., *supra*, at 13.

explained the public dissatisfaction as a result of impressment's "arbitrary and oppressive" nature, which haphazardly imposed public burdens on private individuals. *Id.*

James Madison—the Takings Clause's author—introduced the just compensation requirement partially because of his dissatisfaction with "improper takings that occurred during the Revolutionary War." Duane L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 CAMPBELL L. REV. 227, 269 (2010). The Clause would prevent the federal government from repeating the kind of improper Revolutionary War-era takings Madison had advocated against when he argued for compensation for the owners of horses the British had seized. *See id.* at 258, 269. For Madison, compensation was "a straightforward equitable principle" that was at "the very heart of [his] fundamental beliefs." *Id.*

The Ninth Circuit's opinion below conflicts with the Takings Clause's core principles as illustrated by this history. Although the SWAT team acted out of necessity, the decision below places the burden of that action entirely on innocent individuals. The government may act for the public good, but when it takes private property for that purpose, it must pay "a full and perfect equivalent for the property taken." *Monongahela*, 148 U.S. at 326. Put another way, even when state action is necessary to achieve some public benefit, that necessity serves as the justification *for the taking*—which must be "for public use"—but not a

justification to deny the compensation that the Takings Clause requires. *See* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 395, 405 (2015). The contrary rule adopted by the decision below resembles Revolutionary War-era impressment, which forced private citizens to disproportionately bear the burden of military operations. Similarly here, by denying compensation for property destroyed while officers apprehended a fugitive who took refuge there, the decisions below unfairly impose the costs of law enforcement on individual owners rather than the public as a whole.

II. No Historical Analogue Supports a Law-Enforcement Necessity Exception.

As no Founding-era law-enforcement necessity exception existed, lower courts have tried to justify it by analogy to historical cases involving fire, disease, and war. That analogy fails for at least three reasons. First, many courts historically allowed only individuals to defeat liability by raising a necessity defense, while still requiring governments to pay compensation for property they destroyed. Second, historical cases that denied compensation involved property that faced inevitable destruction, such that private individuals suffered no additional loss from the government's action. Petitioners' property differs because it only faced destruction as a result of law enforcement's deliberate actions. Third, the wartime cases, upon which lower courts heavily depend, involve additional unique considerations, including war's vast destructive power that often imposed considerable costs on most members of society. Modern SWAT raids result in

comparatively modest damage to the property of just one individual or household. For these reasons, prior cases invoking necessity do not justify a contemporary exception for necessary law-enforcement action.

A. The Necessity Defense Often Spared Private Persons But Not the Government from Liability for Property Destruction.

Many cases from the early Republic—including Supreme Court authority—required the government to pay compensation for the destruction of property even in the face of grave public necessity, such as fire, war, or disease. The common law allowed trespassers, including those who destroyed property, to defeat liability by claiming the destruction was necessary to avoid greater evil. *See Mayor of New York* v. *Lord*, 18 Wend. 126, 129–30 (N.Y. 1837) ("[I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, [or] the advance of a hostile army . . . the private property of an individual may be lawfully . . . destroyed . . . without subjecting those [who destroyed the property] to personal liability."). But myriad cases distinguished the government from private persons and found that the defense could only protect the government from liability as a trespasser—not from the duty to pay just compensation. *See*, *e.g.*, *id.* at 131; *Jarvis* v. *Pinckney*, 21 S.C.L. 123, 141 (1836) ("The emergency affords an excuse for the trespass . . . but it is compensation alone that can justify, and make the act lawful."); *United States* v. *Russell*, 80 U.S. (13 Wall.) 623, 628–30 (1871). The widespread adoption of this distinction indicates that no historical tradition

justifies a law-enforcement necessity exception to the Takings Clause. *See Bruen*, 597 U.S. at 24.

This distinction partially reflects the Takings Clause's exclusive application to state action. Private trespassers owe no constitutional duty to pay compensation when they destroy property out of public necessity. But for many courts in early America, the distinction went straight to the just compensation requirement's underlying concern for fairness by ensuring the citizenry equitably bears the cost of public burdens. *See Monongahela*, 148 U.S. at 325 (noting the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). Shifting the cost of property destruction from the owner to an individual who destroyed property to avert a grave public harm merely transfers the cost from one private person to another. In contrast, requiring the government to pay compensation shifts the burden to the public treasury and spares the owner from bearing the costs alone. That outcome is just because it ensures all those who benefit from a public good contribute to its costs.

Mayor of New York v. *Lord* provides an early example of the distinction between private trespass and government takings in the context of firebreaks. *See* 17 Wend. 285, 291–92 (N.Y. Sup. Ct. 1837), *aff'd* 18 Wend. 126 (1837). At the time, fires spread quickly through America's dense, largely wood-built cities. To stop them, residents often created physical gaps, called firebreaks, by tearing down buildings adjacent to those already ablaze. The New York court explained that, in

these situations, the property owner may have a meritorious "claim for redress," but that imposing liability on citizens who acted "for the benefit of the public" would create "injustice." *Id.* at 291. The "very ground [however] upon which a private person" escapes "liability" by acting "for the public good" entitles the owner by "reason and justice" to "full compensation from [the] common funds." *Id.* at 292. Though *Lord* involved a state statute, the court based the distinction on the "spirit and reason of the [just compensation] principle" embodied in the Takings Clause. *See id.* at 291–92.

Other courts from the period agreed with that distinction as recognized in *Lord*. For instance, the Supreme Court of Georgia reasoned that, "[i]f the public necessity exists . . . no trespass" has been committed by destroying property to create a firebreak. *Bishop & Parsons* v. *City of Macon*, 7 Ga. 200, 202 (1849). But the owner nonetheless deserved "compensation from the public" because "in equity and justice" the public ought "to make good the loss which the individual has sustained for the common advantage of all." *Id.*; *see also Hale* v. *Lawrence*, 21 N.J.L. 714, 739 (1848) (similar, applying New York law). South Carolina's Court of Appeals of Law likewise found property may be destroyed to "save the community from a possible pestilence," but that justice still entitles the owner to "full compensation." *Jarvis*, 3 Hill (SC) at 140–41. These decisions, among the earliest to address the interaction between just compensation and necessity, suggest the Clause was

not originally understood to contain a necessity exception.

This Court's decision in *Bowditch* v. *City of Boston*, 101 U.S. 16 (1879) also recognized that Massachusetts law similarly required cities to compensate owners for property destroyed to create a firebreak, even though the Ninth Circuit below cited it as favorable authority. *See Pena*, 158 F.4th at 1045, 1047. *Bowditch* concerned a Massachusetts statute, dating from at least 1836, that required "reasonable compensation" for those whose property a city or town destroyed to stop a fire at the direction of three or more government engineers. 101 U.S. at 17.[5] Municipal officers otherwise lacked the authority to destroy buildings, absent the agreement of the appropriate officials. *See id.* at 19. This Court denied compensation under that statute—without reference to the Takings Clause—primarily because the requisite engineers never approved the destruction. *See id.* at 20-22. The existence of the Massachusetts statute nonetheless demonstrates that Massachusetts required compensation, as did New York and Georgia, for property the government destroyed to create a firebreak.

Additionally, this Court expressly rejected a necessity exception—and acknowledged the distinction between private trespass and government takings—when the government destroyed property in wartime. As the Court explained in *Mitchell* v. *Harmony*,

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[5] An early version of the law appears in Mass. Rev. St. c. 18, § 7 (1836).

"private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy." 54 U.S. (13 How.) 115, 134 (1851). However, the "government is bound to make full compensation to the owner," even though "the officer is not a trespasser." *Id.* This Court later affirmed that rule, reasoning that "extreme necessity in time of war" justifies the seizure or "destr[uction]" of property, even though it "is well settled" that though the officer "is not a trespasser, . . . the government is bound to make full compensation." *Russell*, 80 U.S. at 627–28. Insofar as this Court strayed from this principle during later wartime cases (after a historical tradition arose), such cases remain distinguishable on multiple grounds. *See infra*, pp. 17–18, 20–21.

The Ninth Circuit's attempt to minimize this history, with select cases denying compensation in times of grave necessity, provides an insufficient basis under this Court's precedents to find an exception to the Takings Clause. *See Pena*, 158 F.4th at 1044–47. Such cases, at most, demonstrate a national disagreement and not the national history and tradition necessary to find an exception to the Constitution's clear text. *See Bruen*, 597 U.S. at 24. And as explained below, these cases are readily distinguishable from the situation Petitioners face. The analogy to public necessity in the context of fire, war, and disease therefore provides an insufficient basis to find an exception to the Takings Clause.

B. Historical Cases Invoking Necessity Are Distinguishable Because the Property Faced Inevitable Destruction.

Any cases denying compensation under the Takings Clause or state law provide an inadequate basis for the contemporary law-enforcement necessity exception, because those cases involved property that faced inevitable destruction, regardless of the government's action. Those early cases recognized that when property faced certain loss—whether from raging fires or the advance of hostile armies—the state's actions imposed no additional injury on the property owner. Therefore, courts allowed the government to escape liability when the property would not have otherwise survived. These early necessity cases from the firebreak and military context thus do not support a law-enforcement necessity exception in situations like Petitioners', because their properties would have survived absent police action.

Firebreak cases provide a quintessential example of inevitable destruction, because in early America's dense and highly flammable cities, fires could only be stopped by destroying structures already in the conflagration's path. As the Supreme Court of Georgia explained, the state owes no compensation when a loss would have occurred "as the necessary consequence of the fire or other public calamity" because the state's action caused no additional damage. *Bishop & Parsons*, 7 Ga. at 202–03. But "[i]t is equally evident," the court held, "that if the private property of an individual, the whole or a part of which *might otherwise have been saved to the owner*, is taken or destroyed for

the benefit of the public . . . adequate remuneration shall be made." *Id.* at 202 (emphasis added). The court thus made clear that any necessity exception did not extend beyond cases of inevitable destruction.

Even courts that did not regard inevitable destruction as a requirement to shield the government from liability only denied compensation in circumstances where the property faced certain loss. In each case, the necessity existed precisely because the property lay in the fire's path and no other means could stop the blaze. *See Surocco* v. *Geary*, 3 Cal. 69, 74 (1853) (denying compensation because "the blowing up of the house was necessary, as it would have been consumed had it been left standing"); *cf. Miller* v. *Horton*, 26 N.E. 100, 101 (Mass. 1891) (Holmes, J.) (noting that under state statute "the town [is] answerable to the house owner except [when] . . . the house is practically worthless because it *would have burned if it had not been destroyed*" (emphasis added)). But if destruction by fire appeared unlikely, liability remained. *See Hale*, 21 N.J.L. at 732 (noting public officers' obligation, in the absence of statute, to show "inevitable necessity, or that the plaintiffs sustained *no injury beyond what would otherwise have been occasioned* by the fire" (emphasis added)); *see also Field* v. *City of Des Moines*, 39 Iowa 575, 578 (1874) ("[I]f property be destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible."). The necessity doctrine as properly understood in this period therefore only applied in firebreak cases in

which the property faced destruction without any action by the government.[6]

Inevitable loss likewise underpins this Court's decisions denying compensation under the Takings Clause for property lost during wartime or military operations. For instance, in *United States* v. *Caltex (Philippines)*, the military destroyed petroleum facilities to deprive the advancing Japanese army of a "potential weapon of great significance" that they could use "to wage war the more successfully." 344 U.S. 149, 150–51, 153, 155 (1952). The facilities therefore faced inevitable loss such that their destruction imposed no additional harm upon the property owner. As this Court said, such property destruction "must be attributed solely to the fortunes of war, and not to the sovereign." *Id.* at 155–56. In reaching that conclusion the Court cited dicta from *United States* v. *Pacific Railroad* indicating that the government would owe no compensation for bridges destroyed to halt the enemy's advance. *Id.* at 153–54 (citing 120 U.S. 227, 234 (1887)). Like the petroleum facilities in *Caltex*, those bridges otherwise would have fallen to the enemy. These cases do not support the denial of compensation absent inevitable destruction or loss.

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[6] Some courts blur the distinction between police power and necessity, describing fire-control destruction as noncompensable under the police power while citing precedent that turns on necessity. *See Allard* v. *United States*, 173 Fed. Cl. 207, 210 (2024) (citing *TrinCo Inv. Co.* v. *United States*, 722 F.3d 1375, 1378 (Fed. Cir. 2013)).

Similarly, in *National Board of YMCA* v. *United States*, this Court denied compensation for damage American soldiers allegedly caused to a set of buildings. 395 U.S. 85, 92 (1969). The Court reasoned the troops acted "primarily in defense of [the owner's] buildings" and that, "had the troops remained outside," rioters would have destroyed the property anyway. *Id.* at 89–92. That inevitable destruction made it unnecessary for the government to pay compensation under the Takings Clause.

Respublica v. *Sparhawk*, upon which the Ninth Circuit relied heavily, and which this brief discusses more below, *see infra*, pp. 19–20, also fits comfortably within the inevitable destruction framework. 1 U.S. 357 (Pa. 1788). There, the Pennsylvania Supreme Court found that necessity justified the removal of grain by state authorities because the grain was "useful to the enemy, and in danger of falling into their hands." *Id.* at 363. In other words, the grain faced imminent loss in any event. Indeed, the grain was ultimately lost, because the British seized it from its place of safekeeping. *See id.* at 358. Neither *Sparhawk* nor this Court's wartime decisions therefore support a freestanding law-enforcement necessity exception outside the context of inevitable destruction.

These firebreak and war cases, by their own logic, support only an exception for property facing inevitable destruction—not a blanket exception to the compensation requirement whenever government officials find it necessary to destroy property. These

cases accordingly provide no support for denying compensation to property owners, like the Petitioners in *Pena* and *Hadley*, whose property faced no risk of destruction prior to the SWAT teams' raids. The fugitives barricaded in Petitioners' properties may have posed a risk to the community's safety, but unlike a spreading fire or an advancing hostile army, the fugitives did not create an unavoidable risk of destruction to the property in which they took shelter. Regardless of whether the SWAT teams were "*required* to act," the properties faced destruction only after a deliberate choice by law enforcement, which, however warranted, was not inevitable. *Pena*, 158 F.4th at 1044; *see also Hadley* v. *City of South Bend*, 154 F.4th 549, 553 (7th Cir. 2025) ("[T]he damage Hadley suffered happened because police executed a lawful search warrant in her home."). The Takings Clause requires compensation as a consequence of that choice.

C. Wartime Cases Are Further Distinguishable Because of the Extraordinary and Widespread Destruction Caused by War.

Wartime cases provide an especially poor analogy for property destroyed during peacetime law-enforcement operations given the unique circumstances presented by armed conflict. The decision below nonetheless relies heavily on wartime authorities, especially the pre-Takings Clause *Sparhawk* decision. *See Pena*, 158 F.4th at 1043–44, 1046. Though the Ninth Circuit acknowledged the "obvious distinctions between the government's . . . wartime powers and the actions of domestic law

enforcement," it still concluded that "[t]he rationale of *Sparhawk* . . . is directly applicable to Pena's situation." *Id.* at 1046. But *Sparhawk* itself forecloses that view. The Supreme Court of Pennsylvania unequivocally stated that "many things are lawful in [wartime], which would not be permitted in a time of peace," and that "[t]he seizure of the property in question, can, indeed, *only be justified under this distinction*." 1 U.S. at 362 (emphasis added). Wartime cases are distinguishable because the sweeping destruction war causes may make compensation impractical and often lessens the concern that particular individuals are forced to bear disproportionate public burdens.

Wartime cases often observed that the extraordinary and widespread destruction caused by war could create a practical limitation on the government's ability to compensate owners for lost property. For instance, concerns over "ruinous" costs partly motivated the government's refusal to pay compensation in *Sparhawk*. 1 U.S. at 362. This Court's decision in *Pacific Railroad* likewise recounted how the federal government repeatedly declined to compensate those who lost property in the Civil War because payment "would invite the presentation of demands for very large sums of money against the government." 120 U.S. at 235–38. The same opinion quoted Vattel's warning that if the state indemnified all wartime property losses, "the public finances would soon be exhausted." *Id.* at 235. These cases recognized the risk that war could destroy such vast swaths of an

economy that the government might lack the financial wherewithal to pay compensation.

None of those concerns transfer to the domestic law-enforcement context where the potential losses are much smaller. While SWAT raids have become more common, *see*, *e.g.*, Bonnie Kristian, *The Troubling Rise of SWAT Teams*, THE WEEK (Jan. 19, 2015), https://theweek.com/articles/531458/troubling-rise-swat-teams, the damages at issue remain modest by comparison. Pena sought around $60,000, *see Pena*, 158 F.4th at 1035, and Hadley requested just $16,000, *see Hadley*, 154 F.4th at 551. Those costs would not impose the "utterly impracticable," *Pac. R.R.*, 120 U.S. at 235, burdens on the balance sheets of local governments as would compensating for wartime losses.

Beyond that, war historically burdened such large swaths of society as to vitiate the equitable concerns about individuals bearing disproportionately the burdens of providing public goods. As this Court observed, "all the [citizenry is] exposed to such damages" "caused by the enemy." *Pac. R.R.*, 120 U.S. at 235. A post-Civil War Pennsylvania Supreme Court decision similarly made the point explicitly that "[l]osses by public enemies—the casualties of war—are risks that every one in society assumes and must bear." *Gillan* v. *Gillan*, 55 Pa. 430, 432 (1867). In some sense, therefore, all in society historically shared in the burdens of war even if the misfortunes fell more harshly on some. By contrast, few confront a realistic risk that a SWAT team will destroy their property.

Such an event is extraordinary. The equitable concerns underlying the Takings Clause therefore arise more strongly in the domestic law-enforcement context than in war.

Perhaps because war often, though not always, produces such extraordinary destruction, this Court has not announced a categorical exception for wartime takings. *Caltex* emphasized that "[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses," and that each case turns on its facts. *See Caltex*, 344 U.S. at 156. Wartime precedents therefore offer little support for a law-enforcement necessity exception in a domestic context without the prospect of widespread and catastrophic destruction.

III. Restoration of the Takings Clause's Original Meaning Protects Innocent Property Owners from Devastating Financial Losses.

This Court should grant the petitions for certiorari because the lower courts' historically unmoored exceptions for law-enforcement action expose a growing number of innocent Americans to devastating financial losses—losses they should not bear alone under the Takings Clause. Pena's print shop (and source of income) was taken when law enforcement fired tear gas cannisters through its walls and windows, destroying the inventory and equipment inside. *Pena*, 158 F.4th at 1035. Hadley's home similarly suffered massive damage to its walls, windows, and contents. *Hadley*, 154 F.4th at 552. Few things hit harder than the loss of a home or a livelihood,

a tragedy more Americans will experience as the use of SWAT raids grows to over 80,000 a year. *See* Kristian, *supra*.

In this Court's denial of certiorari in *Baker* v. *City of McKinney*, Justices Sotomayor and Gorsuch asked whether "there is an 'objectively necessary' exception to the Takings Clause" and "how the Takings Clause applies when the government destroys property pursuant to its police power." 145 S. Ct. 11, 13 (2024). Since then, the Ninth Circuit has invoked a "necessity exception" while the Seventh Circuit relied on a "police power exception" to the Takings Clause. Both "exceptions" have percolated through the lower courts, created a circuit split, and caused great personal injustice to private property owners. These cases are well-suited for this Court's review.

To be sure, the Constitution does not require compensation for every loss. But it does require compensation here, where Petitioners' property was destroyed for the benefit of public safety. The Founders understood that, in all fairness and justice, society should bear costs undertaken for society's benefit. This Court should grant the petitions to remedy these injustices and restore the original understanding of the Takings Clause.

CONCLUSION

The Court should grant the petitions for certiorari.

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