

No. _____

In The
Supreme Court of the United States

CARLOS PENA,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In recent years, this Court has seen petitions where plaintiffs have asserted Takings Clause claims related to destructive law-enforcement activity. See *Slaybaugh v. Rutherford County*, 145 S. Ct. 1959 (2025); *Baker v. City of McKinney*, 145 S. Ct. 11 (2024); *Lech v. Jackson*, 141 S. Ct. 160 (2020). Justices Sotomayor and Gorsuch have recognized that these cases “raise[] an important question that has divided the courts of appeals,” *Baker*, 145 S. Ct. at 11, yet they felt it was a question that “would benefit from further percolation in the lower courts prior to this Court’s intervention.” *Id.* at 13. Since then, the Ninth Circuit has weighed in, and the Seventh Circuit has reaffirmed its previous approach, adding to the doctrinal disarray in the lower courts.

The Questions Presented are:

1. Whether the government is exempt from liability under the Takings Clause when law enforcement officers intentionally destroy an innocent person’s property in the course of attempting to apprehend a fugitive.
2. Whether the doctrine of “public necessity” is an exception to the Takings Clause.

PARTIES TO THE PROCEEDING

Petitioner Carlos Pena is a natural person and was the plaintiff-appellant in the court below. Respondent City of Los Angeles was the defendant-appellee in the court below.

RELATED PROCEEDINGS

U.S. District Court for the Central District of
California:

Pena v. City of Los Angeles
No. 2:23-cv-5821 (April 3, 2024)

U.S. Court of Appeals for the Ninth Circuit:

Pena v. City of Los Angeles
No. 24-2422 (November 4, 2025)

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Carlos Pena petitions for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, 1a, is reported at 158 F.4th 1033.

The district court's opinion denying Plaintiff's motion for summary judgment, 44a, is unreported.

The district court's opinion denying Defendant's motion for judgment on the pleadings, 63a, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 2025. Petitioner timely moved for an extension of time to file a petition for rehearing and rehearing *en banc*, which was granted on November 12, 2025. Petitioner filed a timely petition for rehearing and rehearing *en banc* on December 18, 2025. Those petitions were denied on January 23, 2026. On the same day, the Court of Appeals filed a corrected opinion. This petition for certiorari was timely filed on April 6, 2026. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT

On August 3, 2022, petitioner Carlos Pena was working in his small print shop in North Hollywood, California, when he heard a commotion outside. He opened his door to investigate, and saw a man running towards him, pursued by United States Marshals with weapons drawn. 45a–46a. The fugitive struck Pena on the shoulder, threw him out of the shop, and barricaded himself inside. The Marshals surrounded the shop, and a standoff ensued. Eventually a Los Angeles Police Department SWAT team arrived and took over from the Marshals. Approximately thirteen hours after the standoff began, the SWAT team assaulted the shop, saturating it with tear gas. When the police entered Pena’s shop, they found that the fugitive had somehow escaped. 5a.

The assault caused extensive damage. Essentially all of Pena’s printing equipment and inventory had been destroyed by the gas. He estimates that the value of that property was approximately \$60,000. 5a. The police officers who caused the damage were under the impression that the City would compensate Pena, C.A. E.R. (Doc. 10.1) at 59:13–20, but they were mistaken. The City categorically refused to pay for the damage.

Pena did not have \$60,000 to replace his equipment, and the damage was not covered by insurance. Since the assault, Pena has been operating out of his garage, without air conditioning, with a single commercial printer that a sympathetic competitor sold to him at a discount. His revenue has dropped significantly. He no longer attracts walk-in customers, and

he does not have the same capabilities that he had before. A business that he built up from scratch over thirty years ago is withering. 48a.

On July 19, 2023, Pena filed suit against the City of Los Angeles in the United States District Court for the Central District of California. He asserted that the government’s intentional destruction of his property, for the public purpose of apprehending a dangerous criminal, was a taking within the meaning of the Fifth Amendment, entitling him to compensation.

The City moved for judgment on the pleadings, asserting that because the destruction of Pena’s property was pursuant to the City’s “police power,” the Takings Clause did not apply. The district court denied that motion. 66a. After discovery concluded, however, the district court also denied Carlos’s motion for summary judgment, largely accepting the arguments that it had previously rejected. 60a. Because the City had not cross-moved for summary judgment, presumably because it would have been futile absent reconsideration of the court’s prior ruling, the parties stipulated to entry of judgment for the City, and Pena filed a timely notice of appeal. 43a.

The Ninth Circuit panel declined to endorse the district court’s broad “police power” reasoning. Instead, the panel held that the tort defense of public necessity barred Pena’s claim. 15a.

Judge Friedland, concurring in the judgment, wrote separately to emphasize that the panel majority had improperly placed the burden on the plaintiff to find a historical analogue to his specific claim,

rather than putting the burden on the government to demonstrate a historical basis for departing from the plain text of the Takings Clause. 40a. Nevertheless, she agreed that Pena’s claim failed. She reasoned that Pena had not actually been deprived of any property right: Because he had never had the right to exclude the police from conducting a lawful search or arrest, he had lost no stick from his bundle of rights. 35a.

Pena filed a motion for rehearing and rehearing *en banc*. Those motions were denied. Carlos filed this timely petition for certiorari on the same day as the petition for certiorari in a companion case, *Hadley v. City of South Bend*, out of the Seventh Circuit. 154 F.4th 549 (2025). *Hadley* likewise concerns a SWAT raid that caused significant damage to an innocent person’s property. Though the Seventh Circuit’s reasoning differs significantly from the Ninth’s, the outcome was the same—the innocent property owner was left holding the bag.

These petitions raise the same issue as a 2024 petition in a materially identical case, *Baker v. City of McKinney*. 145 S. Ct. 11 (2024). In *Baker*, a fugitive barricaded himself inside the home of Vicki Baker, an innocent third party whose only connection to the fugitive was that at one point he had worked as a handyman at her house. A SWAT team eventually assaulted her house using tear gas, explosives, and a Bearcat armored vehicle. As is typical, insurance did not cover the damage, and the City insisted that Ms. Baker would not see a dime. Although the district court awarded compensation to Ms. Baker, the Fifth Circuit reversed, denying compensation on the same ground as the Ninth Circuit in this case: It held that

“public necessity” is an exception to the Takings Clause.

Justice Sotomayor, joined by Justice Gorsuch, authored an opinion respecting the denial of certiorari, explaining that this Court’s precedents had only ever applied “public necessity” to defeat a Takings Clause claim in cases where the property would have inevitably been destroyed. 145 S. Ct. at 12. “Whether the inevitable-destruction cases should extend” to situations where the destruction is *not* inevitable, they observed, remains “an important and complex question that would benefit from further percolation in the lower courts.” *Id.* at 12–13.

The issue has continued to percolate. The Seventh, Ninth, and Eleventh Circuits have now had an opportunity to address the issue. The Seventh Circuit has held that the Takings Clause simply does not apply when the government is acting pursuant to its “police power” rather than the power of eminent domain. *Hadley*, 154 F.4th at 553. The Ninth Circuit, below, has held that “public necessity” is an exception to the Takings Clause, regardless of whether the property would be subject to inevitable destruction. 4a. The Eleventh Circuit, by contrast, has held that emergencies do not absolve the government of the duty to pay for what it takes. *Alford v. Walton County*, 159 F.4th 844 (11th Cir. 2025).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to settle the deep confusion among the Courts of Appeals. Lower courts disagree about whether the Takings Clause

applies to: exercises of the police power, actions privileged by “public necessity,” or actions privileged as lawful searches or arrests. As a result, Americans are losing their homes and businesses, through no fault of their own, without compensation and without the ability to protect themselves via insurance, which almost always excludes damage done by the government. And the doctrinal chaos is seeping into other contexts. Lower courts have cited these opinions to deny compensation in a wide variety of cases, dealing with situations as diverse as COVID-19 closures and government-caused flooding.

These decisions denying compensation share a common, flawed premise: that when the government is acting for a good reason, it would somehow be unfair or unwise to “penalize” it by requiring it to pay for the property it takes. This fundamentally misunderstands the nature of the Takings Clause, which starts from the assumption that the government is acting for a good reason. The point of the Clause is not to deter or punish wrongdoing, but to ensure that the Government is not “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). Taking dangerous criminals off the streets is unquestionably an important function of government, but the cost of those operations should be borne by the public, just as we pay for police salaries, training, equipment, and the entire criminal justice system.

The decision below—like others denying compensation—is also at odds with the historical record, which speaks with unusual clarity on the precise

question in this case. At the time of the Founding, “necessity” was understood to be an individual defense against tort liability, not a governmental immunity against the Takings Clause. Every early court to confront the issue agreed, and contemporary commentary indicates that the Takings Clause was adopted *specifically* to ensure that public necessity would not be used to justify uncompensated taking of private property.

I. The Courts of Appeals are divided on whether and how the Takings Clause applies to lawful government actions.

This Court’s intervention is necessary because the lower courts are still divided on how to apply the Takings Clause when the government burdens property rights without formally appropriating them. Doctrinally, these decisions are all over the map, but those cases that have rejected compensation do contain a common thread: that it would somehow be unfair or unwise to require the government to compensate people who have been forced to sacrifice their property for the greater good.

A. The Police Power Exemption

The Seventh, Tenth, and Federal Circuits have squarely held that, when the government is acting pursuant to its so-called “police powers,” the Takings Clause simply does not apply.

Lech v. Jackson, 791 F. App’x 711 (10th Cir. 2019), involved a now-familiar fact pattern in which: (1) a fugitive barricades himself inside property owned by an innocent third party, (2) a SWAT team causes

significant damage in the course of apprehending the fugitive, and (3) the government refuses to compensate the innocent owner. The police did so much damage to the Lechs' home that it was deemed uninhabitable and had to be razed to the ground. *Id.* at 713. The Tenth Circuit, however, held 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.” *Id.* at 717. Although this case was unreported, it has been cited dozens of times by other courts, almost always to reject a takings claim.

The same rule governs in the Seventh Circuit. In *Johnson v. Manitowoc County*, the court squarely held that “the Takings Clause does not apply when property is retained or damaged as the result of the government’s exercise of its authority pursuant to some power other than the power of eminent domain.” 635 F.3d 331, 336 (7th Cir. 2011). Applying that circuit precedent, a subsequent Seventh Circuit panel rejected the takings claim in another case involving a SWAT raid on an innocent person’s home. *Hadley v. City of South Bend*, 154 F.4th 549, 552 (7th Cir. 2025) (“Because we agree that *Johnson* controls, we affirm”). That case is the subject of a companion petition for certiorari, filed the same day as this one.

The Federal Circuit has likewise held that “so long as the government’s exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment.” *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008). The Federal Circuit made clear that its conception of

the police power was “nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions,” limited only by the due process clause. *Id.* at 1153–54. Although the Federal Circuit has never cast doubt on the validity of *AmeriSource*’s broad holding, it has applied it selectively, without ever articulating a basis for determining when the rule applies. See note 1, *infra*.

Squarely rejecting this rule are the Fourth, Fifth, and Sixth Circuits. *Slaybaugh v. Rutherford County*, 114 F.4th 593, 597 (6th Cir. 2024) (“We decline to apply the categorical “police power” exception adopted by the district court”), cert. denied, 145 S. Ct. 1959 (2025); *Baker v. City of McKinney*, 84 F.4th 378, 384 (5th Cir. 2023) (“[W]ith 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.”); *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021) (“That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court’s jurisprudence.”).

B. Necessity Exemption

In the decision below, the Ninth Circuit joined the Fifth in holding that “public necessity” is an exception to the Takings Clause. 15a (“Law enforcement officers destroyed Pena’s property while acting reasonably to capture an armed fugitive fleeing from police. The necessity exception to the Takings Clause therefore applies to Pena’s claim, and no compensable taking occurred.” (cleaned up)); *Baker*, 84 F.4th at 379 (“[T]he

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.”).

The Federal Circuit has also endorsed the “public necessity” exception to the Takings Clause, though its understanding of the doctrine differs. Unlike the Fifth and Ninth Circuits, the Federal Circuit emphasizes that “[t]he necessity defense is just what it says it is: a defense.” *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013). In a case involving a controlled blaze, which the Forest Service lit in an effort to contain a wildfire, the Federal Circuit remanded for discovery regarding whether it was truly necessary to sacrifice private property and whether the government had reasonable alternatives. *Ibid.* On remand, the court denied cross motions for summary judgment, and the case eventually settled.¹

The North Dakota Supreme Court has extended the necessity defense beyond destruction, to encompass the actual appropriation of personal property without compensation. In *Irwin v. City of Minot*, the city took clay and topsoil from a private farm, for use in constructing emergency dikes prior to a flood. 860 N.W.2d 849, 851 (N.D. 2015). The court remanded to determine whether the facts would support the

¹ Given the breadth of *AmeriSource*’s “police power exemption” from the Takings Clause, *TrinCo* is a puzzling case. It is unclear why the necessity defense is relevant in a circuit where any actions taken pursuant to the police power are categorically non-compensable.

defense, but it harbored no doubt as to the doctrine's application to seizure as well as destruction.

The Eleventh Circuit has rejected this approach. *Alford v. Walton County*, 159 F.4th 844, 860 (11th Cir. 2025). *Alford* concerned a COVID-19 order that restricted property owners' access to private beaches. The district court had held that the order was not a taking because "there was no way to know * * * how many people would die or become gravely ill," so government officials "exercised their best judgment * * * on how to preserve life and health." *KI Fla. Props., Inc. v. Walton County*, No. 3:20-CV-5358, 2021 WL 5456668, at *6 (N.D. Fla. Oct. 15, 2021). In other words, the district court adopted a "public necessity" exception to the Takings Clause, just like the panel in the present case. In reversing, the Eleventh Circuit held that "the normal requirements of the Takings Clause remain in force, even during emergencies." 159 F.4th at 860. The court explained that while an emergency can justify the taking of property, it cannot absolve the government of its obligation to pay for what it took. *Ibid.*²

C. Law Enforcement Exemption

Finally, the Sixth Circuit has adopted yet a third exemption from the Takings Clause. In *Slaybaugh v. Rutherford County*, 114 F.4th 593 (2024), a fugitive barricaded himself inside a home, and the police

² The Sixth Circuit, while not squarely answering the question, observed that "historical evidence suggests that, in certain circumstances, persons could be compensated for the taking of property out of necessity." *Slaybaugh v. Rutherford County*, 114 F.4th 593, 603 (6th Cir. 2024).

destroyed it in the course of apprehending him. The property owners were innocent, and the government refused to pay for the damage. The Sixth Circuit denied compensation on the ground that the “search and arrest” privilege immunized the government from takings liability. The court explained that the search-and-arrest privilege has a long history at common law, and it has always immunized law enforcement officers who are conducting lawful arrests. *Id.* at 598. True enough. But the court did not identify any historical basis for imputing a personal tort immunity to the government for purposes of the Takings Clause. The only source it identified for that crucial link was dicta from this Court’s recent decision in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). Judge Friedland, below, adopted similar reasoning in her concurrence. 33a.

The discussion below regarding public necessity—another personal tort defense to trespass—is largely applicable to the Sixth Circuit’s decision as well, and the forthcoming amicus brief of the Pacific Legal Foundation will explain in detail how the Sixth Circuit has misinterpreted *Cedar Point*.

Below is a chart summarizing the splits in the federal circuits and state high courts:

Police Power Exception to Takings Clause	
Recognizes	Rejects
<i>Lech v. Jackson</i> , 791 F. App’x 711 (10th Cir. 2019); <i>Johnson v. Manitowoc County</i> , 635 F.3d 331 (7th Cir. 2011);	<i>Alford v. Walton County</i> , 159 F.4th 844 (11th Cir. 2025) (implicit); <i>Slaybaugh v. Rutherford County</i> , 114 F.4th 593 (6th Cir. 2024);

<p><i>AmeriSource Corp. v. United States</i>, 525 F.3d 1149 (Fed. Cir. 2008);</p> <p><i>Hamen v. Hamlin County</i>, 955 N.W.2d 336 (S.D. 2021);</p> <p><i>Eggleston v. Pierce County</i>, 64 P.3d 618, 623 (Wash. 2003);</p> <p><i>Kelley v. Story Cnty. Sheriff</i>, 611 N.W.2d 475, 480 (Iowa 2000);</p> <p><i>Customer Co. v. City of Sacramento</i>, 895 P.2d 900, 908 (Cal. 1995)</p>	<p><i>Baker v. City of McKinney</i>, 84 F.4th 378 (5th Cir. 2023);</p> <p><i>Yawn v. Dorchester County</i>, 1 F.4th 191 (4th Cir. 2021);</p> <p><i>Brewer v. Alaska</i>, 341 P.3d 1107 (Alaska 2014);</p> <p><i>Garrett v. City of Topeka</i>, 916 P.2d 21 (Kan. 1996);</p> <p><i>Soucy v. New Hampshire</i>, 506 A.2d 288 (N.H. 1985);</p> <p><i>Steele v. City of Houston</i>, 603 S.W.2d 786 (Tex. 1980);</p> <p><i>Just v. Marinette County</i>, 201 N.W.2d 761 (Wis. 1972)</p>
Necessity/Emergency Exception to Takings Clause	
Recognizes	Rejects
<p><i>Pena v. City of Los Angeles</i>, 158 F.4th 1033 (9th Cir. 2025);</p> <p><i>Baker v. City of McKinney</i>, 84 F.4th 378 (5th Cir. 2023);</p> <p><i>TrinCo Inv. Co. v. United States</i>, 722 F.3d 1375 (Fed. Cir. 2013) (narrower than Fifth/Ninth version);</p> <p><i>Brewer v. Alaska</i>, 341 P.3d 1107 (Alaska 2014)</p>	<p><i>Alford v. Walton County</i>, 159 F.4th 844 (11th Cir. 2025);</p> <p><i>Steele v. City of Houston</i>, 603 S.W.2d 786, 792 (Tex. 1980) (Public necessity applies where property is “destined to destruction anyway.”);</p> <p><i>Commons of Lake Houston, Ltd. v. City of Houston</i>, 711 S.W.3d 666, 680 n.39 (Tex. 2025)</p>
Search and Arrest Exception to Takings Clause	
Recognizes	Rejects
<p><i>Slaybaugh v. Rutherford County</i>, 114 F.4th 593 (6th Cir. 2024)</p>	

II. This Court’s intervention is necessary because the decision below, along with others rejecting similar claims, is wrong.

A. The Takings Clause applies to physical destruction of property.

The court below “decline[d] to endorse th[e] position” that the Takings Clause applies to property destruction. 25a n.21. But this Court has long held the opposite:

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...it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can * * * 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.

Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 178 (1872).³

³ Accord *United States v. Welch*, 217 U.S. 333, 339 (1910) (“a destruction for public purposes may as well be a taking as would be an appropriation for the same end.”); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 713 (2010) (plurality) (“[W]hen the government uses its own property in such a way that it destroys private property, it has taken that property.”); *Baker v. City of McKinney*, 93 F.4th 251, 252 (5th

The panel dismissed *Pumpelly* on the ground that this Court “was construing the Wisconsin Constitution,” 25a n.21, but *Pumpelly* explicitly stated that it “rest[ed] its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights.” 80 U.S. (13 Wall.) at 180. This Court has gone on to cite *Pumpelly* dozens of times, treating it as one of the foundational precedents of federal takings law. See, e.g., *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 32 (2012).

The Fifth Circuit, while at least acknowledging that *Pumpelly* is binding federal law, argued that it was inapplicable because it “was a flooding case.” *Baker*, 84 F.4th at 384. Yet this Court has expressly rejected arguments that “flooding is different,” holding instead that “[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property.” *Ark. Game & Fish*, 568 U.S. at 36.

If that were not clear enough, *Pumpelly* itself states a broader rule: “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material * * * so as to effectually destroy or impair its usefulness, it is a taking.” 80 U.S. (13 Wall.) at 181. That is precisely what happened in the case below: A Los Angeles SWAT team “actually invaded” Carlos’s shop with canisters of noxious gas,

Cir. 2024) (dissent) (“The panel did not quibble with Baker’s contention that the ‘plain text’ of the Fifth Amendment suggests she is entitled to compensation. Nor could it have.” (citation omitted)).

which effectively destroyed his property and “im-pair[ed] its usefulness.” That is a prima facie taking.

B. There is no basis in text, history, or tradition for treating “necessity” as an exception to the Takings Clause.

“Public necessity” is a common-law defense against the tort of trespass. It protects individuals against personal liability when they destroy property “for the purpose of avoiding a public disaster.” Restatement (Second) of Torts § 262 (1965). It has no application, however, when the government itself destroys private property. See *Baker v. City of McKinney*, 93 F.4th 251, 254 (5th Cir. 2024) (dissent) (questioning application of private tort defenses to the Takings Clause).

Start with the text of the Fifth Amendment: It says, “nor shall private property be taken for public uses without just compensation.” It does not say “unless it was really necessary to take the property.” See *Knick v. Twp of Scott*, 588 U.S. 180, 189 (2019) (“The Clause provides: ‘[N]or shall private property be taken for public use, without just compensation.’ It does not say: ‘Nor shall private property be taken for public use, without an available procedure that will result in compensation.’”). That textual silence is significant. “[W]hen 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.” *Baker v. City of McKinney*, 93 F.4th 251, 253 (5th Cir. 2024) (dissent) (citing

N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022)).

Here, the history is unusually clear: Early American cases repeatedly drew a distinction between the individual tort defense of public necessity and the government's just compensation duty, universally holding that necessity was not an exception to the Takings Clause:

[T]he individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defence of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle (Const. U. S. Art. 5, of the Amendments).

City of New York v. Lord, 17 Wend. 285, 291 (N.Y. Sup. Ct.), *aff'd*, 18 Wend. 126 (N.Y. 1837).⁴

⁴ See also *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) (“[P]rivate rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.”); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (“Unquestionably * * * the government is bound to make full compensation to the owner; but the officer is not a trespasser.”); *Grant v. United States*, 1 Ct. Cl. 41, 47 (1863) (“taking of private

Indeed, a common view in the early republic was that public necessity, far from being an exception to the Takings Clause, was in fact the only valid justification for taking or destroying property without the owner's consent. See, e.g., *Tide Water Canal Co. v. Archer*, 9 G. & J. 479, 484 (Md. 1839) (“[W]henever public necessity demands that the property of any individual should be appropriated to public uses, he shall receive a just and reasonable compensation therefor[.]”).⁵ Several founding era declarations of

property for use or destruction, when the public exigency demands it, * * * is an exercise of the right of *eminent domain*”); *Jarvis v. Pinckney*, 21 S.C.L. (3 Hill) 123, 140 (1836) (“[A]s the danger to human life was great, it might be destroyed upon the principle that private property may be taken for the public use[, but] * * * it can only be done upon just compensation.”); *Bishop v. Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849) (“[I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be *lawfully* taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases, while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss.”); *Hale v. Lawrence*, 21 N.J.L. 714, 728–29 (1848) (“Whether or not, a law authorizing the destruction of private property for public benefit or safety, is to be esteemed a taking * * * such a law is nevertheless an exercise of the right of eminent domain, and if it makes no provision for compensation to the owner, the law is [] unconstitutional[.]”).

⁵ Accord *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. 344, 408 (1829) (holding that “public exigency did not require that their franchise should be taken away without compensation”), *aff’d*, 36 U.S. 420 (1837); *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 290 (1823) (noting that Under the Maine Constitution, even in cases of “public exigency * * * the individual is * * * to receive ‘just

rights echoed this understanding. The Northwest Ordinance of 1787 provided that “should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.” The Massachusetts Constitution of 1780 spoke of compensated takings “whenever the public exigencies require” it. And the Vermont Constitution of 1777 speaks of compensated takings “when necessity requires it.”⁶

It is not a coincidence that we have so much early material addressing the interplay between necessity and just compensation. As this Court has recognized, the earliest contemporary commentary on the Takings Clause explained that it was “‘probably’ adopted in response to ‘the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any

compensation”); *Robinson v. Barfield*, 6 N.C. 391, 420 (1818) (“only in case of necessity, and rendering full compensation”).

⁶ Although these declarations of rights used slightly different language than the Fifth Amendment, it was understood at the time of the Founding that these were simply varying articulations of a common principle that dated back to Magna Carta. See *Young v. McKenzie*, 3 Ga. 31, 41–42 (1847); *Bristol v. New-Chester*, 3 N.H. 524, 535 (1826) (“[C]ompensation shall be made. And natural justice speaks on this point, where our constitution is silent.”); *Bradshaw v. Rogers*, 20 Johns. 103, 106 (N.Y. 1822) (Fifth Amendment’s prohibition of uncompensated takings is simply “declaratory of a great and fundamental principle of government” arising from “natural rights and justice”); *Bowman v. Middleton*, 1 Bay 252, 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be “against common right, as well as against Magna Charta,” to take property without compensation).

compensation whatever.” *Horne v. Dep’t of Agric.*, 576 U.S. 350, 359 (2015) (quoting 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)). Of course, public necessity would certainly justify the military’s seizure of supplies during a domestic war for independence, yet the Takings Clause was drafted and ratified specifically to ensure that compensation would be available in such situations. *Baker*, 93 F.4th at 257 (dissent) (“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.”).⁷

Scholarly authority also overwhelmingly supports the conclusion that necessity is not a historically grounded exception to the Takings Clause.⁸

⁷ The opinion below argues that history cuts the other way because, in the pre-ratification period, colonial governments sometimes seized property, including real property, without paying for it. 16a–24a. But there is no question that the Takings Clause applies to the seizure of real property to build a road (one of the examples the panel majority referenced), so this history tells us nothing; the panel failed to “exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.” *United States v. Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring).

⁸ See, e.g., Tony Smith, *In Case of Emergency: Reconciling Necessity Takings with the Original Meaning of the Takings Clause*, 120 Nw. U. L. Rev. 465, 492 (2025) (“[T]here is no evidence to support a necessity exception to the Fifth Amendment’s compensation requirement.”); Megan Friner, *Breaking Down Baker: The Takings Clause, Law Enforcement, and the Need for A New Framework*, 84 Md. L. Rev. 1003 (2025); Kathleen Collins,

Although the historical record forecloses any necessity exception to the Takings Clause, it is true that this Court has, in dicta, assumed the opposite. Most famously, in *Pennsylvania Coal Co. v. Mahon*, Justice Holmes mused that “[i]t 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” that the government owes compensation when it destroys private property, “whether they do not stand as much upon tradition as upon principle.” 260 U.S. 393, 415–16 (1922). Far from establishing a necessity defense to the Takings Clause, however, Justice Holmes was both (1) critical of the notion of a

Taking Back the Takings Clause: The Case for Compensating Innocent Property Owners Caught in the Crossfire of Police Activity, 66 Wm. & Mary L. Rev. 1613 (2025); Case Comment, *Baker v. City of McKinney*, 137 Harv. L. Rev. 2408 (2024); Dandee Cabanay, *Baking Up a Taking: Why There Is No Categorical Exception to the Fifth Amendment Takings Clause for the Police Power*, 75 Baylor L. Rev. 778, 793 (2023); Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 143 (2021); Tristan Reagan, *Dude, Where’s My House: The Interaction Between the Takings Clause, the Police Power, the Militarization of Law Enforcement, and the Innocent Third-Party Property Owner*, 58 Tulsa L. Rev. 99, 130 (2022); Zachery Hunter, *You Break It, You Buy It—Unless You Have A Badge? An Argument Against a Categorical Police Powers Exception to Just Compensation*, 82 Ohio St. L.J. 695, 706 (2021); Emilio R. Longoria, *Lech’s Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 Wake Forest J.L. & Pol’y 297 (2021); Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm. & Mary Bill Rts. J. 1145, 1196 (2021); Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 449–50 (2015); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. Rev. 127, 128 (2013).

necessity defense and (2) ambivalent about whether such a defense even existed.

Seventy years later, necessity made another appearance in this Court's dicta, when Justice Scalia dropped a footnote in *Lucas v. South Carolina Coastal Council*, referencing "litigation absolving the State (or private parties) 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." 505 U.S. 1003, 1029 n.16 (1992).

Lower courts have afforded these asides weight that they cannot bear. In neither *Lucas* nor *Pennsylvania Coal* did the Court actually confront a question of public necessity, and neither court had occasion to consider the voluminous historical record undermining their assumptions. As Justice Sotomayor and Gorsuch recently observed, whether public necessity is an exception to the Takings Clause "remains an open question" under this Court's precedents. *Baker*, 145 S. Ct. at 13.⁹

⁹ Notably in *YMCA v. United States*, 395 U.S. 85 (1969), discussed in more detail in II.C, the government argued that public necessity absolved it of any takings liability. No justices endorsed that argument. The justices who voted to deny compensation did so on a much narrower ground, and the dissenters simply disagreed about what the record showed.

C. This Court’s existing limiting principles do not excuse non-compensation here.

Although public necessity is not an exception to the Takings Clause, that does not mean that the government is liable every time it destroys private property. This Court has recognized several circumstances where compensation may not be due. None of these, however, applies to the present case.

First, if the government destroys property that would have been destroyed or lost anyway, then no compensation is due. *Baker*, 145 S. Ct. at 13 (“Whether the inevitable-destruction cases should extend to this distinct context remains an open question.”).¹⁰ This was the situation in *United States v. Caltex*, 344 U.S. 149 (1952). The retreating U.S. Army destroyed a petroleum refinery in Manila, so as to prevent it from falling into the hands of advancing Japanese forces. The Court explained that because there would have been no compensation due for destroying it after the Japanese had seized it, it should not matter that the destruction was effected just prior to seizure. 344 U.S. at 155. In the present case, Respondent

¹⁰ See *Miller v. Horton*, 26 N.E. 100, 101 (Mass. 1891) (noting that if a house is pulled down to create a firebreak, no compensation will be due if “the house is practically worthless because it would have burned if it had not been destroyed.”); *Bishop & Parsons v. City of Macon*, 7 Ga. 200, 202–03 (1849) (“Where the same extent of loss or injury would have been sustained by the individual, as the necessary consequence of the fire or other public calamity, if his property had not been thus taken or destroyed for the protection of others, he would hardly seem entitled to compensation. For in such case, although others have been benefited, he has in fact sustained no damage.”).

has not argued—nor could it—that the fugitive would have destroyed Pena’s shop regardless of the SWAT team’s actions.

Second, this Court has recognized that no compensation is due when the property owner is the “particular intended beneficiary” of the government action that caused the property damage. In *YMCA v. United States*, during a riot in the Panama Canal Zone, American troops occupied several buildings and attempted to protect them from rioters. 395 U.S. 85, 90 (1969). Several buildings were, nonetheless, damaged or destroyed. The Court explained that the Takings Clause did not apply because, even if the troops were, in some sense, responsible for the damage, they were acting primarily to protect private property. *Id.* at 92. The same would be true, for instance, if firefighters had to break down a door to get inside a burning building. The same cannot be said for the SWAT team in the present case. The police were already in pursuit of the fugitive when he entered Pena’s shop, and there is no way in which Pena could be viewed as the particular intended beneficiary of an assault which destroyed his business.

Third, it is not a taking when the government is simply abating a nuisance. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). For instance, the government may destroy diseased animals without compensating their owners, *Miller v. Horton*, 26 N.E. 100, 102 (Mass. 1891), or raze an unsafe building that the owner has failed to maintain. *John Corp. v. City of Houston*, 214 F.3d 573, 580 (5th Cir. 2000). But “the government cannot avoid paying compensation based simply on its own declaration that the property is a

nuisance.” *Tex. Dep’t of Transp. v. Self*, 690 S.W.3d 12, 30 (Tex. 2024). It must prove that the property at issue was, in fact, a nuisance under background principles of property law. *Lucas*, 505 U.S. at 1031; *Miller*, 26 N.E. at 102 (“Certainly the legislature could not declare all cattle to be nuisances[.]”). Crucially, the tort of nuisance requires an element of fault on the part of the property owner. Restatement (Second) of Torts § 821B comment e (1979) (“[T]he defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities.”) There can be no contention that Pena was at fault for a fugitive assaulting him and taking refuge in his shop.¹¹

Finally, the damage must be intentional or at least foreseeable. See *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 39 (2012); *John Horstmann Co. v. United States*, 257 U.S. 138 (1921) (“[I]t would border on the extreme to say that the government intended a taking by that which no human knowledge could even predict.”). This Court has denied compensation where neither “government [n]or any of its officers * * * had any intention to” damage private property or “any reason to expect that such result would follow.” *Sanguinetti v. United States*, 264 U.S. 146, 147–48 (1924); *In re Chi., Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986) (“Accidental,

¹¹ The logic of these cases would extend to a situation in which the property owner is not truly innocent; an individual who barricaded himself inside his own house would obviously not have a claim against the police for the damage caused in removing him.

unintended injuries inflicted by governmental actors are treated as torts, not takings.”). In the present case, the SWAT team knew that, by saturating Carlos’s shop with toxic gas, they would cause damage. Of course, the destruction was not the ultimate objective—just as destroying timber was not the objective of the Army Corps of Engineers in *Arkansas Game & Fish*—but they intended an act which they knew would cause damage, and that is sufficient.

These are some of the limitations on takings liability that this Court has recognized. It is possible that other exceptions may exist, but the burden is on the government to demonstrate that any novel exception to the Takings Clause is grounded in text, history, and tradition. 39a (Friedland, J., concurring in the judgment) (The burden is “not on the plaintiff to show historical examples of compensation in similar circumstances.”).

III. The Questions Presented are important.

As Justices Sotomayor and Gorsuch already recognized, these cases raise “an important question,” 145 S. Ct. at 11, both in the specific context of SWAT raids, and for takings doctrine more generally.

The damage caused by these raids is catastrophic to people like Carlos Pena. Most insurance policies exclude damage caused by the government. See Jordan Plitt et al., 10A Couch on Ins. § 152:22 (3d ed. 2024) (noting that loss associated with authorized acts of government are “typically excluded from most property insurance policies”). These exclusions have been interpreted to cover damage caused by lawful actions

of the police, unless the damage was caused by an officer who “acts so egregiously that his behavior is not properly characterized as” government action. *Cal. Cafe Rest. v. Nationwide Mut. Ins. Co.*, C.A. No. 92-1326, 1994 WL 519449 at *2 (C.D. Cal. Sept. 14, 1994); accord *Alton v. Mfrs. & Merchants Mut. Ins. Co.*, 624 N.E.2d 545, 546–47 (Mass. 1993). This means there is no good way for most people to protect themselves from the financial ruin that often follows a SWAT raid.

There is no reason to think that providing compensation to people like Carlos would open the floodgates of litigation or subject municipalities to ruinous liability. Takings liability is limited to actual property destruction, which is relatively easy to ascertain. Punitive damages, personal injuries, pain and suffering, and consequential damages are all outside the scope of the Takings Clause. And because takings liability does not depend on the government having acted wrongly, factual disputes will be rare. On the occasions when it is truly necessary for police to destroy private property to protect the public, local government will simply pay those claims, without the need for litigation. Indeed, many cities already voluntarily pay such claims, and in Minnesota they are constitutionally required to do so.¹² There is no indication that

¹² *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1991) (“At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.”); Andy Sheehan, *City council looks to make homeowners impacted*

compensation has proven unworkable in those jurisdictions.

While there is no national database of SWAT raids, it is clear that this kind of damage is becoming more common. At the time of the founding, professional law enforcement did not exist, and any damage they caused would have been de minimis. See *Sandford v. Nichols*, 13 Mass. 286, 289–90 (1816) (suggesting that the damage caused by an illegal search will be “very small” so “the parties will, therefore, judge, whether it is worth their while to proceed further.”). The first SWAT team did not exist until 1969, and it is not until this century that SWAT teams (often equipped with surplus military hardware from the wars in Iraq and Afghanistan) became truly ubiquitous.¹³ Whatever one thinks of this trend, it ensures that more innocent property owners like Carlos Pena, Amy Hadley, and Vicki Baker will be left 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).

by *Garfield shootout financially whole*, CBS Pittsburgh, Feb. 19, 2024, <https://perma.cc/9NCL-T9JB>; Ian Margon, *Taxpayers could pay for home damage after standoff with ex-MDPD lieutenant*, Local10.com, Oct. 30, 2023, <https://perma.cc/U37D-UBYT>; Brad Devereaux, *Kalamazoo offers \$150K to tenant, landlord after tearing down home during police standoff*, mlive.com, Mar. 7, 2022, <https://perma.cc/77PX-7QM9>; Vic Micolucci, *Police working with city to fix damage SWAT team left behind*, News4Jax.com, Aug. 18, 2021, <https://perma.cc/AES9-W4FR>.

¹³ Matt Apuzo, *War Gear Flows to Police Departments*, New York Times, June 8, 2014, <https://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html>.

At bottom, decisions denying compensation to people like Pena all rest on a common error—they conflate the legitimacy of the destruction with the legitimacy of not compensating innocent owners. But “the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). Indeed, if the government is not taking property for a valid public purpose, its actions are simply illegal. The Ninth Circuit’s approach creates a strange situation, where the government owes nothing when it takes property for really compelling reasons, but it must pay when it takes property for merely legitimate reasons. It “make[s] little sense to say that the second owner has suffered a taking while the first has not.” *Lingle*, 544 U.S. at 543.

The reasoning of decisions like the one below have far-reaching consequences. The necessity defense has already been imported into the flooding context—one place where it should be clear that the government is not categorically exempt from takings liability. See *Anson v. City of Deltona*, No. 6:23-CV-766-JSS-LHP, 2025 WL 4477502, at *1 (M.D. Fla. Dec. 2, 2025). And the Tenth Circuit’s decision in *Lech*, exempting the government from liability whenever it acts pursuant to its “police power,” has been cited dozens of times. Courts have used *Lech* to dismiss takings claims related to such diverse government actions as COVID-19 closure orders, *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020), plowing snow onto private property, *David v. Midway City*, No. 2:20-CV-00066-DBP, 2021 WL 6927739, at *8 (D. Utah Dec. 14, 2021), and the destruction of trees. *Carrasco v. City of Udall*, No. 20-1322-EFM, 2022 WL 522959, at

*3 (D. Kan. Feb. 22, 2022). While some of these cases may have turned out the same way under a proper analysis of this Court’s precedents, lower courts have been quick to adopt these “blanket exclusionary rules,” *Ark. Game & Fish*, 568 U.S. at 37, which essentially collapse the Takings Clause into the Due Process rational basis test. These decisions “risk[] turning the right to private property into ‘a second-class right.’” *Baker*, 93 F.4th at 253 (dissental).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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