

No. 25-1163

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

CARLOS PENA,

*Petitioner,*

*v.*

CITY OF LOS ANGELES,

*Respondent.*

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*On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit*

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION IN  
SUPPORT OF PETITIONER**

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AARON NEWELL  
Pacific Legal Foundation  
3100 Clarendon Blvd.  
Suite 1000  
Arlington, VA 22201

WESLEY P. HOTTOT  
*Counsel of Record*  
Pacific Legal Foundation  
1425 Broadway, #429  
Seattle, WA 98122  
(916) 419-7111  
WHottot@pacificlegal.org

*Counsel for Amicus Curiae  
Pacific Legal Foundation*

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## **QUESTIONS PRESENTED**

1. Whether the government is exempt from liability under the Takings Clause when law enforcement officers intentionally destroy an innocent person's property while trying to apprehend a fugitive.
2. Whether the doctrine of "public necessity" is an exception to the Takings Clause.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

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

PLF has represented petitioners in some of the most consequential property-rights cases in recent times. *See, e.g., Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Knick v. Twp. of Scott*, 588 U.S. 180 (2019). PLF has also filed countless amicus briefs on behalf of property owners in this Court and lower courts.

Given PLF's expertise, this brief should assist the Court in resolving the question presented.

## SUMMARY OF ARGUMENT

Amicus agrees with Petitioner. There is no public necessity exception to the Takings Clause and the Ninth Circuit was wrong to hold that there can be no compensable taking when police intentionally destroy a person's business in pursuit of a fugitive.

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<sup>1</sup> Pursuant to Rule 37.2, counsel for all parties received notice of intent to file this brief at least 10 days prior to the due date. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Ninth Circuit incorrectly determined Carlos Pena has no constitutional remedy because the government was exercising what the panel deemed the police power, rather than taking private property for public use. Pena is right: The outcome below cannot be squared with the text of the Takings Clause or this Court's precedents.

Amicus writes separately to ask a more precise question and to explain how the Ninth Circuit has misapplied this Court's holding in *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021), which Amicus litigated.

The more precise question is whether the public-necessity exception recognized in *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (destruction of building to stop fire), *United States v. Pacific Railroad Co.*, 120 U.S. 227 (1887) (wartime destruction of railroad bridges to prevent a national enemy's advance), and *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (destruction of oil terminal to prevent impending seizure by national enemy), extends to the circumstance of this case. This Court should grant certiorari and hold that these cases do not apply.

The public necessity cases are readily distinguishable from Pena's. See *Baker v. City of McKinney*, 145 S. Ct. 11, 12-13 (2024) (statement of Sotomayor, J. & Gorsuch, J., respecting denial of certiorari) (distinguishing same). *Bowditch*, *Pacific Railroad*, and *Caltex* deal with property in the path of an uncontrollable fire or conquering army, making destruction of the property impending, inevitable, and unstoppable. The destruction of Pena's print shop, by contrast, was intentional. It was a deliberate policy choice to expedite

the apprehension of a fugitive. It was, in constitutional terms, a taking of property for public use.

In support of this argument, Amicus shows first why severe damage to a person's property is a per se physical taking that requires compensation. Fairness and consistency demand this result. After all, had the government installed a half-inch cable line on the roof of Pena's print shop, he would be entitled to compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982). If it required temporary access to his shop for union organizing, compensation would be required. *Cedar Point*, 594 U.S. at 149. The government in this case went far beyond these relatively minor intrusions. So the same simple rule applies: the government must pay for what it takes. *Id.* at 148.

Second, no public-necessity exception to the Takings Clause applies. That exception—if it exists—has been rigidly confined to the most extreme circumstances: wartime exigencies and uncontrollable conflagrations, situations where the destruction of private property is inevitable and unavoidable. But Pena's shop was not in the path of some conquering army or uncontrollable fire. His shop was seized by force by a fugitive and then targeted by police who, in the end, found the fugitive had fled. The destruction of Pena's shop was not inevitable or unavoidable. The police chose to destroy it. That is precisely the type of ultra-concentrated public burden that the Takings Clause was adopted to address.

Third, "background restrictions on property rights" are no help to the government. *See Cedar Point Nursery*, 594 U.S. at 160. What the dictum in *Cedar*

*Point* acknowledges is simply the government’s privilege to enter property to arrest someone or enforce the law. *Cedar Point* is about access to private land. And even while acknowledging the government’s right of access, this Court held property owners are entitled to compensation when lawmakers compel them to grant access for union organizing. Nothing in *Cedar Point* suggests the government could get around paying compensation to the nursery had it only gained access to the land by setting its fencing and strawberries ablaze. This case is about making one business bear all the public burden for police operations. And the power to destroy a business is not a “background restriction on property rights.” It is a compensable taking of property.

## ARGUMENT

### I. Destruction of property is a per se taking

When private property is pressed into public service, the plain text of the Fifth Amendment requires just compensation. U.S. Const. amend. V, cl. 5 (“nor shall private property be taken for public use, without just compensation”). The textbook trigger for compensation is a straight condemnation where the government initiates a lawsuit seeking transfer of ownership by court order. The other path is inverse condemnation, where the property owner files a lawsuit alleging the government has taken property without payment.

When government actions other than eminent domain “go[] too far,” a person’s compulsory loss of property rights “will be recognized as a taking” and compensation will be required. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that, while property may be regulated to a certain extent, if

regulation goes too far, it will be recognized as a taking.”).

This Court has defined “too far” with relatively modest intrusions. Installation of a half-inch cable line on an apartment building goes too far. *Loretto*, 458 U.S. at 438. Denial of all economically viable use of property goes too far. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). And requiring temporary access to farmland for union organizing goes too far. *Cedar Point*, 594 U.S. at 149.

The destruction of Pena’s business went further still. It has long been held that “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectively destroy or impair its usefulness, it is a taking.” *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871). Rather than water destroying Pumpelly’s farm, the government saturated Pena’s shop with tear gas. Under *Pumpelly*’s logic, compensation is required. *Id.* at 179 (“there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken”).

No one could seriously dispute today, had the government intentionally flooded the shop, it would constitute a taking. *See United States v. Cress*, 243 U.S. 316, 328 (1917). It makes no constitutional difference that the police filled the shop with tear gas instead of water or sand. What happened in the real world is the same: the government destroyed an innocent person’s property and left him with the bill. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requiring

compensation where the federal government exercised its commerce power over navigation to require public access to a private marina); *Loretto*, 458 U.S. at 436 (requiring compensation where a city used its police power to require the owners of apartment buildings to allow the installation of cable television equipment).

The fact that the government had a compelling reason to enter and search Pena’s property does not diminish its constitutional obligation to pay for what it intentionally destroyed. A good reason for taking someone’s property is not an exemption from the Takings Clause; it is a requirement. All takings of private property must be objectively necessary. The Ninth Circuit’s rule—that the Takings Clause never applies when the government acts out of “necessity” rather than eminent domain—inverts the constitutional structure and effectively writes the Clause out of the Constitution for an enormous category of government conduct.

The government destroyed an innocent person’s business in service of a public end. The Constitution says plainly what happens next. Pena is owed just compensation, and no amount of relabeling the police action as something other than a taking can change that.

## **II. “Public necessity” does not apply to routine law enforcement**

The only viable exception to the plain text of the Takings Clause is reserved for the most extreme circumstances of conflagration or wartime exigency. This Court recognized the doctrine of inevitable destruction in *Bowditch v. City of Boston*, when it refused to compensate a building owner for property damage after firemen exploded his building to stop a

fire from spreading. 101 U.S. 16 (1879). Later cases involving claims for Fifth Amendment takings relied on *Bowditch* to deny compensation on the grounds that the government enjoys a privilege of necessity. See Derek T. Muller, “As Much Upon Tradition as Upon Principle”: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 Notre Dame L. Rev. 481, 495 (2006) (collecting cases). The early cases involved building demolitions in urban areas to create firebreaks. See Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 396-97 (2015). While building demolition “to create firebreaks was a common tactic for fighting the vast urban fires of the nineteenth century,” modern firefighting strategies have reduced the need for such drastic actions. *Id.* at 397.

The fire cases harmonize with those decided in the wake of war. After the Civil War, this Court held that the federal government did not have to compensate railroad companies for bridges demolished by the Union Army to halt advancing Confederate forces. *United States v. Pac. R.R. Co.*, 120 U.S. 227 (1887). And in *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), this Court denied compensation under the Fifth Amendment to oil companies whose terminal facilities in Manila were demolished by the U.S. Army to prevent them from falling into the hands of the invading Japanese. The Court noted that it “has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.” *Id.* at 155-56. See also Steven J. Eagle, *Regulatory Takings* § 6-5 (5th ed. 2012) (noting that Japanese troops were expected to overrun the refinery within hours, so any fair market value at the time of appropriation was merely “conjectural”).

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

The decision below leans heavily on these extreme examples. See *Pena v. City of Los Angeles*, 158 F.4th 1033, 1045-46 (9th Cir. 2025) (discussing *Bowditch*, *Pacific Railroad*, and *Caltex*). But it is not enough to say that under extreme circumstances, like uncontained fires and advancing enemies, the government can take a person’s property without compensation. If the Fifth Amendment does not apply in the face of fire or war, it is because the property was already doomed and the government destroys the property only to save much more private property elsewhere. This rule fits nicely with the characterization of the Takings Clause in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), where the Supreme Court said that the Clause is “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.” In these extreme circumstances, the government is not forcing an individual to bear public burdens; the emergency has already condemned the property, and the

government is simply managing the inevitable. *See Baker*, 145 S. Ct. at 12-13 (statement of Sotomayor, J. & Gorsuch, J., respecting denial of certiorari) (similar).

Pena's shop was not subject to inevitable destruction. No fire was raging. No enemy army was bearing down on Los Angeles. A fugitive barricaded himself inside. The police made a calculated decision to break windows, fire tear gas, and rage through the shop. Nothing about that is inevitable. This case is a far cry from the wartime commander who destroys a bridge in a desperate bid to defend the United States against invading enemy forces.

Pena's case is the exact scenario about which *Armstrong* warned: the government forcing one person to bear a public burden that should be spread across the community. 364 U.S. at 49. The government chose to inflict \$60,000 in damage on Pena's business and required him to absorb the cost alone. Extending the necessity exception from wartime destruction to routine policing would gut the Takings Clause for the people who need it most: innocent bystanders caught in the crossfire of law enforcement operations they had nothing to do with. This kind of taking requires compensation, even under this Court's longstanding decisions dealing with the most extreme circumstances of conflagration and war.

### **III. *Cedar Point* dicta do not authorize the destruction of property without compensation**

The panel below believed—incorrectly—that that the Takings Clause has a “public necessity” exception. *See Pena*, 158 F.4th at 1045 (suggesting “the Supreme Court has never held that the State's reasonable and

necessary destruction of property under its police power constitutes a compensable taking.”). Under this view, the Takings Clause does not apply where government enjoys “traditional common law privileges’ like the ‘privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances.” *Ibid.* (quoting *Cedar Point*, 594 U.S. at 160-61). Even assuming common law can ever override the plain text of the Fifth Amendment, however, the panel confused the government’s limited right of entry mentioned in *Cedar Point* with the owner’s otherwise exclusive rights to possess, use, and dispose of property.

Amicus litigated *Cedar Point* from start to finish. In the end, this Court held that California effected a per se physical taking when it required landowners to grant access to union organizers three hours a day, 120 days of the year. 594 U.S. at 149. The majority acknowledged in dicta that “many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights” and gave, as an example, the common-law “privilege [which] allowed individuals to enter property in the event of public or private necessity.” *Id.* at 160-61.

This is mere truism. No one disputes that police have the right to pursue suspects onto private land. The police in this case surely could have entered Pena’s shop to execute a search warrant or in hot pursuit of the suspect. Access is not the issue. Read correctly, *Cedar Point* is about government’s access to property. The common-law privileges discussed in dicta tell us that sometimes government access to land does not implicate the Takings Clause because the government has always enjoyed that type of access.

But this tells us nothing about the government’s destruction of a person’s business.

One concurring judge leaned on *Cedar Point* in support of a “search-and-arrest privilege” under which “entry ‘cannot be said to take any property right from landowners.’” *Pena*, 158 F.4th at 1049 (Friedland, J., concurring) (quoting *Cedar Point*, 594 U.S. at 161). Entering a business and looking around is a search, yes—no one disputes that police could have entered *Pena*’s shop and arrested the fugitive. But again, the common-law privilege to enter property and enforce the criminal law is a privilege of entry, not one of destruction without compensation. The search-and-arrest privilege supported by Judge Friedland authorizes officers to enter property and, if necessary, to break down a door. It does not authorize them to fire canisters of tear gas through walls, windows, and the roof of an innocent person’s shop, leaving it so toxic and unusable as to shut the business down. At least, not without compensation.

Only the Sixth Circuit has adopted the search-and-arrest privilege advocated by Judge Friedland. See *Slaybaugh v. Rutherford County*, 114 F.4th 593 (6th Cir. 2024). This Court “has never held that anything that would have been privileged by public necessity at common law is non-compensable under the Fifth Amendment.” *Baker v. City of McKinney*, 93 F.4th 251, 255 (5th Cir. 2024) (Elrod, J. & Oldham, J., dissenting from denial of rehearing en banc).

The common law must conform to the Takings Clause, not swallow it. All this Court’s “necessity” decisions since ratification of the Takings Clause have involved property destroyed when destruction was al-

ready inevitable, and the government merely accelerated the process to save other people's property. *See id.* at 257. Pena's case is nothing like that. His shop was intact before a fugitive forced his way in and the police arrived. Nothing damaged the shop other than the way the police chose to carry out their operation. Because they chose to destroy the shop, the Constitution says they have to pay for it.

It follows that nothing in *Cedar Point* supports the Ninth Circuit's leap in this case. *Cedar Point* does not authorize the uncompensated destruction of an innocent person's business. *Cedar Point* required the government to pay for granting union organizers temporary access to farmland. It does not follow that no compensation would have been required in *Cedar Point* had the government accessed the farmland by setting its strawberry fields ablaze, driving out the owners, and organizing workers atop the ashes. *Cedar Point* cannot sensibly be read to excuse the government from paying when it fills a business with tear gas, breaks its windows, and punches through its walls.

\* \* \*

It is a cornerstone of American constitutionalism that government cannot take private property for public use without compensating the owner. Naturally, governments prefer not to pay. But fiscal reality cannot overcome constitutional text. *See* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. Colo. L. Rev. 497, 546 (2004) ("Predictions of doom for governmental entities required to carry greater compensation burdens do not ameliorate the unconstitu-

tionality, illegality, and moral perfidy of wrongful deprivations of private property by irresistible public power.”).

### CONCLUSION

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

Respectfully submitted,

AARON NEWELL  
Pacific Legal Foundation  
3100 Clarendon Blvd.  
Suite 1000  
Arlington, VA 22201

WESLEY P. HOTTOT  
*Counsel of Record*  
Pacific Legal Foundation  
1425 Broadway, #429  
Seattle, WA 98122  
(916) 419-7111  
WHottot@pacificlegal.org

*Counsel for Amicus Curiae*  
*Pacific Legal Foundation*

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