No. 25-1163

IN THE

Supreme Court of the United States

CARLOS PENA,

Petitioner,

v.

CITY OF LOS ANGELES, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court should deny the Petition because all the circuit courts and the claims court agree that the property damage to Pena's print shop resulting from reasonable law enforcement actions does not constitute a taking under the Takings Clause. Neither the parties nor amicus located any circuit case finding that damages resulting from reasonable law enforcement actions was a taking for public use, because the cases that considered the issue all reject that premise. While several other constitutional and legal remedies apply to such activities, and substantive policy and equity arguments may support a legislative response, none of those are at issue here. The parties agree that the police acted reasonably and appropriately at all times, meaning that they directed their actions solely to the apprehension of a dangerous suspect and to protect public safety. That property damage was a foreseeable result is distinct from acting with the purpose of destroying property or using that property as the Takings Clause requires. The fundamental issue here is the scope of the Takings Clause and when property is "taken for public use." Thus, the appropriate question here is:

> Does the Takings Clause extend to property damage that results from reasonable criminal law enforcement actions in the defense of public safety?

Stated differently:

> When the sovereign reasonably exercises its right and duty to protect public safety by enforcing criminal laws, and does not otherwise

waive sovereign immunity, does any resulting property damage constitute taking of property for public use under the Takings Clause?

The circuit and claims court have consistently answered—No.

PARTIES TO THE PROCEEDING

Petitioner Carlos Pena was the Appellant and Plaintiff below.

Respondent The City of Los Angeles, California was the Appellee and Defendant below.

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THE TAKINGS CLAUSE

The Takings Clause states: "nor shall private property be taken for public use, without just compensation" U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual Background

On August 3, 2022, the United States Marshal's Fugitive Task Force, which included officers from the Los Angeles Police Department (LAPD), pursued a fleeing, armed fugitive wanted on federal and state charges. *Pena v. City of Los Angeles*, at 45a-46a, fn. 3.[1] Carlos Pena worked at his print shop in North Hollywood, California (a part of Los Angeles), heard a commotion, and opened the door. Pena saw a fugitive fleeing law enforcement officers. The fugitive forced his way into Pena's shop, violently forced Pena out, and barricaded himself inside. *Pena*, at 4-5a.

The Task Force set up a perimeter. After a thirteen-hour stand-off, which included failed attempts by the LAPD Crisis Negotiation Team, the LAPD SWAT deployed three phases of chemical munitions, a total of twenty-five rounds of tear gas into the four adjoining businesses that shared an attic, which included Pena's shop. *Pena*, at 5a, 46a, including fn. 4. Perceiving no

1. The published citation is *Pena v. City of Los Angeles*, 158 F.4th 1033 (9th Cir. 2025), but the City will cite to the Petition's appendix.

response from the fugitive, the officers cleared the individual stores. *Pena*, at 5a, 46a-47a. They ultimately determined that the fugitive escaped at some unknown time.[2] *Pena*, at 5a, 47a, fn. 5. Pena admits that all police actions were authorized, reasonable, and lawful. *Pena*, at 5a. Pena alleges that the property damage to his shop, which he leased on a monthly basis, including from the tear gas, exceeds $60,000. *Pena*, at 5a, 45a, fn. 2. Pena alleges that his insurance does not cover the loss. *Pena*, at 47a.

II. Procedural History

Pena first filed a claim for property damage with the United States Marshals Service, which it rejected while recommending filing a claim with the City. *Pena*, at 48a. Pena's original claim with the City stated that the fugitive, not the police, caused a significant amount of the damage to his shop. *Pena*, at 5a, fn. 4. The City did not respond to Pena's claim. *Pena*, at 6a.

In July 2023, Pena filed a federal lawsuit against the City, alleging a single claim under 42 U.S.C. § 1983, under the Takings Clause. *Pena*, at 6a. The City moved for judgment on the pleadings. *Pena*, at 65a. The district court denied the City's motion, finding that the issues raised "are more appropriately resolved on a motion for summary judgment." *Pena*, at 66a. Pena later filed a Motion for Partial Summary Judgment on the issue of liability. *Pena*, at 50a. The district court denied Pena's motion, finding that the police activities in this case "constituted a valid use of police power and did not constitute a taking for

2. Twelve days later, following another barricade incident, the fugitive died from a self-inflicted gunshot wound.

purposes of the Fifth Amendment." *Pena*, at 52a. The district court then granted the City's unopposed Request for Entry of Judgment in Light of Court's Order Denying Plaintiff's Motion for Partial Summary Judgment. *Pena*, at 41a, 43a. The parties stipulated to judgment. *Pena*, at 70a.

The Ninth Circuit affirmed. *Pena*, at 4a. The court declined to decide whether "a categorical police-power exception to the Takings Clause," existed, and instead limited its decision to holding "that no taking occurs for the purposes of the Takings Clause when law enforcement officers destroy private property while acting reasonably in the necessary defense of public safety." *Pena*, at 15a. Based on the history and precedent of the Takings Clause, the panel concluded that "when law enforcement officers destroy or damage private property in the necessary and reasonable defense of public safety, such destruction is exempt from the scope of the federal Takings Clause." *Pena*, at 32a. The concurring opinion by Judge Friedland agreed with the judgment, but reached the conclusion by a different route. She relied on the historical record holding that law enforcement officers are not liable for consequential property damage resulting from reasonable law enforcement actions, which the Restatement (Second) of Torts characterizes as the privilege to use reasonable force to break and enter a building to arrest criminal offenders. *Pena*, at 35a-36a. Judge Friedland concluded that because this search and arrest privilege limited all private property rights, acting within that privilege, as the City did here, does not support a takings claim even though property damage resulted. The Ninth Circuit denied Pena's petition for panel or en banc rehearing. *Pena*, at 61a.

REASONS TO DENY THE PETITION

I. The Ninth Circuit's Ruling Is Consistent with Federal Precedent.

Neither the Petition nor any amicus identifies any circuit case that extends the Takings Clause to cover damages resulting from lawful and reasonable criminal law enforcement, and the City also found none. The Petition and the amicus make the unsupported assertion that no real attempts at law enforcement occurred before the twentieth century and, insofar as there were, such efforts never included breaking down doors or any other property damage worth noting. See Petition at 28. In fact, several federal cases decided before the twentieth century hold or support the conclusion that consequential property damages are beyond the scope of the Takings Clause. The Petition asserts that courts should disregard the limitation of "public use" in the Takings Clause, or at least expand it to include all property damages resulting from any government action. See *Pena*, at 29a-30a (Ninth Circuit recognized that Petitioner's position "would cover essentially all government destruction of private property"). This would effectively eliminate "public use" as a defining aspect of a taking as distinct from any consequential property damage. Without saying so, the Petition argues that the founders intended the Takings Clause to mostly eliminate sovereign immunity for property damage.

A. The Takings Clause has never included property damage resulting from criminal law enforcement.

As the Ninth Circuit discussed, although courts inconsistently applied the law regarding government takings prior to the Founding; no court applied it to damages resulting from law enforcement actions for public safety. See *Pena*, at 16a-24a. The subsequent jurisprudence is clearer. Before the twentieth century, courts limited the Takings Clause to "physical appropriations of property" for public use, such as when it "uses its power of eminent domain to formally condemn property." *Cedar Point Nursery v. Hassid* ("*Cedar Point*"), 594 U.S. 139, 147-148 (2021). This includes "when the government physically takes possession of property without acquiring title to it" or "when it occupies property—say, by recurring flooding as a result of building a dam." *Id.*; and see *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871) (physical invasion of property by raised water levels a public dam caused was a taking even if the public entity neglected to pursue condemnation proceedings for all the property this public use took). Similarly, a law requiring private persons to deliver goods to the government for public use falls within the Takings Clause. See *Horne v. Dep't of Agric.*, 576 U.S. 350, 355 (2015) (regulations required raisin growers to remit a percentage of their crop to the government as part of a market stabilization program is a per se physical taking).

In the twentieth century, this Court held that regulations taken too far "will be recognized as" a "regulatory taking." *Cedar Point*, 594 U.S. at 148-149 (requiring property owners to allow access to union

representatives constituted a taking by depriving owners of the right of exclusion). These cases recognized that "government regulation—by definition—involves the adjustment of [property] rights for the public good." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Thus, the courts determine whether the government regulations adjust the affected property rights to such an extent that such rights are "taken" for the public good sought by the regulations. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005) (Listing three theories for a regulatory taking: (1) a permanent physical invasion, (2) the deprivation of all economic beneficial use, or (3) balancing the *Penn Central* factors); and see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316-17 (1987) (regulatory scheme that banned all construction on property was a regulatory taking).

Pena does not allege that the government used his property for any purpose or that LAPD subjected him to a regulatory taking. The undisputed facts show that the police had no intention towards Pena's property at all, but were singularly focused on pursuing an armed criminal who threatened public safety. The Petition now proposes to create a third category of 'taking' that consists of whatever property damages result from lawful government action unrelated to the use of the property. In this case, that would be the property damage resulting from the reasonable enforcement of criminal laws. To do so, the Petition relies on cases that each fall within the eminent domain and regulatory taking jurisprudence described above. However, several cases from this Court, the circuit courts, and the claims court consistently reach the opposite conclusion: the Takings Clause does not apply

to consequential damages generally and damages from the reasonable enforcement of criminal laws particularly.

B. It is well established that property damage from reasonable police activity does not trigger the Takings Clause.

This Court has long recognized the distinction between a compensable 'taking' of property for public use and 'consequential' damages other lawful government actions cause which are "not compensable." *Armstrong v. United States*, 364 U.S. 40, 48 (1960); and see *Omnia Com. Co. v. United States*, 261 U.S. 502, 510 (1923) ("If, under any power, a contract or other property is taken for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable."); *Bedford v. United States*, 192 U.S. 217, 224 (1904) ("a distinction has been made between damage and taking, and that distinction must be observed in applying [the Takings Clause]"). Thus, the nature of the government action determines whether a taking occurs. *Omnia Com. Co*, 261 U.S. at 510; *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1155 (Fed. Cir. 2008) ("*AmeriSource*") ("the character of the government action is the sole determining factor" whether a compensable taking occurred.) Because the singular goal of the police was to apprehend an armed criminal suspect, the Ninth Circuit correctly found no taking occurred.

In *Armstrong*, the Court held that voiding otherwise valid liens on property that the government took possession of for public use was a compensable taking as to the lienholder, since the government took the property interest held by those liens for public use. *Armstrong*,

364 U.S. at 48. In contrast, *Omnia Com. Co.* found as non-compensable the business losses of a company that contracted to purchase steel plates when, before any delivery to the claimant, the government seized those plates from the manufacturer for public use. *Omnia Com. Co.* recognized that the seizure rendered the claimant's purchase contract valueless, since the manufacturer could no longer deliver the plates, causing a loss of "large profits." But, since the government did not take anything from the claimant for public use, no basis for a Takings Clause claim existed (the taking was against the manufacturer, not the claimant). *Omnia Com. Co.*, 261 U.S. at 507 and 510-511. Similarly, while police actions caused damages to Pena, they took nothing from Pena for public use.

More specific to law enforcement, in *Bennis v. Michigan*, 516 U.S. 442, 444-445 (1996), an innocent plaintiff sought to recover her interest in a vehicle the government seized as a public nuisance due to its use in a crime that she did not know about. "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.*, at 452. Even with the government in possession of the vehicle, *Bennis* held that it was well-established that property lawfully seized in furtherance of enforcing criminal laws was not compensable under the Takings Clause regardless of the innocence of the owner. *Id.* No case suggests that a practical difference exists between property lost due to a lawful seizure and property lost due to lawful police activity.

More recently, *Cedar Point*, 594 U.S. at 161, expressly confirmed the common law privilege "to enter property to effect an arrest or enforce the criminal law under certain circumstances" and that "government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners." Citing Restatement (Second) of Torts §§ 204-205. This necessarily includes taking all reasonable steps necessary to effectuate the arrest or enforce the law within the excessive force limits of the Fourth Amendment. See *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment."). *Cedar Point* confirms that the Fourth Amendment and due process, not the Takings Clause, holds government actors accountable for such excesses.

Cedar Point found that requiring land owners to regularly allow undesired union representatives on their land was not a privileged government activity and therefore that mandate took away the owners' established right to exclude people from their property. *Cedar Point*, at 161-162. *Cedar Point* also cited *Sandford v. Nichols*, 13 Mass. 286, 288-298 (1816) as an authority on this point. In *Sandford*, the plaintiff suffered damages from the execution of a warrant that named the wrong establishment but resulted in the seizure of the sought after smuggled goods. *Id*, at 289-290. While ordering a new trial on evidentiary grounds, *Sandford* recognized no potential liability for "any violence or injury . . . what was necessary to obtain possession of the [smuggled] goods" identified in the warrant. *Id*. at 289. The only potential liability was for damages that went beyond the

reasonable execution of the warrant. *Id*., at 290; see also *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92 (1969) ("*YMCA*") (rejecting the idea that "governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.")

This Court made a similar point in *United States v. Pac. R.R.*, 120 U.S. 227 (1887). The primary issue in *Pac R.R.* was whether the army could recover from the property owner for the cost the army incurred to rebuild train bridges after the Civil War. In addressing that issue, which is not applicable here, the Court discussed whether the bridges' prior destruction by the military fell within the Takings Clause. The Court noted that when the government seizes property for use in the war effort, it owes compensation. *Id*., at 234. Conversely, when damage is only collateral to the government's purpose—the war time example used was damage from artillery fire intended to retake a town—"[t]hese are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall." *Id*. The Court thought the government should provide relief in such cases, but also stated that "no action lies against the state for misfortunes of this nature, for losses which she has occasioned, not willfully, but through necessity and by mere accident, in the exertion of her rights." *Id*., at 234-235; and, *Pena*, at 24a (distinguishing between damages "done deliberately and by way of precaution," which are takings, and damages that occur "through necessity and by mere accident, in the [State's] exertion of her rights,"

which are not.); citing Emmerich de Vattel, THE LAW OF NATIONS 403 (London, G.G. and J. Robinson ed. 1797).[3]

As the cases above confirm, to invoke the takings power the government action must be directed to the use and condition of property. This is in stark contrast to police actions that are directed at arresting dangerous criminals and which comply with all constitutional and legal restrictions, even if those actions result in consequential property damages.[4]

C. The non-compensation cases the Petition attempts to distinguish further undermine its position.

The Petition's attempt to apply the Takings Clause to all property damage resulting from government

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3. The cases the Petition cites from that era do not support review. See Petition at 17-18, fn.4. For example, both *United States v. Russell*, 80 U.S. 623, 627 (1871) (private sea vessels compelled to carry freight for the military) and *Mitchell v. Harmony*, 54 U.S. 115, 116 (1851) (military commander seized horses, mules, wagons, and other supplies, which he "converted to his own use") are classic examples of taking private property and using it for a public purpose. *Grant v. United States*, 1 Ct. Cl. 41 (1863) does not help Pena because "whatever precedential impact [*Grant*] might have had was abrogated by the Supreme Court in *Caltex* . . . " *Doe v. United States*, 95 Fed. Cl. 546, 565, n. 12 (Ct. Cl. 2010).

4. Conversely, if unreasonable or unauthorized police actions cause property damage, then the remedy is a Fourth Amendment claim. See *Downs v. United States*, 522 F.2d 990, 1004 (6th Cir. 1975) (if the officer "had acted reasonably in deciding forcibly to disable the plane" no claim would result, but since the court found he acted unreasonably he was potentially liable for the resulting damages to the plane under the Fourth Amendment).

actions—thereby disregarding the "for public use" limitation—relies on a superficial reading of the Takings Clause which has never been the law. The Petition even acknowledges that circumstances exist in which the government's intentional property destruction does not support a takings claim. The Petition mischaracterizes some of these cases which actually support the Ninth Circuit's decision here. See Petition at 23-26.

For example, the Petition mistakenly cites *United States v. Caltex*, 344 U.S. 149 (1952) (*Caltex*), for the proposition that no taking occurs if the property's destruction was inevitable. In *Caltex*, the owners of oil processing facilities in Manila sued for compensation because in 1942, the U.S. Army seized and then destroyed their facility to prevent the approaching Japanese army from using it. *Id.*, at 150-151. The parties agreed that the Army had the right to seize and destroy the facility, but the owners invoked the Takings Clause. The Army agreed to compensate the owners for the materials and equipment that the Army seized and used in its operations as a compensable taking, but balked at paying for the destruction of the facility because the Army did not take or use it for any purpose. *Id.*, at 151. In contrast with the Petition's assertions, and of some amicus, *Caltex* confirms the Constitution is not suspended or altered during military operations. As in all cases, the law is applied to the facts.

Caltex rejected the takings claim because the U.S. Army was entitled to destroy the facility to prevent the enemy from using it as a resource in the war, a basis fully contrary to the assumption the facility would inevitably be destroyed. *Caltex*, 344 U.S. 149 at 153. In its discussion,

Caltex opined that if the U.S. army later bombed the facility when under Japanese control that would not constitute a taking, but that speculated about a possible future event and was not a significant basis for the ruling. *Id*., at 155. It is always possible that a subsequent event might destroy a property's value, but when the army chose to destroy the facility to better achieve its war aims, it removed such future speculation and presently destroyed any possibility of the owner recovering the facility after the war.

The public necessity/safety limitation on the Takings Clause applied in *Caltex* is fundamentally similar to the public necessity/safety limitation the Ninth Circuit invoked here, although clearly different in scale. The scope of the threat to public safety is dramatically different as between an approaching enemy army and an armed fugitive who refuses to surrender, or as in *Baker*, an armed fugitive holding a child at gunpoint,[5] but the urgency is similar.[6] The distinction is not that only one of those scenarios involves a real threat to public safety that compels a response from the sovereign; rather the distinction is what level of force is a reasonable response to that threat? The parties in *Caltex* agreed that the

5. Although, it may not seem so to the child or the child's parents. See *Baker v. City of McKinney, Texas*, 84 F.4th 378, 380 (5th Cir. 2023).

6. "Once Pena's property had been seized by a hostile force outside the City's control—an armed fugitive—the City was required to act. Its failure to do so would have represented an abdication of its role as the defender of public safety, which the Supreme Court has described as the 'paramount governmental interest.'" *Pena*, at 24a; citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)

destruction of the facility was a reasonable response to the approaching army, while the parties here agree that the City's use of tear gas was a reasonable response to a gunman in Pena's shop. *Id*., at 152; *Pena* at 7a. Just as that was not a taking in *Caltex*, it was also not a taking here. Ultimately, the Fourth Amendment, and perhaps the due process clause, restrains the authorities and supports a remedy for any unreasonable use of government force, as Congress provided for in 42 U.S.C. § 1983 and the Federal Tort Claims Act.[7] See *Downs*, 522 F.2d at 1004.

The Petition also misapplies *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969) ("*YMCA*"). *YMCA* addressed riots in Panama that damaged the plaintiffs' buildings. U.S. troops responded to protect the buildings and the soldiers sheltered in the buildings to avoid sniper fire. The owners claimed that this constituted a 'taking' of the building and made a claim for all damages occurring thereafter. *Id*., at 87-88. The Court affirmed the claim's denial, stating that using the buildings as a temporary shelter was not a taking for public use. *Id*., at 91. The Court further stated that when government activity particularly benefits a specific person, this further confirms no taking occurred, "even though the activity may also be intended incidentally to benefit the public." *Id.*, at 92. "Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside." *Id*.

7. While the Petition and the amicus focus on the extent of consequential damage in some cases, the more logical response to that concern would be to focus on, and perhaps reconsider, what constitutes a reasonable use of force under the Fourth Amendment in some circumstances.

In this case, the fleeing felon victimized Pena and took control of his store. As a result, the officers' subsequent efforts to eject the felon from Pena's store and arrest him particularly benefitted Pena while also benefitting the public. Alternatively, what if the gunman seized the store and kept Pena as a hostage (similar to *Baker*)? Then, the particular benefits to Pena would be starker and *YMCA* even more clearly applicable, yet the police may have proceeded in the same manner in response. Since the existence of a "taking" is based on police's actions, and not the felons, *YMCA* holds that neither is a taking.

While the Petition acknowledges that engaging in reasonable actions to remove a public nuisance is not a taking, he incorrectly asserts no public nuisance existed here. It is undisputed that an armed felon forcibly seized exclusive possession and control of Pena's shop and refused to surrender. This clearly constituted a public nuisance. See Cal. Civ. Code §§ 3479, 3480. Historically the Court "has drawn a distinction . . . between the exercise of the police power to enforce the law to remove or restrict nuisances, blights, and other unlawful use of property and, on the other hand the government 'taking property for public use.'" *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017) ("Unlawful uses or nuisances are not protected."); quoting *Mugler v. Kansas*, 123 U.S. 623, 669 (1887); and *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (state is entitled to remove public nuisance without compensation for damages). This further confirms that the police action to remove the armed gunman from Pena's shop was not a taking.

II. No Substantive Circuit Split Exists Because All Courts Have Reached the Same Result.

A thoughtful review of the decisions does not support the Petition's insistence that a circuit split requires the Court's intervention. Neither the Petition nor the amicus briefs identify a circuit decision that disagrees with the Ninth Circuit's conclusion that the Takings Clause does not apply. Instead, the circuit and claims court decisions consistently and unanimously hold that damages resulting from reasonable criminal law enforcement activities do not invoke the Takings Clause. Some courts note a circuit split over the application of the Takings Clause to actions taken under "police power." However, they do so without consideration of the restricted nature of the 'police power' holdings, which are limited to reasonable criminal law enforcement, leaving little actual distance between the circuits in the specific context of criminal law enforcement. See *Baker*, 84 F.4th at 383-384; *Pena*, at 10a. No substantive circuit conflict exists.

A. The term "police powers" is unhelpful unless placed in a specific context.

To avoid the circuit courts' consensus on the result in this case, the Petition argues that the manner in which the circuit courts reach their consistent and unanimous results creates a circuit split, particularly with regard to a so-called "police power" exception. However, a more careful review confirms no substantive dispute exists regarding property damage from criminal law enforcement activities. This is presumably why the Petition includes cases unrelated to criminal law enforcement to support a purported conflict.

In its broadest sense, "the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights." *Patterson v. State of Kentucky*, 97 U.S. 501, 504 (1878) (discussing the state power to regulate the types of gas used for illumination). This unwieldy definition has little practical use here since it can refer to all actions, direct or indirect, that a government can take. For example, the police power includes the power to enact a regulatory scheme that limits the rights of property owners to use their property. See, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-1015 and 1026 (1992). Taken too far, the exercise of that power can result in a regulatory taking. *Id.* However, *Lucas* also recognized that the government would be absolved "of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.*, at 1029, n.16; citing *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880)[8]. In contrast, in *Lingle*, 544 U.S. at p. 543, the Court rejected a regulatory taking claim based on a state law that set a limit on the rent that oil companies may charge to lease service stations. The opinion rejected a previous holding that included the effectiveness of such a regulation in the takings analysis rather than focusing on whether the provision impinged on property rights. *Id.*, at 540-541. The Petition mistakenly relies on *Lucas* and *Lingle*, among others, even though none of them support a compensation claim for damages

8. *Bowditch* applied a Massachusetts statute that provided compensation for these fire-fighting tactics upon meeting certain conditions. The existence of the statute indicates an understanding that the Takings Clause did not already provide such relief. *Id.* at 16.

resulting from the lawful and reasonable pursuit of criminals. *Lucas* actually supports the Ninth Circuit's position.

The broad sense of "police power" is misleading here because the only aspect of police power at issue is the distinct power to reasonably enforce criminal laws to protect public safety. This is clear both in the language and the facts of the cases addressing criminal law enforcement. In that context, little, if any, substantive split exists between the circuits.

B. The circuits agree that property damage resulting from reasonable criminal law enforcement does not invoke the Takings Clause.

Several cases take the well-established distinction between the power to take property for public use and the consequential damages that result from exercising lawful police powers, as described in *Armstrong*, *Omnia Com. Co.*, and *Bedford*, and applied it to criminal law enforcement. Each of these cases reach a decision consistent with *Pena*; that the Takings Clause does not apply to damages resulting from reasonable criminal law enforcement actions.

For example, in *Bachmann v. United States*, 134 Fed. Cl. 694, 695 (2017), officers damaged the plaintiffs' cabin apprehending a criminal suspect who sheltered there without the plaintiffs' knowledge. Noting that "the nature of the government's action is critical" in evaluating a takings claim, *Bachmann* concluded that "the damage caused in the course of arresting a fugitive on plaintiffs'

property was not a taking for public use, but rather it was an exercise of the police power of the United States." *Id.* at 696-697; citing *Bedford*, 192 U.S. at 224 (distinguishing "between damage and taking"). *Bachmann* also rejected the argument that the damage supported a regulatory taking. *Id.*, at 697-698. Indeed, the officers "used perhaps the most traditional function of the police power: entering property to effectuate an arrest or a seizure." *Id.*, at 697.

Also addressing nearly identical facts, in *Lech v. Jackson*, 791 Fed.Appx. 711, 713 (10th Cir. 2019), officers pursued an armed robbery suspect who shot at them and made a stand in the plaintiff's house, which the police's lawful efforts to arrest the suspect seriously damaged. The Tenth Circuit affirmed the rejection of the owner's Takings Clause claim, holding that the damage "fell outside the ambit of the Takings Clause" "because the officers destroyed the Lechs' home while attempting to enforce the state's criminal laws." *Id.* at 712. *Lech* rejected comparisons to regulatory takings, holding that a dispositive distinction between eminent domain and police powers applies in the context of criminal law enforcement. *Id.*, at 715-716.

While *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011), provides only a brief discussion on its takings claim, the prevailing facts and the cited authorities necessarily inform its holding. The primary claim was for excessive force in causing property damage while executing a warrant in a murder investigation. *Johnson* found that all police actions complied with the Fourth Amendment. *Id.*, at 334-336. In rejecting the additional takings claim, *Johnson* referred generally to 'police powers' as distinct from the power of eminent

domain, but *Johnson*'s facts were specific to criminal law enforcement. Consistent with this, *Johnson* relied on two cases holding that a lawful seizure was not a taking. *Id*., at 336; see *Bennis*, 516 U.S. 442, 452; and *AmeriSource*, 525 F.3d 1149, 1154 (*AmeriSource* is discussed below).

The Seventh Circuit recently reaffirmed and elaborated on *Johnson* in *Hadley v. City of S. Bend, Indiana*, 154 F.4th 549, 552-553 (7th Cir. 2025)[9]. The fugitive in *Hadley* was wanted on both federal and state charges, was armed, and actively fled the authorities. The plaintiff did not challenge the validity of the search warrant or sue under the Fourth Amendment, but only invoked the Takings Clause for the property damages resulting from the search. *Hadley* reaffirmed that property damages resulting from the reasonable execution of a valid warrant does not trigger the Takings Clause. *Id*., at 555; relying on *Cedar Point*, 594 U.S. at 160-61 (searches consistent with Fourth Amendment take no property rights); and *Bennis*, 516 U.S. at 452-53 (lawfully seizing property in criminal investigation is not a taking). *Hadley* distinguished between regulating property use (which could result in a regulatory taking) and the power to pursue criminal activity, confirming that the holding was limited to the latter. *Id*., at 554-555.

Also consistent with *Pena* are the cases holding that property lawfully seized from innocent parties, even if it is destroyed, is not a taking for public use under the Takings Clause. In *AmeriSource*, 525 F.3d at 1150-1151, the government seized pharmaceuticals from an innocent

9. A petition for certiorari is also currently pending in *Hadley*, U.S. Supreme Court Case No. 25-1158.

party as evidence in a criminal proceeding, which all expired before the government considered releasing them. The Federal Circuit held that "when the government seizes an innocent third party's property for use in a criminal prosecution . . . and it is rendered worthless over the course of the proceedings . . . no compensable taking has occurred." *Id.*, at 1150. Similarly, in *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1329 (Fed. Cir. 2006), United States Customs seized three shipments of cooling fans for an alleged trademark violation, but later dismissed the forfeiture proceedings after the fans only had scrap value. The Federal Circuit again found that this was not a taking. "When property has been seized pursuant to the criminal laws, or subjected to in rem forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation." *Id.*, at 1331. The Third Circuit also held, with little discussion after rejecting plaintiff's Fourth Amendment and due process claims, that the plaintiff "lacks a viable Takings claim because Defendants acquired the property pursuant to a lawful search warrant." *Zitter v. Petruccelli*, 744 Fed. Appx. 90, 96 (3d Cir. 2018); citing *Bennis*, 516 U.S. at 452. Because no practical distinction to an innocent owner exists between the government permanently depriving him of property because of a lawful seizure and because of the damages from reasonable police activity, these cases each support the *Pena* decision.

The Petition also lists several state law cases that address takings claims under that state's law, but those cases do not address the Takings Clause, or do not address criminal law enforcement, or both, and a federal ruling on the narrow issue presented here will not affect those state law decisions. See e.g., *Steele v. City of Houston*,

603 S.W.2d 786 (Tex. 1980); *Brewer v. Alaska*, 341 P.3d 1107 (Alaska 2014).

C. The cases that identify a necessity or privilege exception are consistent with the 'police power' cases.

The Petition incorrectly states that the 'police power' cases discussed above conflict with the other cases that also held that the Takings Clause did not apply to damages resulting from reasonable law enforcement activities. The Fifth and Sixth Circuits "confronted cases that presented very similar facts to Pena's," with the police taking reasonable steps to pursue a dangerous suspect, resulting in property damage. All three cases reached the same result as the 'police power' cases—the Takings Clause does not apply. *Pena*, at 11a.

The Ninth Circuit described a circuit split as between the courts that adopted a broad police power exception to the Takings Clause, and those holding "that there exists no categorical police-power exception to the Takings Clause." *Pena*, at 11a. But this mischaracterizes the holdings described above, which were each limited to damage resulting from reasonable law enforcement actions. In any event, regardless of the route the other circuits took to arrive at their conclusion, they all hold it did not constitute a taking. The Ninth Circuit found it was unnecessary to decide whether a broad exemption exists, and limited its ruling to "hold only that no taking occurs for the purposes of the Takings Clause when law enforcement officers destroy private property while acting reasonably in the necessary defense of public safety." *Id.*,

at 15a. This narrow, fact-specific holding is consistent with the 'police power' cases, as applied to these facts.

In *Baker v. City of McKinney, Texas*, 84 F.4th 378, 380-381 (5th Cir. 2023) (discussed in *Pena*, at 11a-12a), the plaintiff's home suffered severe damage when officers apprehended an armed fugitive holding a 15-year-old girl hostage inside the house. The city argued for a broad police power exception from takings claims, which *Baker* rejected as antithetical to this Court's holdings on regulatory takings. *Id.*, at 383. As part of that discussion, *Baker* incorrectly assumed that *Lech*, *Johnson*, and *AmeriSource* supported such a broad rule. *Id.*, at 383-384. However, as discussed above, the other circuit holdings were much narrower, limited to damages resulting from reasonable law enforcement in compliance with the Fourth Amendment. Nothing in *Baker*'s decision rejected that narrower holding, and much of *Baker*'s discussion (e.g., the focus on the specific facts) supports the other circuit holdings.

While *Baker* concluded that "historical precedent reaching back to the Founding supports the existence of a necessity exception to the Takings Clause" it did not articulate or define such an exception or what law enforcement circumstances supported a 'necessity.' Instead, *Baker* limited its holding to finding that "it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons. We need not determine whether the necessity exception extends further than this." *Id.*, at 388. That holding is fully in accord with *Bachmann*, *Lech*, and *Johnson*, which would each have reached the same conclusion regarding the takings claims in *Baker*.

The question of what circumstances would be included as a 'necessity,' similar to determining what force is reasonable, is a fact-based analysis that courts must do on a case-by a case basis.

In *Slaybaugh v. Rutherford Cnty., Tennessee*, 114 F.4th 593, 595 (6th Cir. 2024), efforts to execute an arrest warrant for a murder suspect that refused to leave his parents' house resulted in property damage. *Slaybaugh* found it "noteworthy" that no previous Supreme Court or circuit court decision ever "held that property damage incurred in the course of executing a valid arrest warrant implicates the Fifth Amendment." *Id.*, at p. 706. Based on its review of the cases rejecting such claims, *Slaybaugh* concluded a search and arrest privilege barred any takings claim for property damage, so long as the officers' actions were lawful and reasonable. *Id.*, at 603-604. By confirming that the Fourth Amendment and due process provide the primary restrictions on police actions, this model is identical to the actual scope of the 'police power' cases.

Baker, *Slaybaugh*, *Lech*, and *Bachmann* all reached the same result as *Pena* on similar facts—that the Takings Clause does not apply when police damage property in the lawful pursuit of a criminal suspect. *Baker*, 84 Fed.4th at 379; *Slaybaugh*, 114 F.4th at 597; *Lech*, 791 Fed,Appx. at 719; and *Bachman* at 698. All circuit and claims cases addressing damage from reasonable police actions agree that the Takings Clause does not apply. As a practical matter, the different analysis models these cases use overlap and reach identical results.

For example, neither *Baker* nor *Pena* attempt to define the threshold for a "necessity" that would bar a

takings claim. However, under the Fourth Amendment, only circumstances driven by an urgent need to protect public safety or other exigency justify a use of force that could result in meaningful property damage. Thus, as a situation becomes less urgent, the Fourth Amendment will provide greater protection, and an adequate remedy, for property damage. As it should be, regardless of the model used, the Fourth Amendment determines when to sanction the use of force and when to hold the officers liable for excessive force damages.

D. The Petition's attempt to rely on non-criminal cases fails.

The Petition's attempt to look beyond criminal law enforcement to support a circuit split similarly fails. For example, the primary issue in *Alford v. Walton Cnty.*, 159 F.4th 844, 854 (11th Cir. 2025), was whether new ordinances that restricted the use of beach property to prevent the spread of COVID constituted a regulatory taking. The court also found a physical taking occurred because the officers "entered and occupied the Landowners' property for nearly a month" to enforce the ordinance and ejected the owners from their own property. *Id.*, at 859. This easily falls into well-established determinations of restricting the rights of property owners for a public benefit and taking physical possession of real property. *Alford* does not address incidental damages resulting from other government functions generally or police activity specifically.

The Petition and Amicus also rely on *Mayor of New York v. Lord*. 17 Wend. 285, 291-92 (N.Y. Sup. Ct. 1837), aff'd 18 Wend. 126 (1837), in which the lower court held

that the necessity defense barred compensation against individual defendants who razed the building to contain a fire, but also stated in dicta that the owners would have been entitled to compensation under the federal Takings Clause. *Lord* is unpersuasive here for at least four reasons: (1) because no one alleged a Takings claim, it is mere dicta; (2) it limited recovery "to such property as one could have saved with ordinary care and diligence" and Pena concedes that officers here acted with ordinary care and diligence (4a, 48a) see *Lord* at 288; (3) the higher court, while affirming the judgment, did not affirm this comment or mention the Takings Clause (see *The Mayor, &C. of New York v. Rufus L. Lord, and David N. Lord*., 18 Wend. 126 (N.Y. 1837); and (4) the opinion does not mention consequential damages resulting from actions unrelated to property use.

Similarly, while not directly applicable to the issue here, *Yawn v. Dorchester Cnty*., 1 F.4th 191 (4th Cir. 2021), is illustrative. The plaintiffs in *Yawn* sued over the loss of their bees after a government mosquito control, arial spraying program destroyed their hives. *Id*., at 192. The court rejected a per se police powers exemption from takings claims, citing the regulatory takings cases. *Id*., at 195. Instead, the court found that the county took all reasonable precautions, including prolific media notices and hired an experienced pilot. *Id*., at 193 and 195-196. *Yawn* rejected the beekeeper's takings claim largely because the county acted reasonably at all times, which Pena concedes is also true of the officers here. See *id*., at 196.

However, *Yawn* is otherwise materially distinct. *Yawn* did not involve the pursuit of criminals, which is a wholly

distinct endeavor than general concerns about public health. As a result, the government aimed its public action at the plaintiff's property in *Yawn*, like the ordinances in the regulatory takings cases. However, in *Pena* (and in *Baker*, *Lech*, *Bachmann*, etc.) the government directed its actions at the criminal suspect and criminal activity. In addition, law enforcement activities naturally come with a greater exigency in pursuing a criminal or ongoing criminal activity, or executing a warrant, and this is particularly exemplified by the circumstances in *Pena*, as well as *Baker*, *Lech*, and *Bachmann*. In contrast, in *Yawn*, the county planned, prepared and released a media statement to reduce potential damages. *Yawn* has little application to the criminal enforcement cases.

III. The Court Should Decline Petitioners' Invitation to Legislate from the Bench.

The issue here is limited to whether the Takings Clause provides the remedy the Petition seeks and not, as the amicus briefs repeatedly argue, whether it would be a good, wise or equitable policy to provide some relief for the property damage resulting from reasonable law enforcement activity. Since the government presumably always acts in the public interest, the Petition's core argument necessarily seeks to extend the Takings Clause to any damage government action causes. This would obliterate the distinction between a taking for public use and consequential damages and would significantly dissolve sovereign immunity by widely compelling government liability for property damage.

Such a broad waiver of sovereign immunity should come from Congress or a state legislature, not by

judicial fiat. For example, Congress already addressed the Petition's concerns in the Federal Tort Claims Act (FTCA) by significantly waiving, while also meaningfully preserving, sovereign immunity regarding damages federal action causes. The states have also adopted similar statutes allowing specific damage claims against state and local governments. See, e.g., Cal. Gov. Code § 810, et seq. (California Government Claims Act). Congress and state legislatures have already struck the balance between allowing recovery for property damage and preserving sovereign immunity and can amend the laws as needed. The Court should not judicially sideline the legislative process.

The events leading to the adoption of the FTCA echo the Petition's concerns here. Before Congress enacted the FTCA in 1946, sovereign immunity barred persons from seeking relief against the government for injuries federal actions caused, even in cases in which a private employer would be liable and regardless of the extent of the damage. *Brownback v. King*, 592 U.S. 209, 211 (2021). This led to private congressional bills to authorize payments to particular injured parties, an unreliable method of compensation. *Id.* This changed when Congress adopted the FTCA and waived sovereign immunity for some torts, leaving immunity in place for others. *Id.*, at 212. Similarly, the solution here is not to reconfigure the Takings Clause or to judicially rescind sovereign immunity, but for advocates on this issue to redirect their efforts to a legislative solution.

The lack of a limiting principle is a fundamental problem with the Petition's proposed reformation of the Takings Clause. See *Pena*, at 29a-30a. While the Petition

attempts to make its position less problematic by offering limiting terms, the terse language of the Takings Clause provides no basis for such distinctions. If the Takings Clause extends to all damages resulting from otherwise authorized state action, the brief language of the Takings Clause does not limit that compensation to only extensive damage, or to consequential damages from certain kinds of state actions but not others, or based on the "innocence" of the injured party. The law is already clear that the innocence of the parties is irrelevant to whether a taking occurred, because a takings analysis focuses on the nature and purpose of the government action. See *Bennis*, 516 U.S. at 453; *AmeriSource*, 525 F.3d at 1150. Moreover, it is wholly unclear what "innocent" means in the context of the Takings Clause—a provision that exclusively addresses property rights and not criminal liability. The lack of a limiting principle further proves that this should be a legislative issue, where Congress can weigh and balance the costs and benefits of various alternatives and impose well-considered limitations and priorities for compensation.

Readily available legislative solutions exist, including:

Restitution: The government should hold the responsible criminal offender accountable. While this remedy is unsatisfying when, as is too often the case, the offender has scant resources, such scenarios are not uncommon. Criminals and tortfeasors often lack the resources to pay for the harm they cause; nevertheless, the law places the responsibility on them for the consequences of their actions.

Insurance: As a risk that is both unlikely and potentially serious to only a few people, the risk of damage by government action unrelated to the claimant's own culpability is typical of insurable risks. See Cal. Ins. Code §§ 25, 250 (insurable risks); and §§ 533, 533.5 (cannot insure one's own criminal behavior). While it seems that insurers commonly exclude some damages law enforcement causes, this is not universal and no one suggests that it is inevitable. See *Baker v. City of McKinney, Texas*, 145 S. Ct. 11, 12, 220 L. Ed. 2d 240 (2024) (Statement by Sotomayor) (acknowledging that some insurers cover such risks); and see *Allen v. Marysville Mut. Ins. Co.*, 54 Kan.App.2d 730, 739 (2017) (insurance covered damage to home officers' efforts to arrest suspect caused). Instead, this practice appears to result from industry custom and customer acquiescence. This could be addressed through market demand or statutorily, but, in any case, the scope of the Takings Clause is not defined by insurance market practices.

State Government Relief: Finally, state and local governments can enact laws or programs to indemnify for designated property damages in specific circumstances, or to pass laws that compel such payments. See, e.g., *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 393 (1995), cert denied 116 S.Ct. 920 (1996), (citing Cal. Gov. Code §§ 29631, 29632, which authorize counties and cities to establish an indemnification program for property damage to innocent residents resulting from police actions). Alternatively, the states can decide whether or not to broaden their own constitutional provisions to provide relief not found in the Takings Clause. See, e.g., *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1991) (compensation required under state constitution); but see

Customer Co., 10 Cal. 4th at 371 (addressing facts nearly identical to Pena's, a takings claim is not actionable under state law "to recover damages caused by the efforts of law enforcement officers to enforce the criminal laws.")[10].

IV. The Court Should Reject the Petition as an Inadequate Vehicle for Review.

This case offers a poor vehicle for review. First, the Petition does not demonstrate its primary basis for review—a substantive circuit split. All of the federal circuit and claims courts agree that that property loss from reasonable police activity does not invoke the Takings Clause, and all agree that the Ninth Circuit reached the correct result. Thus, an opinion based on this Petition would amount to an advisory opinion that will not alter the case outcome. A better vehicle for appropriate guidance would be a case in which the choice between the different approaches determines the case outcome. This is not that case.

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10. While not raised below, an additional question exists about whether Pena has a state property interest that supports a taking claim. Federal takings cases rely on state law to determine the existence of property rights in addressing whether the government took property for public use. See *Cedar Point*, 594 U.S. at 155. The California Supreme Court ruled that property interests in California do not include a takings claim for damages resulting from reasonable criminal law enforcement activities. *Customer Co.*, 10 Cal. 4th at 388-389. "[T]he public entities involved may be held liable, if at all, only in a tort action filed pursuant to the Tort Claims Act." *Id.*, at pp. 371 and 391. Without a cognizable property interest under state law, presumably nothing supports a federal claim under the Takings Clause.

Second, as noted above, the Petition offers no coherent takings theory for review. For example, in its question to the Court, the Petition injects the issue of innocence as a deciding factor into whether a constitutional taking occurred, even though the nature of the government action defines whether takings law applies, not the mental culpability of private parties. See *Omnia Com. Co*, 261 U.S. at 510. While statutory schemes commonly incorporate such distinctions, the Court should not give them constitutional stature.

Third, given that the lower courts universally agree on the outcome, and the courts will flesh out any remaining issues by addressing the specific facts of future cases, such as the scope of 'necessity' or the allowable force in a given situation, the Court's intervention now is premature. The legal development of this issue is best conducted by the consideration of additional cases and fact patterns at the district and circuit court levels, which the circuit courts will either harmonize or come to define a substantive conflict with opposing outcomes for the Court to consider.

CONCLUSION

The facts of each case necessarily inform the scope of that holding. In the relevant cases here, the term "police power" consistently refers to the official power and duty to enforce criminal laws. See e.g., *Bachmann*, 134 Fed.Cl at 695-696; *Lech*, 791 Fed.Appx. at 714; *Hadley*, 154 F.4th at 555; and *AmeriSource*, 525 F.3d at 1153. In that limited context all the courts agree that property damaged as a result of reasonable law enforcement officers' actions to protect public safety is not a taking for public use

invoking the Takings Clause. E.g., *Baker*, 84 F.4th at 379, *Slaybaugh*, 114 F.4th at 598, and *Pena*, at 4a.

The Court should decline the Petition's invitation to expand the scope of the Takings Clause as a substitute for the legislative action that would more appropriately address the Petition's proposed policy goals.

Respectfully submitted,

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Dated: June 10, 2026