No. 25-1163

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

REPLY IN SUPPORT OF CERTIORARI

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As the Petition demonstrated, the lower court decisions rejecting takings claims regarding police destruction of property cannot be reconciled with either the history of the Takings Clause or with this Court's precedents. Pet. 14–22. It has been black-letter law for over a century that the "police power" is not exempt from the Takings Clause. And history and precedent overwhelmingly demonstrate that tort defenses against trespass–such as "public necessity" (relied on by the majority below) or the "search and arrest privilege" (relied on by the concurrence)—only protect individual officers from liability; they do not immunize the government from takings claims.

Tellingly, Respondent does not dispute this, nor does it defend the actual holdings of these cases. Instead, Respondent attempts to rehabilitate these decisions, as well as eliminate the circuit split, by claiming that these courts were all secretly applying a different rule from the ones they articulated: that the "damages from the reasonable enforcement of criminal laws" are categorically exempt from the Takings Clause. BIO 6–7.

That novel rule does not appear in any of the Courts of Appeals' decisions. The rule has no basis in history or precedent. More fundamentally, it doesn't make any sense: Why would the Framers have decided that individuals are entitled to compensation when the government forces them to sacrifice their property for the common good—except when the government agent taking the property is engaged in criminal law enforcement? See *Lingle* v. *Chevron*, 544

U.S. 528, 543 (2005) ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.").

I. The split of authority is real, acknowledged, and outcome determinative.

Respondent claims that the courts have converged on a rule that the "reasonable enforcement of criminal laws" is exempt from the Takings Clause. This proposed rule is pure invention. No court has adopted it.

Those courts which have held that the "police power" is exempt from the Takings Clause, did not limit their holdings to the "reasonable enforcement of criminal laws." The Federal Circuit, in holding that the police power is exempt from the Takings Clause, defined the police powers as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions," *AmeriSource* v. *United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (citing *The License Cases*, 46 U.S. (5 How.) 504, 584 (1847)), limited only by the Due Process Clause. *Id.* at 1154.

The Tenth Circuit followed *Amerisource*, holding 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." *Lech* v. *Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019). It was only in a subsequent section of its opinion that the Tenth Circuit explained that law

enforcement was a *subset* of the police power, and therefore exempt from the Takings Clause.

And the Seventh Circuit also held, categorically, 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." *Johnson* v. *Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011).

These decisions are so obviously incorrect that Respondent does not attempt to defend their reasoning, arguing instead that the decisions mean something else. Cf. *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."). Other courts, however, have taken these decisions at their word, acknowledging that the split is real. See *Slaybaugh* v. *Rutherford County*, 114 F.4th 593, 597 (6th Cir. 2024) ("[A] categorical exception [for the police power] would run afoul of Supreme Court precedent recognizing that the government's exercise of its police powers can, in some circumstances, amount to a taking."); *Baker* v. *City of McKinney*, 84 F.4th 378, 384 (5th Cir. 2023) ("But with respect to our sister circuits, their opinions do not rely on history, tradition, or historical precedent, and moreover, the rule they adopt is inconsistent with our court's precedent."); Pet. App. 9a–15a (discussing "the circuit split" for seven pages); *Baker* v. *City of McKinney*, 145 S. Ct. 11 (2024) (Sotomayor, J., statement regarding denial of cert.) ("This case raises an important question that has divided the

courts of appeals[.]"). The breadth of this rule has caused mischief, as lower courts have applied the broad police-power exemption far beyond the law enforcement context. Pet. 29–30 (collecting cases). They will continue to do so until this Court intervenes.

Respondent's "reasonable law enforcement" rule is also quite different from the rule applied by both Fifth Circuit, in *Baker*, and the Ninth Circuit, below. Both courts adopted a "public necessity" exception to the Takings Clause, but neither court held that "necessity" would apply to *all* reasonable law enforcement activities, as Respondent would have it.

The Fifth Circuit's rule applies when it is "objectively necessary for officers to damage or destroy [private] property in an active emergency to prevent imminent harm to persons." *Baker*, 84 F.4th at 388. The Ninth Circuit below likewise explicitly limited its holding to the "the necessary defense of public safety." Pet. App. 15a. That rule, therefore, would not apply in situations involving routine warrant service, because there would be no emergency or immediate risk to human safety. It is likely that *most* damage caused by police would be compensable in these jurisdictions. Indeed, the petitioner in *Hadley* v. *South Bend,* No. 25-1158, would likely have prevailed in the Fifth Circuit. Respondent's imaginary rule would drastically expand the necessity exception just as it drastically narrows the police power exception.

Respondent protests that the Fourth and Eleventh Circuits are not part of the split because, while they rejected the "police power" and "necessity" exceptions above, they did so in cases that had nothing to do with

law enforcement. BIO 25–26; That would be a fair point if any of the cases discussed above had actually applied respondent's novel "reasonable enforcement of criminal laws" exception to the Takings Clause. They did not. Those courts applied: (1) an astonishingly broad "police power" exception, which the Fourth Circuit squarely rejected, *Yawn*, 1 F.4th at 195, and (2) a "necessity" or emergency exception, which the Eleventh Circuit rejected. *Alford* v. *Walton County*, 159 F.4th 844, 859–60 (2025) ("[T]here is no exception [to the Takings Clause] for any reason * * * the normal requirements of the Takings Clause remain in force, even during emergencies."). Respondent's rule is not actually the rule in any jurisdiction.[1]

The disagreement here is deeper than an ordinary circuit split. The lower courts have adopted multiple, irreconcilable theories for why police destruction of property falls outside the Takings Clause. Yet Respondent does not defend any of those theories. Instead, it asks this Court to affirm on the basis of a new rule that no court has adopted. The reason is apparent: The existing rationales cannot be reconciled with this Court's precedents, with one another, and with the text of the Takings Clause itself. When neither courts nor litigants can agree on the governing rule,

[1] The Sixth Circuit's approach, in *Slaybaugh* v. *Rutherford County*, 114 F.4th 593 (2024), probably comes closest to Respondent's proposed rule. *Slaybaugh* held that the common law "search and arrest" privilege against trespass is also a governmental defense against takings claims. *Id.* at 604. Still, the Sixth Circuit did not go so far as to hold that all damage from the "reasonable enforcement of criminal laws" is categorically outside the scope of the Takings Clause.

further percolation is unlikely to produce clarity. Review is warranted.

II. Respondent does not dispute that a "necessity" exception to the Takings Clause is inconsistent with text, history, and tradition.

The Petition demonstrates that the historical record overwhelmingly forecloses a necessity exception to the Takings Clause. Writings from the time of the Founding indicate that the Takings Clause was adopted *specifically* to ensure that public necessity would not defeat just compensation claims, and every early American court to confront the question agreed that while necessity is an individual defense against tort liability, it is not a governmental immunity from the Takings Clause. Pet. 16–20; see generally Amicus Brief of Professors James W. Ely et al.

Respondent does not dispute any of this. Instead, Respondent argues that we can simply disregard the entire historical record because that is supposedly what this Court did in *United States* v. *Caltex*, 344 U.S. 149 (1952). BIO 11 n.3. Hardly. The Court in *Caltex* discussed very little history, and it went out of its way to confine its decision to the facts, explaining that "[n]o rigid rules can be laid down," but that "the destruction of respondents' [property] * * * in the face of their impending seizure by the enemy" was not a taking. *Caltex*, 344 U.S. at 156. That was the key fact for the *Caltex* Court—that this property was about to be lost anyway, as Justices Sotomayor and Gorsuch pointed out. *Baker*, 145 S. Ct. 11, 12–13 (2024) (statement respecting denial of cert.).

The *Caltex* Court also distinguished cases where courts had granted compensation after the army had taken property for its own use, rather than to prevent it from falling into enemy hands. *Id.* at 155. Yet the doctrine of public necessity does not distinguish between property use and property destruction, so *Caltex* cannot possibly support a blanket necessity exception to the Takings Clause. See, *e.g.*, Restatement (Second) of Torts § 262 (1965) ("One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.").

Even if Respondent were correct, and *Caltex* means that we can skip the historical inquiry, Respondent still has a problem: No other court has adopted Respondent's reading of *Caltex*. The circuits remain divided, and *Caltex* has not helped them produce anything like a consensus. So this Court's intervention is still necessary.

III. Respondent's other objections are meritless.

Respondent raises a number of other undeveloped objections, which are easily disposed of:

1. Respondent argues that recognizing liability here would abrogate sovereign immunity and constitute "legislat[ing] from the bench." BIO i–ii, 4, 27–28. But Congress has already—indisputably—abrogated the City's sovereign immunity for federal constitutional claims. See *Owen* v. *City of Independence*, 445 U.S. 622, 647–48 (1980) ("Congress * * * abolished

whatever vestige of the State's sovereign immunity the municipality possessed."). In any event, the relationship between sovereign immunity and takings claims is a distinct question, entirely separate from the predicate question of what constitutes a taking in the first place.

2. Respondent argues Pena's claim fails under *YMCA* v. *United States*, 395 U.S. 85 (1969), because Pena "particularly benefitted" from the raid that destroyed his business. BIO 15. But Respondent never made this argument below, and for good reason. The police did not come to Pena's aid in order to preserve his property; they had already been in pursuit of the fugitive, and their actions drove the man to assault Pena and hide in his shop. The destruction of the shop clearly left Pena far worse off than if the police had simply left.

3. Respondent argues that in destroying Pena's shop, it was simply abating a public nuisance. BIO 15. Again, this is a novel argument, but it is also wrong as a matter of California law. As explained in the Petition, nuisance requires an element of fault on the part of the property owner, and California courts have repeatedly held as much. See *City of Modesto Redevelopment Agency* v. *Superior Ct.*, 119 Cal. App. 4th 28, 38 (2004) (property owner must have "created or assisted in the creation of the nuisance."); Pet. 25. Pena was not at fault for being assaulted and driven from his business, or for failing to eject the fugitive.

4. Respondent argues that even if Pena's shop was taken, it was not taken for "public use," so no compensation is due. BIO 4, 11–12. This is wrong twice over.

First, the assault on Pena's shop satisfied even the narrowest definition of public use. In *Kelo* v. *City of New London*, 545 U.S. 469 (2005), five justices held that "public use" is synonymous with "public purpose," and that it includes anything the government "believes will provide appreciable benefits to the community." *Id.* at 479–80, 483. The dissenters, while arguing for a narrower conception, acknowledged that there are "circumstances [where,] to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution." *Id.* at 498 (O'Connor, J.).

In any event, this Court has explained that if a taking of private property "fails to meet the 'public use' requirement * * * that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle* v. *Chevron*, 544 U.S. 528, 543 (2005). "Public use" is a limitation on the ability of government to take property, not a precondition for compensation.

5. Finally, Respondent argues that Pena cannot recover because all of his damages are "consequential." BIO 4, 7, 11. It is unclear what Respondent means. It is of course true that just compensation under the Takings Clause does not normally include "consequential" damages, but under no possible definition of the term could Pena's damages be considered consequential. He seeks to replace equipment that government agents intentionally destroyed. These are not second or third order ripple effects.[2]

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[2] The most famous example of consequential damages being non-compensable is *Mitchell* v. *United States*, 267 U.S. 341 (1925). There, the plaintiffs owned a "shoe peg corn" canning

IV. The burden is on the government to justify a departure from the plain text of the Bill of Rights.

Respondent is correct about one thing: So far as the parties and amici have been able to discern, the existing historical record contains no examples of early American courts holding the government liable under the Takings Clause for destructive law enforcement activity. But crucially, there is no historical evidence of the government being held immune in such cases either. The cases simply do not exist. The record is silent.[3] The question is what to do with this silence.

Respondent believes that unless there is clear precedent saying this exact kind of governmental

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factory that was rendered worthless because the government had condemned all of the land in the region that was suitable for producing shoe peg corn. Similarly, if one of Pena's customers had filed a suit claiming that the destruction of Pena's shop had forced them to take their business to a more expensive competitor, those would be non-compensable consequential damages.

[3] The absence of such cases is not surprising, for a number of reasons: (1) Professional law enforcement did not exist until a century after the Founding. (2) The knock-and-announce rule, see *Wilson* v. *Arkansas*, 514 U.S. 927, 931–34 (1995), ensured that if doors had to be broken, the property owner would likely have been at fault for not opening and would therefore not have a claim. (3) Any damage relating to a broken door would likely have been relatively minor and unlikely to lead to reported cases, see *Sandford* v. *Nichols*, 13 Mass. 286, 289–90 (1816) (suggesting that the "very small" damage caused by an illegal search would not be worth litigating), particularly at a time when mechanisms for judicially enforcing the Takings Clause were unclear. (4) It is entirely possible that in the rare cases where innocent owners' property was destroyed by law enforcement, they received voluntary compensation from the government, just as they would in many jurisdictions today. See Pet. 27 n.12.

action can constitute a taking, the property owner loses. That is not this Court's approach. To begin with, when it comes to the Bill of Rights, the tie goes to the individual, not the government. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 17 (2022) ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition[.]"); Pet. App. 39a (Friedland, J., concurring) ("[T]he burden [is] on the government to demonstrate the existence of such limits [to the Takings Clause], not on the plaintiff to show historical examples of compensation in similar circumstances.").

And while the precise factual circumstances of this case may be new, takings claims can be resolved by applying long established takings principles and analogizing from similar cases. See *Lingle*, 544 U.S. at 542 (asking whether government action is "functionally comparable to government appropriation or invasion of private property"); *United States* v. *Rahimi*, 602 U.S. 680, 699 (2024) (relying on "historical analogue[s]"). So while we may not have takings cases involving property destruction at the hands of SWAT teams, we do have cases involving firebreaks and wartime appropriation and destruction, and in those cases, public safety did not trump the individual's right to compensation. Pet. 16–20. We also have the black-letter rule that intentional, physical destruction of property is a taking. *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 178 (1872). And we have the underlying principle of the Takings Clause—that it was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United*

States, 364 U.S. 40, 49 (1960). "This statement's relevance to" people like Pena, "who is faultless but must 'alone' bear the burdens of a misfortune that might have befallen anyone, is manifest." *Baker* v. *City of McKinney*, 84 F.4th 378, 388 (5th Cir. 2023).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

June 23, 2026

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