IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22-40644

VICKI BAKER,

Plaintiff -Appellee,

vs.

CITY OF McKINNEY, TEXAS,

Defendant - Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

AMICUS BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, TEXAS MUNICIPAL LEAGUE, AND TEXAS CITY ATTORNEYS ASSOCIATION SUPPORTING DEFENDANT-APPELLANT CITY OF McKINNEY, TEXAS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Name	**Interest**
Vicki Baker	The Plaintiff herein.

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Texas Municipal League	Amicus Curie herein
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STATEMENT OF THE AMICI

The International Municipal Lawyers Association ("IMLA") has a significant interest in this case. As a nonpartisan, nonprofit association of counsel representing more than 2,500 local governments across the country, IMLA routinely articulates the collective viewpoint of municipalities in amicus briefs before the United States Supreme Court, the federal Circuit Courts of Appeal, and other appellate courts nationwide.

The Texas Municipal League (TML) is a non-profit association of over 1,170 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 500 attorneys who represent Texas cities and city officials in the performance of their duties.

IMLA, TML and TCAA (collectively "Amici") provide this amicus brief to emphasize the negative consequences of expanding traditional takings jurisprudence to require payment by law enforcement, firefighters, first responders and other governmental entities as they act to save lives and protect the public. The logical outcome of that expansion—an expansion of the Fifth Amendment which no Circuit has adopted--will be to undermine established emergency response protocols and throw municipal budgeting into disarray. Most critically, that expansion will infuse doubt and delay into life-saving responses. As the recent tragedy in Uvalde vividly

illustrates, hesitation by law enforcement, regardless of the reason, leads to deadly and heartbreaking results. If first responders waste precious time evaluating and pursuing options aimed at minimizing property damage, lives will inevitably be lost.

The pressure on law enforcement to protect the public has never been greater. Police departments nationwide, including those in Texas, are increasingly asked to do more, with less. They struggle to retain officers and fill depleted ranks, facing calls for defunding and demands that they develop the acumen to handle the nuances of homelessness, drug overdose, and mental illness in the communities they are sworn to serve. Against this complex backdrop, the number and ferocity of live shooter incidents continues to spiral. First responders race to address unpredictable and often lethal scenarios, needing to make split-second decisions to protect the public. Sometimes those scenarios will necessitate damage to private property: where hostages are being held in a bank or nightclub, where a sniper is murdering dozens from a hotel penthouse, where children are trapped a fire consuming an adjoining apartment. The cost to local government cannot play a role in these circumstances.

This month, the nation pauses to mark the ten-year anniversary of Sandy Hook. In that tragedy, police could not respond in time to protect the 26 innocents lost. But in many similar such events, law enforcement has arrived in time to make a difference, requiring SWAT teams and other forces to target residences and

commercial buildings in order to subdue killers and save lives. That response cannot be hindered by a repurposing of the Fifth Amendment. At its core, the decision below labors to conclude that the Constitution's Takings Clause applies to emergency police actions. But it finds no viable support for that proposition, instead citing to three eminent domain precedents (*Pennsylvania Coal*,[1] *Tahoe-Sierra,*[2] and *South Carolina Coastal Council*[3]); extracting dicta from the latter, it infers that law enforcement activity is a compensable taking: "if the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared."[4]

Amici submit that nothing in a legitimate law enforcement effort to subdue a killer amounts to "unbridled, uncompensated qualification under the police power," and such an insubstantial nexus cannot become the predicate for subjecting police departments and their local governments to virtually unlimited claims for damage to property in the line of Duty.

That outcome is precisely what the plaintiff in this case hopes to achieve, by obtaining a *per se* declaration that all police activity (and by implication, all rescue

[1] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
[2] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).
[3] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).
[4] *Id*. at 1014.

efforts by firefighters, EMTs and other first responders) necessitates the payment of compensation to property owners when damage occurs. This court should reject the plaintiff's unsupportable arguments. Instead, Takings liability should be limited to instances where damage arises in the context of traditional eminent domain activity. That approach is more consistent with enabling local governments to budget coherently, to allocate resources most effectively, and above all, to safeguard their communities.

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned affirms that no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money to fund the preparation of this brief, nor did any person, other than the amicus curie, its members, or its counsel, contribute money to fund the preparation or submission of this brief.

ARGUMENT

A. Federal Law Distinguishes Between Exercises of the Police Power and Eminent Domain Proceedings

First and foremost, the distinction recognized in federal law—and in Fifth Amendment jurisprudence—between an exercise of the police power and an exercise of government power in the nature of eminent domain should be respected, as the Supreme Court has recognized same. Analyzing this distinction, the Northern District of Texas has recently observed that "State government often uses its police power—the power to protect the health and safety of its people—to seize contraband. For example, state governments have determined that cocaine should be illegal because of the danger it poses to the health and safety of the people." *Lane v. United States*, No. 3:19-CV-01492-X, 2020 WL 1513470, at *4 (N.D. Tex. Mar. 30, 2020) (Starr, J.). Recognizing that ridiculous results could come from a conflation of the police power and the power of eminent domain, the Northern District observed "[w]hen states first made this decision, did they owe drug lords fair market value for these now-prohibited drugs? No. The Supreme Court of the United States has concluded that when a state government declares the possession of something to be illegal due to health and safety concerns, the state exercises its police power and it is not a compensable taking." *Id.*; *see also AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008) (seizure of plaintiff's pharmaceuticals in connection with criminal investigation was not an unconstitutional taking).

The District Court's opinion would upend this rationale. In deciding the underlying case, the District Court determined that physical takings of any sort should result in "the property owner [being] compensated for forfeiting the property for a public use." *Baker v. City of McKinney, Tex.*, No. 4:21-CV-00176, 2022 WL 2068257, at *8 (E.D. Tex. Apr. 29, 2022) (Mazzant, J.). By the District Court's reasoning, no exercise of the police power on the part of the government is sufficient to excuse the government from the requirement that it compensate an individual for damage that may result from the exercise of that power. The District Court's reasoning, however, stands alone, apart from that of this Court's sister circuits and would broaden the Fifth Amendment's taking jurisprudence beyond that recognized by the Supreme Court.

In *Lech*, the circuit case most criticized by the District Court, the Tenth Circuit analyzed the Supreme Court's holdings and determined that the Fifth Amendment did not require compensation for an exercise of the police power. *Lech v. Jackson*, 791 Fed. Appx. 711, 715 (10th Cir. 2019). In this regard, *Lech* recognized that three other circuits and the federal circuit had "expressly relied upon the distinction between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property." *Id*. As was noted in *Lech*, these cases almost universally relied on *Bennis v. Michigan*, 516 U.S.

442 (1996) for their reasoning that a taking had not occurred. *See Lech*, 791 Fed. Appx. at 715.

But the District Court dismisses *Bennis*. Indeed, the District Court, quoting from a law review article, argues in this section of its opinion that "*Lech* Improperly Relied on *Bennis v. Michigan*" and takes the position that the language relied on by *Lech* and the Tenth Circuit's sister circuits is nothing more than dicta which the District Court is not obliged to follow. *See Baker*, 2022 WL 2068257 at *9. The District Court was wrong. The *Bennis* court is expressly addressing a claim made by the petitioner and disposing of that claim. To wit, in *Bennis* the Supreme Court noted that:

> Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. *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.*

Bennis v. Michigan, 516 U.S. 442, 452, 116 S. Ct. 994, 1001, 134 L. Ed. 2d 68 (1996) (emphasis added). Where analysis is necessary to dispose of a claim it is not mere dicta, but a valid holding by the higher court. *In re Keegan Mgmt. Co. Sec. Litig.*, No. CIV. 91-20084 SW, 1991 WL 253003, at *5 (N.D. Cal. Sept. 10, 1991). Thus, the District Court erred in its analysis. The Supreme Court in *Bennis* expressly

recognized that the government could acquire property by "other than the power of eminent domain" and could do so lawfully. *Bennis*, 516 U.S. at 452. The District Court's opinion rejects this *holding* and takes the position that no distinction exists. As has been noted by, now, four circuit courts and the court of federal claims, the District Court is in error.

Indeed, the circuit courts which have analyzed the issue of whether valid law enforcement activity can constitute a taking have universally rejected this position. In *Zitter v. Peturccelli*, 744 Fed. App'x 90 (3d Cir. 2018) (unpublished), the third circuit relied on the distinction between the power of eminent domain and the police power to hold that no taking had occurred when a valid exercise of the police power was in question. In this regard, in *Zitter*, the third circuit addressed property taken "pursuant to a lawful search warrant." *Id*. at 96. Citing *Bennis*, the third circuit held that the plaintiff could not state a viable claim and that the district court properly granted a motion to *dismiss* due to the fact that the government had "already lawfully acquired [the property] under the exercise of governmental authority other than the power of eminent domain." *Id*. at 96 (quoting, in citation, *Bennis*, 516 U.S. at 452).

In the seventh circuit, via *Johnson v. Manitowoc County*, 635 F.3d 331 (7th Cir. 2011), it is clear that the damage to property which occurs during the execution of a search warrant (an exercise of the police power) is not compensable under the Takings Clause. In this regard, *Johnson* addressed a circumstance where officers,

pursuant to a valid search warrant, utilized a jackhammer instead of "a less destructive instrument" to remove concrete from the plaintiff's garage. *Id*. at 333. Specifically, under the Fifth Amendment, the plaintiff sought "damage caused to his property and items taken during the execution of the search warrants." *Id*. at 333.The Seventh Circuit, again citing *Bennis*, notes that, unfortunately for the plaintiff, "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." *Id*. at 336. That power was the police power, the same power at issue in the case at bar.

In the federal circuit, the court held similarly. In *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008), the court addressed a situation where it was required to determine "whether the Fifth Amendment's Takings Clause applies when the government seizes an innocent third party's property for use in a criminal prosecution but never introduces the property in evidence, and it is rendered worthless over the course of the proceedings." *Id*. at 1150. In a section of the opinion literally titled "The government's seizure of property to enforce criminal laws is a traditional exercise of the police power that does not constitute a 'public use,'" the circuit court, citing *Bennis*, notes that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." The court went on, noting that "*Bennis* suggests that so long as the government's

exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment. The innocence of the property owner does not factor into the determination." *Id*. at 1154 (citations omitted).

Finally, the court of federal claims, a court tasked with examining takings law, has held that "the United States has drawn a distinction on the one hand 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) (quoting *Mugler v. Kansas*, 123 U.S. 623, 629 (1887)). Importantly, the court of federal claims recognized that "law enforcement must have the authority to enter onto or seize property, and in some instances damage property, in order carry out their duty to enforce the law." *Bachmann*, 134 Fed. Cl. at 696. The court concluded that "When private property is damaged incident to the exercise of the police power, such damage is not a taking for the public use, because the property has not been altered or turned over for public benefit. Instead, both the owner of the property and the public can be said to be benefited by the enforcement of criminal laws and cessation of the criminal activity." *Id*. at 696 (citing *Nat'l Bd. of Young Men's Christian Ass'ns v. United States,* 395 U.S. 85, 92–93, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969)).

To put it simply: federal law has long recognized the distinction between takings pursuant to eminent domain proceedings (or their inverse condemnation counterparts) and takings which occur pursuant to the police power. The Fifth Amendment protects only the former, with the latter giving leeway to law enforcement (and fire protection services) to engage in the necessary actions required to perform their official duties. Where there is no affront to the police power (*i.e.*, there is no question that viable police or fire action was responsible for the damages), there is simply no taking of property under the Fifth Amendment. The District Court simply erred in holding that such a taking had occurred, contrary to established federal law.

B. The Distinction Between Eminent Domain and Police Power Exercises is Recognized by the Majority of Jurisdictions

Amici concedes that in the state of Texas, a state whose constitutional takings provision extends beyond that of its federal counterpart, the distinction between eminent domain proceedings and an exercise of the police power has been abolished. *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980); *see Palacios Seafood Inc. v. Piling, Inc.*, 888 F.2d 1509, 1513 (5th Cir. 1989) ("Section 17 confers upon property owners greater rights of recovery against the government than its federal fifth amendment counterpart."). However, this is the minority position and should not affect this Court's determination of *federal* law.

The majority of states which have examined whether a taking exists from an exercise of police power have determined that it does not. Indeed, Texas, Florida, New Jersey, and Minnesota appear to be the outliers of cases who have examined this issue. For example, in *Sullivant v. City of Oklahoma City*, the Oklahoma Supreme Court determined, following the lead of the California Supreme Court, that the destruction of property in the course of law enforcement action was not compensable. 940 P.2d 220, 226-27 (Okla. 1997). *Sullivant* cited and interpreted the California Supreme Court's decision in *Customer Company v. City of Sacramento*, wherein the owner of a convenience store brought a takings action against the city after its police caused damage in the apprehension of a suspect. 895 P.2d 900 (Ca. 1995).[5] Therein, the California court noted that "[a]lthough in many circumstances it may appear 'fair' to require the government to compensate innocent persons for damage resulting, for example, from routine efforts to enforce the criminal laws, inverse condemnation is an inappropriate vehicle for achieving this goal because it was not designed for such a purpose." *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 389, 895 P.2d 900, 913 (1995).

> Similarly, the Colorado Supreme Court has noted that
>
> Police power should *not* be confused with eminent domain, in that the former controls the use of property by the owner for the public good,

[5] The court in *City of Sacramento* notes that the *Steele* opinion is "poorly reasoned and internally inconsistent." *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 388, 895 P.2d 900, 912 (1995).

> authorizing its regulation and destruction without compensation, whereas the latter takes property for the public use and compensation is given for property taken, damaged or destroyed.

City & Cty. of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 766 (Colo. 1992) (emphasis added). Pennsylvania has similarly so held. *Com. v. Barnes & Tucker Co.*, 23 Pa. Comm. 496, 353 A.2d 471, 479 (1976). So has the supreme court of Washington. *Eggleston v. Peirce County*, 64 P.2d 618, 626 (Wash. 2003) (en banc). And South Dakota. *Hamen v. Hamlin County*, 955 N.W.2d 336, 348 (S.D. 2021). And Iowa. *Kelley v. Story County Sheriff*, 611 N.W.2d 475, 482 (Iowa 2000) (damage to property during the execution of a search warrant not a compensable taking). And the appellate court in Georgia. *McCoy v. Sanders*, 148 S.E.2d 902, 904 (Ga. App. 1966).

Put simply, the majority of courts who have addressed this issue have held that no taking occurs on the exercise of police power. This court should similarly so hold.

C. Extending the Fifth Amendment Takings clause to police activity will adversely impact municipal finances and public safety.

As shown above, the District Court's *per se* rule runs contrary to the traditional understanding of the Takings Clause. If allowed to stand, it will harm local governments whose first responders endeavor to fulfill core governmental functions.

1. Police protection is a core governmental function.

The Texas constitution gives to the Texas Legislature the authority to define the government functions of a municipality. Tex. Const. Art. XI, § 13. The Legislature designated police protection as a municipal governmental function to be exercised in the interest of the general public. *See* Tex. Civ. Prac. & Rem. Code § 101.0215(a)(1). Consistent with this objective, most Texas municipalities are authorized to appoint police officers or establish police departments. *See* Tex. Loc. Gov't Code §§ 341.001–.003. According to the Texas Commission on Law Enforcement, there are 2,741 law enforcement agencies in Texas employing some 78,635 licensed peace officers.[6]

The service that these men and women provide has little to do with traditional notions of eminent domain. The duties of a Texas peace officer are defined by law, and include:

- The duty to preserve the peace using all lawful means;
- The duty to prevent or suppress crime; and
- The duty to arrest offenders without warrant in every case where the officer is authorized by law to do so.

[6] *See Current Statistics*, Texas Commission on Law Enforcement, https://www.tcole.texas.gov/content/current-statistics (last visited December 22, 2022).

See Tex. Code Crim. Proc. arts. 2.13(a), (b)(1), & (b)(4). The Supreme Court has described the police as "fulfill[ing] a most fundamental obligation of government to its constituency." *Foley v. Connelie*, 435 U.S. 291, 297 (1978).

2. Texas and other states authorize peace officers to forcibly enter homes under limited circumstances.

Many state legislatures have already considered the policy question of whether and when peace officers should forcefully enter private homes to arrest someone. In Texas, for example, peace officers have the discretion to break down the door of any house to make an arrest, but only for a felony, and only when officers have first announced their authority and purpose and been refused entry. *See* Tex. Code Crim. Proc. art. 15.25; Tex. Gov't Code § 311.016(1). Mississippi, Louisiana, and 29 other states plus Guam have similar laws.[7] Mississippi's statute is typical. It provides: "To make an arrest an officer or private person, after notice of his office and object, if admittance is refused, may break open a window or outer or inner door

[7] *See* Alabama Code § 15-10-2; Alaska Stat. § 12.25.100; Ariz. Rev. Stat. Ann. § 13-3891; Ark. Code Ann. § 16-81-107(c); Colo. Rev. Stat. § 16-3-101(c); Fla. Stat. § 901.19(1); Ga. Code Ann. § 17-4-3; Haw. Rev. Stat. § 803-7; Idaho Code Ann. § 19-611; Ill. Comp. Stat. § 5/107-5; Ind. Code § 35-33-2-3(3)(b); Kan. Stat. Ann. § 22-2405(3); La. Code Crim. Proc. Ann. art. 224; Mich. Comp. Laws § 764.21; Miss. Code Ann. § 99-3-11; Mo. Rev. Stat. § 544.200; Mont. Code Ann. § 46-6-104; Neb. Rev. Stat. § 29-411; Nev. Rev. Stat. § 171.138, -.142, & -.144; N.C. Gen. Stat. § 15A-401(e); N.D. Cent. Code § 29-06-14; Ohio Rev. Code Ann. § 2935.2; Okla. Stat. tit. 22, § 194; Or. Rev. Stat. § 133.235(6); S.D. Codified Laws § 23A-3-5; Tenn. Code Ann. § 40-7-107; Utah Code Ann. § 77-7-8(2)(a); Wash. Rev. Code § 10.31.040(1); W. Va. Code § 62-1A-5; Wis. Stat. § 968.14; Wyo. Stat. Ann. § 7-8-104; 8 Guam Code Ann. § 20.50. *See also* 18 U.S.C. § 3109 (authorizing officers to break open doors, windows, or any part of a house to execute a search warrant if entry is refused after notice).

of any dwelling or house in which he has reason to believe the offender may be found." Miss. Code Ann. § 99-3-11. Louisiana peace officers may, in similar circumstances, break the doors or windows of vehicles, watercraft, aircraft, dwellings, or structures to make an arrest. *See* La. Code Crim. Proc. art. 224.

Most statutes that authorize peace officers to forcibly enter homes to make an arrest say nothing about compensation for the inevitable damage. Minnesota, which provides for "just compensation" to an innocent third party, is an exception. *See* Minn. Stat. Ann. § 626.74. Texas, in fact, provides an independent state-law remedy for what this Court has described as "certain excesses of the police power." *See Palacios Seafood Inc., v. Piling, Inc.*, 888 F.2d 1509, 1513–14 (5th Cir. 1989) (citing *Steele v. City of Houston*, 603 S.W.2d 786 (1980)). But municipalities exercising police powers have never before been exposed to Fifth Amendment Takings-Clause liability as a matter of law.

3. Discarding the longstanding distinction between a government's police-power activities and its eminent-domain power activities will cost money and imperil public safety.

Appellee will no doubt respond—and Amici do not dispute—that the damage done here far exceeds a broken door or window. The problem is that the District Court's *per se* rule ignores the distinction, upon which local governments have long relied, between police-power activity and eminent-domain activity.

In the past, courts have distinguished property damage done through the government's use of its police power from that done through use of its eminent domain power. In *Bennis v. Michigan*, the Supreme Court distinguished, for Fifth Amendment purposes, property legally acquired under some authority other than eminent domain. 516 U.S. 442, 452 (1996). There, the Supreme Court held that a civil forfeiture action against a vehicle did not offend the Fifth Amendment's Takings clause. *Id.* at 443. In *Lafaye v. City of New Orleans*, this Court began its analysis with the premise that "takings are generally effected through the power of eminent domain." 35 F.4th 940, 943 (5th Cir. 2022). In *Johnson v. Manitowoc County*, the seventh circuit rejected a Takings-Clause claim made by an innocent third party for property damage done during the execution of a search warrant, calling it "a non-starter." 635 F.3d 331, 336 (7th Cir. 2011).

There is logic behind the police power/eminent domain power distinction. For one thing, a city exercising its eminent domain power has the luxury of time. The city council can deliberate about the city's long-term goals, the citizens can participate in the debate, and the cost to the taxpayers can be known, more or less, in advance. Moreover, the city can make appropriate financial arrangements for the acquisition, such as issuing bonds to absorb the cost over time, if necessary. A standoff with an armed fugitive is a different matter. There is no time for meetings,

debate, and careful financial planning. Police officers must take decisive, lifesaving action—and the Takings clause has been no obstacle, until now.

The District Court's *per se* rule muddies these once-clear waters. Before deciding that McKinney was liable under the Fifth Amendment "as a matter of law," *Baker*, 2022 WL 2068257 at *15, the District Court required only two findings: first, that the government took the property, and second, that compensation was denied. *Baker*, 2022 WL 2068257 at *12. But in *National Board of Young Men's Christian Associations v. United States*, the Supreme Court instructed courts to do more: "in any case where government action is causally related to private misconduct which leads to property damage[,] a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." 395 U.S. 85, 93 (1969). The District Court's *per se* rule omits this crucial step, and "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335 (2002).

It is America's municipalities who provide the bulk of the day-to-day police protection that Americans enjoy. Abandoning the historical distinction between eminent-domain and police-power activity will therefore hit municipal governments hard—and in multiple ways. First, in these litigious times, the change is certain to

bring to new lawsuits. While the first cases might involve homes ruined during armed standoffs, no reason exists for the suits to end there. A *per se* rule that makes no exception for police-power activity could precipitate suits over seized fentanyl, the removal of homeless encampments, or impounded scooters and bicycles. Even if most suits fail, the litigation costs could be ruinous for some municipalities.

Second, the District Court's *per se* rule will prompt hesitation amongst first responders and other municipal workers. Consider, for example:

- A police officer who, on a hot day, finds an unresponsive child in the back seat of a locked car. Should she call a locksmith, or smash a window with her baton?

- A fire department paramedic who responds to the home of an elderly diabetic who has not answered his phone all day. Should he leave a voice mail, or enter by any available means?

- A fire marshal who finds a car parked in front of a fire hydrant in a dense block of townhomes on New Year's Eve. Should he write a ticket, or tow the car?

- An animal control officer who, in the midst of a record-breaking winter ice storm, finds a dog chained up outside, shivering, and caked in ice. Should she summons the owner to court, or take the dog to a shelter?[8]

Even when the best course is obvious, a *per se* rule of liability will breed uncertainty. When the police dawdle, people die, as Texans in Uvalde can now attest.

[8] "Pets are property in the eyes of the law," as the Supreme Court of Texas once put it. *Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013).

Third, a *per se* rule makes property value a new variable that first responders will, for better or worse, consider. If a hostage crisis occurs at a historic Garden District mansion, the best tactical approach will probably be the same as it would be at any other house in New Orleans, but the incident commander in the Garden District will surely feel added pressure to exercise restraint for the sake of *property*. A child in the back of a hot Maserati may be in the same predicament as one in a worn-out sedan—but the predicament for the officer will be different.

The District Court's *per se* rule "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *See Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 335. For all of these reasons, it should give this Court great pause.

4. If cities are liable for law enforcement activity, they will likewise be liable for fire protection services.

One sure indication that the District Court's *per se* rule sweeps too broadly is this: If, instead of being visited by an armed fugitive, Vicki Baker's house had caught on fire, and the McKinney Fire Department had knocked down a fence to bring in a ladder engine, cut holes in the roof for ventilation, and aimed high-pressure jets of water inside the home in excess of 1,000 gallons per minute, the outcome of this case, under the District Court's reasoning, would seem to be the same.

Like police protection, fire protection is a core governmental function provided in no small part by municipal governments. *See* Tex. Civ. Prac. & Rem.

Code § 101.0215(a)(1); Tex. Loc. Gov't Code §§ 342.004(a) & 342.011. According to the Texas A&M Forest Service, which maintains a list of fire departments in Texas, there are 200 career fire departments, 1,305 volunteer fire departments, and 333 combination fire departments serving the Texas public.[9] *See* Tex. Gov't Code § 614.153(1). The population centers—Houston, Dallas, San Antonio, etc.—are served by city fire departments. *See, e.g.*, Houston, Tex. Ordinances ch. 34, art. III, § 34-46; Dallas, Tex. Charter Ch. XIII, § 1; San Antonio, Tex. Charter Art. V, § 50. Houston's alone protects 2.3 million people.[10]

Firefighting can be a destructive business. The tools of the trade include axes, sledgehammers, chainsaws, and the hydraulic rescue equipment commonly called "the jaws of life." These tools are intended to be used on property—including private property. Nevertheless, the damage that firefighters intentionally cause has never been thought of as actionable under the Takings Clause. The Supreme Court said years ago that "the entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises." *National Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 93 (1969). Still, nothing apparent in

[9] *Search All Fire Departments*, Texas A&M Forest Service, https://fireconnect.tfs.tamu.edu/SearchFireDepartments/Index (last visited December 22, 2022).
[10] *About the HFD*, Houston Fire Department, https://houstontx.gov/fire/about/index.html (last visited Dec. 22, 2022).

the District Court's *per se* rule would exempt municipalities from Takings-Clause liability for damage caused by their fire departments.

CONCLUSION

In these uncertain times, the historical approach is worth keeping. The District Court's *per se* rule is a blunt instrument that finds no support in traditional interpretations of the Takings Clause, exposes municipal governments to liability for providing emergency services, and imperils public safety. For the reasons stated above and in the City's brief, IMLA, TML and TCAA urge the Court to reject a broadening of the Takings Clause to include these types of damages and urge that the District Court's order finding Fifth Amendment liability as a matter of law be reversed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies an electronic version of this document was served by the Court's ECF system, upon counsel for Appellee, Messrs. Jeffrey H. Redfern, William R. Aronin, Robert McNamara, and Suranjan M. Sen, INSTITUTE FOR JUSTICE, 901 North Glebe Road, Suite 900, Arlington, Virginia 22203, and upon counsel for Appellant, Edwin Armstrong Price Voss, Jr., BROWN AND HOFMEISTER, L.L.P., 740 East Campbell Road, Suite 800, Richardson, Texas 75081, on the 29th day of December, 2022.

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Dated: December 29, 2022

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