No. _____

In The
Supreme Court of the United States

VICKI BAKER,

Petitioner,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government acquires private property for a public use, the Takings Clause requires the government to provide the owner with "just compensation." The Third, Sixth, Seventh, Tenth, and Federal Circuits, however, have held that the Takings Clause does not apply when government takes property pursuant to its "police power," while the Fourth Circuit disagrees. Below, the Fifth Circuit adopted a middle road, while explicitly breaking with the Seventh, Tenth, and Federal Circuits. The court below held that the government's actions cannot constitute a taking when they were "objectively necessary." That holding doomed the claim of petitioner, a concededly innocent homeowner whose house was destroyed by the police in pursuit of a dangerous fugitive.

The question presented is whether the Takings Clause applies even when the government takes property for a particularly compelling public use.

STATEMENT OF RELATED PROCEEDINGS

Baker v. *City of McKinney, Texas*, 22-40644 (5th Cir.), judgment entered on October 11, 2023;

Baker v. *City of McKinney, Texas*, 4:21-CV-00176 (E.D. Tex.), judgment entered on June 22, 2022.

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Vicki Baker petitions for a writ of certiorari to review the judgment of the Fifth Circuit.

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The opinion of the court of appeals, App. 1a, is reported at 84 F.4th 378.

The district court's opinion granting partial summary judgment, App. 26a, is reported at 601 F.Supp.3d 124.

The district court's opinion denying Defendant's renewed motion for judgment as a matter of law, App. 74a, is reported at 624 F.Supp.3d 668.

The district court's opinion denying Defendant's motion for a new trial, App. 99a, is reported at 624 F.Supp.3d 653.

The dissent from denial of rehearing en banc, App. 127a, is reported at 93 F.4th 251.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2023. Timely filed motions for rehearing were denied on February 14, 2024. On April 4, 2024, petitioner requested a 45-day extension of time to file this petition, which was granted on April 9, 2024. This petition was timely filed on June 28, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

On July 25, 2020, in McKinney, Texas, a fugitive named Wesley Little went on the run with a 15-year-old girl. App. 3a. He evaded the police in a high-speed chase and eventually arrived at a home owned by petitioner, Vicki Baker. Little was familiar with the house because he had previously worked there as a handyman, though he had not been there in over a year. Baker had recently moved to Montana for her retirement, but her adult daughter was at the house, preparing it for sale.

Baker's daughter had heard earlier in the day that Little was a wanted man, but she feigned ignorance, let him into the house, and then said she needed to go to the store. After escaping the house, she called Baker, who then called the police. *Ibid.*

A McKinney Police Department SWAT team set up a perimeter around Baker's house. The 15-year-old girl eventually left the house unharmed, but she told the police that Little was armed and was ready to go down shooting. Eventually, the police decided to assault the house. They used explosives to take down the garage door, armored personnel carriers to knock down the front door and fence, and they launched tear gas grenades through the windows and walls until every cubic inch of the interior was saturated. When

they entered the house, they found that Little had died by his own hand. App. 4a.

The damage was extensive. A hazmat team disposed of essentially all of the personal property in the house. The flooring, drywall, and insulation had to be removed. Appliances were destroyed. Doors and windows needed to be replaced. App. 5a.

Baker reached out to the City to request compensation, but the City said it was not liable. App. 95a. Baker's insurer couldn't help either because her policy–as is typical–excludes damage caused by the government. (The insurer did compensate her for whatever damage it could attribute to Little.) App. 29a n. 1.

On March 3, 2021, Baker filed a lawsuit against the City of McKinney in the U.S. District Court for the Eastern District of Texas. *Ibid.* She alleged that the intentional destruction of her property, for the purpose of apprehending a dangerous criminal, was a taking within the meaning of the Fifth Amendment, and she invoked the court's jurisdiction under 28 U.S.C. 1331. Judge Mazzant denied the City's motion to dismiss and later granted Baker's motion for partial summary judgment as to liability under the Fifth Amendment. App. 31a; 71a.

The City had argued that Judge Mazzant should follow decisions by the Seventh, Tenth, and Federal Circuits, which had held that "when the state acts pursuant to its police power * * * 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), cert. denied, 141 S. Ct. 160 (2020). The City placed particular emphasis on the Tenth Circuit's decision, which also involved a SWAT raid that destroyed an innocent family's home. Judge Mazzant, however, found that these decisions "rest[ed] on an untenable analysis of police power and eminent domain." App. 44a; 42a n.5. He discussed the Tenth Circuit's errors for nearly eight pages. A jury then determined that Baker was entitled to $59,656.59 in damages. App. 73a. Judge Mazzant denied the City's post-trial motions, and the City timely appealed to the Fifth Circuit. App. 74a; 99a.

Before the Fifth Circuit, the City renewed its argument that the Takings Clause does not apply when the government takes property pursuant to its "police power." In an opinion by Judge Higginson, the panel disagreed, explicitly rejecting the "ahistorical" approach of the Seventh, Tenth, and Federal Circuits. App. 12a. Nevertheless, the panel reversed the judgment on a different ground–one never argued by the City. The panel held that "a 'necessity' or 'emergency' privilege has existed in Takings Clause jurisprudence since the Founding," and the City of McKinney was entitled to rely on that privilege in this case. App. 15a–16a.

Baker filed petitions for rehearing and rehearing en banc. She explained that the panel had: (1) violated the party presentation principle, (2) inverted the normal burden in constitutional cases, and (3) gotten the history entirely wrong.

By a vote of eleven-to-six, the Fifth Circuit denied the petition, with Judges Elrod and Oldham filing a

joint dissent. They explained that "[i]t has been settled law for over 150 years that the destruction of property constitutes a taking." App. 130a. But instead of applying this straightforward principle, the panel "plac[ed] the onus on Baker to ground her right to compensation in a historical analogue–rather than requiring the City to establish some historically based exception to the compensation requirement." App. 132a.

Even setting aside the panel's procedural errors, Judges Elrod and Oldham explained that the panel also erred "[i]n its *sua sponte* plumbing of the historical evidence." *Ibid.* Public necessity, they explained, has long been a common law defense against private tort liability, but not a governmental immunity against the Takings Clause. App. 133a. Moreover, "exempting some kinds of takings from the just compensation requirement on the basis of the public necessity privilege is fundamentally at odds with the purpose of the Takings Clause." App. 138a. If the "welfare of the people * * * could be invoked to render a taking non-compensable, compensation would never be required," they explained *Ibid.* This petition followed.

REASONS FOR GRANTING THE PETITION

This Court has consistently recognized that when the government intentionally or foreseeably destroys an innocent person's private property for a public use, it is a taking within the meaning of the Fifth Amendment. See *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (11 Wall.) 166, 181 (1871) ("[W]here real estate is actually invaded . . . so as to effectually destroy

or impair its usefulness, it is a taking, within the meaning of the Constitution[.]").[1] This Court has also held that the Takings Clause "focuses directly upon the severity of the burden that government imposes upon private property rights"—not the importance of the governmental interest advanced by the taking. *Lingle* v. *Chevron*, 544 U.S. 528, 539 (2005). And, finally, this Court has held that the government bears the burden of demonstrating any historical exceptions to the plain text of the Bill of Rights. *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 24 (2022).

The decision below rejects all of these teachings, and it is only the latest in an accelerating trend. In recent years lower courts—including the Third, Sixth, Seventh, Tenth and Federal Circuits—have held that when the government is taking property for a good reason, such as promoting health and safety, it shouldn't have to pay for it. The Fourth Circuit stands alone in rejecting this exception to the plain text of the Fifth Amendment, an exception that cannot be reconciled with either this Court's precedents or with the historical record. The Takings Clause *requires* a good reason for taking private property. Otherwise, the taking is simply unlawful.

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[1] Accord *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 32 (2012) (citing *Pumpelly*); *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713 (2010) (plurality) ("[W]hen the government uses its own property in such a way that it destroys private property, it has taken that property") (citing *Pumpelly*); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 316–17 (1987) (citing *Pumpelly*).

These erroneous decisions have serious consequences for everyday Americans. Few people can afford to easily bounce back from the financial devastation that a SWAT raid inevitably leaves behind. To make matters worse, few insurance policies cover this kind of damage.

The logic of these decisions, however, is not limited to SWAT raids. If government action cannot constitute a taking when it is being undertaken for a good reason, then inverse condemnation would no longer exist. This Court should grant review to put a stop to a trend that threatens to make the Takings Clause a dead letter.

I. Lower courts are hopelessly confused about whether actions taken pursuant to the police power can constitute takings.

It has been over 100 years since this Court recognized that valid exercises of the police power can constitute takings, requiring the payment of just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) ("When th[e] seemingly absolute protection [of the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.").[2] Nevertheless, lower courts are

[2] Moreover, the concept of "the police power" did not even exist when the Fifth Amendment was ratified. See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 473–84 (2004) (detailing the origin and evolution of the term).

increasingly rejecting inverse condemnation claims on the theory that, "when the state acts to preserve the 'safety of the public'" it "cannot be[] burdened with the condition that the state must compensate affected property owners." *Lech* v. *Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019). Many of these courts have adopted a categorical rule that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking." *Ibid.*

The Fourth Circuit has properly rejected this categorical exception to the Takings Clause, but it is an outlier. Lower courts are increasingly adopting the Tenth Circuit's police power exception. And the Fifth Circuit's decision below, while not purporting to go as far as the Tenth Circuit, nevertheless shares the same premise that when the government is taking property for a *really good reason*, it shouldn't have to pay.

A. Many courts have adopted a "police power" exception to the Takings Clause.

Federal Circuit. In *AmeriSource Corp* v. *United States*, the plaintiff was a pharmaceutical company whose drugs, worth over $200,000, were seized as evidence for use in a criminal case against a third party. 525 F.3d 1149 (Fed. Cir. 2008). The expiration date for the drugs passed, rendering them worthless, and they were never used in the prosecution. The drug company had requested that the government retain only a sample, so the rest could be sold, but the government refused.

In denying the company's just compensation claim, the Federal Circuit acknowledged that "a literal reading of the text" of the Fifth Amendment suggested that the petitioner should prevail. *Id.* at 1153. Nevertheless, the court held 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." *Ibid.*

Where did the Federal Circuit find support for this broad ruling? Supposedly this Court "suggest[ed]," *id.* at 1154, that the police power is exempt from the Takings Clause in *Bennis* v. *Michigan*, 516 U.S. 442 (1996). *Bennis*, however, said nothing of the kind. The case concerned a challenge to the forfeiture of a vehicle that was used in the commission of a crime by one of the owners. This Court rejected the plaintiff's takings claim because "[t]he 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. In other words, *Bennis* was talking about lawful, formal proceedings that transfer title, not a general police power exemption to Takings Clause.[3]

The *Amerisource* court made clear that its holding was not limited to the specific context of evidence

[3] Moreover, forfeitures have a long, common-law history that predates the Bill of Rights. See *Bennis*, 516 U.S. at 454 (Thomas, J., concurring) ("forfeiture of * * * 'instrumentalit[ies]' of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments."). No comparable history supports a "police power" exception to the Takings Clause.

seizures. It specifically defined the police power as encompassing "the powers of government inherent in every sovereignty to the extent of its dominions," *AmeriSource*, 525 F.3d at 1153, and it explained that the limits of the police power "are largely imposed by the Due Process Clause," *id.* at 1154, rather than by the Takings Clause. In other words, so long as the government is acting lawfully, its actions cannot effect a taking. This decision is particularly harmful because the Federal Circuit has jurisdiction over most takings suits against the federal government. 28 U.S.C. 1491.

Seventh Circuit. In *Johnson* v. *Manitowoc County*, the plaintiff was a landlord whose rental property was damaged while the police were executing a search warrant. 635 F.3d 331, 333 (7th Cir. 2011). He sued for, inter alia, just compensation under the Fifth Amendment. The Seventh Circuit dismissed that claim in just three sentences, relying on *Amerisource* and *Bennis*:

> But 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. See *AmeriSource Corp.* v. *United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008) (citing *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996)). Here, the actions were taken under the state's police power. The Takings Clause claim is a non-starter.

Id. at 336. The Seventh Circuit went on to express sympathy for the property owner, noting that the

result was "quite unfair," and suggesting that he attempt to invoke state statutory remedies. *Ibid*.

Tenth Circuit. In *Lech* v. *Jackson*, the plaintiff was an innocent homeowner whose house was destroyed by a SWAT team after an unrelated fugitive barricaded himself inside. 791 F. App'x 711, 712 (10th Cir. 2019). In all material respects, it is the same as petitioner's case. The Tenth Circuit rejected the Takings Claim, holding that when the state is protecting public safety, it "'is not, and, consistent with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate affected property owners for pecuniary losses they may sustain' in the process." *Id.* at 717. Accordingly, the court relied on *Amerisource* and held "that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause." *Ibid.*

Lech was unreported, but it has proven influential. no fewer than 16 courts have cited it for the proposition that government action pursuant to the police power is categorically exempt from the Fifth Amendment.[4] To be sure, some of the takings claims in these

[4] See *Ostipow* v. *Federspiel*, 824 F. App'x 336, 342 (6th Cir. 2020) ("The weight of authority holds that claims emanating from the use of police power are excluded from review under the Takings Clause."); *Pena* v. *City of Los Angeles*, No. CV23-5821-JFW(MAAx), 2024 WL 1600319, at *4 (C.D. Cal. Mar. 25, 2024); *Slaybaugh* v. *Rutherford Cnty., Tennessee*, 688 F. Supp. 3d 692, 706 (M.D. Tenn. 2023); *West* v. *D.C.*, No. 22-cv-3107 (CRC), 2023 WL 5929442, at *5 (D.D.C. Sept. 12, 2023); *Scott* v. *Angerhofer*, No. 2:20-CV-14 DAK, 2023 WL 2480191, at *5 (D. Utah Mar. 13, 2023); *Parrott* v. *D.C.*, No. 1:21-cv-2930-RCL, 2023 WL 2162859,

cases might have failed anyway under a proper application of this Court's precedents. But as this Court has recognized, "most takings claims turn on situation-specific factual inquiries." *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 32 (2012). Instead of analyzing the "particular circumstances of each case," as this Court has instructed, these courts are improperly "resorting to blanket exclusionary rules," to quickly dispose of takings claims. *Id.* at 37. And now that so many courts have followed *Amerisource*, *Johnson*, and *Lech*, the rule is metastasizing.

B. The Fourth Circuit faithfully applies this Court's precedents.

Fourth Circuit. The Fourth Circuit stands alone in in following this Court's takings precedents. In

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at *13 (D.D.C. Feb. 22, 2023); *Carrasco* v. *City of Udall, Kansas*, No. 20-1322-EFM, 2022 WL 522959, at *3 (D. Kan. Feb. 22, 2022); *Bojicic* v. *DeWine*, 569 F. Supp. 3d 669, 690 (N.D. Ohio 2021), aff'd, 2022 WL 3585636 (6th Cir. Aug. 22, 2022); *David* v. *Midway City*, No. 2:20-cv-00066-DBP, 2021 WL 6927739, at *7 (D. Utah Dec. 14, 2021); *Cuervo* v. *Salazar*, No. 20-cv-0671-WJM-GPG, 2021 WL 1534607, at *9 (D. Colo. Apr. 19, 2021); *Eden LLC* v. *Justice*, No. 5:20-CV-201, 2021 WL 4241020, at *6 (N.D.W. Va. Jan. 7, 2021), vacated as moot, 36 F.4th 166 (4th Cir. 2022); *TJM 64, Inc.* v. *Harris*, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020); *Yawn* v. *Dorchester Cnty.*, 446 F. Supp. 3d 41, 46 (D.S.C. 2020); *Emesowum* v. *Arlington Cnty.*, No. 1:20-cv-113, 2020 WL 3050377, at *5 n. 9 (E.D. Va. June 5, 2020); *Britton* v. *Keller*, No. 1:19-cv-01113 KWR/JHR, 2020 WL 1889017, at *4 (D.N.M. Apr. 16, 2020), aff'd, 851 F. App'x 821 (10th Cir. 2021); *In re Venoco, LLC*, No. 17-10828 (JTD), 2022 WL 3639414, at *11 (Bankr. D. Del. Aug. 23, 2022), aff'd, No. ADV 18-50908 (JTD), 2023 WL 8596325 (D. Del. Dec. 12, 2023); see also *McKenna* v. *Portman*, 538 F. App'x 221, 224 (3d Cir. 2013) (same, but not citing *Lech*).

Yawn v. *Dorchester County*, the plaintiffs were beekeepers whose hives had allegedly been killed by an aerial mosquito spraying operation, undertaken to curb the spread of the Zika virus. 1 F.4th 191, 192 (4th Cir. 2021). The government urged the court to follow *Lech* in holding that the police power is exempt from the Takings Clause. The court refused, explaining "[t]hat 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." *Id.* at 195.

The Fourth Circuit ultimately rejected the beekeepers' claim on different grounds. The record showed that the government had made extensive efforts to notify people in the affected area of the spraying, and the pilot even had a map of known beehives in the area so he could turn off the sprayers when he was overhead. *Id.* at 193. These measures had proven adequate in the past. Under these circumstances, the court explained, there was no reason to expect that the spraying operation would result in the death of the bees. Following this Court's guidance, the Fourth Circuit held that "[i]f the invasion is not intended or foreseeable, then it does not constitute a taking." *Id.* at 195 (citing *Ark. Game & Fish*, 568 U.S. at 39). This is precisely the kind of case-specific analysis that this Court requires. See *Ark. Game & Fish*, 568 U.S. at 32.

C. The decision below takes a middle road.

Fifth Circuit. The decision below charts a third path. While explicitly breaking with the Seventh, Tenth, and Federal Circuits, App. 13a, which held

that actions taken pursuant to the police power are categorically exempt from the Takings Clause, the Fifth Circuit nevertheless created a new exception to the plain text of the Fifth Amendment—"public necessity." The court held that "the Takings Clause does not require compensation * * * when it was objectively necessary for officers to damage or destroy * * * property in an active emergency to prevent imminent harm to persons." App. 2a. This novel exception, however, shares the same flawed logic as the Tenth Circuit's police power exception: that when the government has a good reason for taking your property, it shouldn't have to pay.

Although the "necessity exception" is ostensibly not as broad as the police power exception that other courts have embraced, there is every reason to expect that it will prove malleable—particularly because the Fifth Circuit made "no attempt to define the bounds of this exception." App. 23a–24a. This lack of guidance makes necessity a blank check for future government litigants. See Case Comment, *Baker v. City of McKinney*, 137 Harv. L. Rev. 2408, 2415 (2024) ("The *Baker* court ran afoul of this guarantee by recognizing a vague exception to the Takings Clause and then applying it to Baker's case without attention to the facts of both its key precedents and the case at bar."). After all, declaring emergencies to arrogate more power is one of government's favorite pastimes.

For instance, *Baker* was recently cited for the proposition that the City of Seattle should be exempted from normal exactions analysis because there is currently an affordable housing "crisis." See Brief of Lawyers' Committee for Civil Rights Under Law as

Amicus Curiae Supporting Defendant, *Adams* v. *City of Seattle*, No. 2:22-CV-01767-TSZ, at 24 (W.D. Wash. Mar. 7, 2024), ECF No. 43. These "emergencies" can last indefinitely; New York City has famously been going through its own housing emergency for most of the last 100 years. See *CHIP* v. *City of New York*, 59 F.4th 540, 545 (2d Cir. 2023). And the United States has tried to rely on emergencies as vague as "[t]he power of the Soviet Union in world affairs" to justify the exercise of emergency powers. *United States* v. *Bishop*, 555 F.2d 771, 777 (10th Cir. 1977).

II. The decision below is wrong.

The Petition should also be granted because the decision below represents the latest in a growing trend of lower courts rejecting this Court's precedents to create novel, atextual exceptions to the Takings Clause. But the Clause contains no exceptions. It provides: "nor shall private property be taken for public use, without just compensation." It does not say, "unless the taking was for really good reason." See *Knick* v. *Twp. of Scott, Pennsylvania*, 588 U.S. 180, 189 (2019) ("The Clause provides: '[N]or shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'"). The government, therefore, bears the burden of establishing that there is any historical basis for finding an exception to that plain text. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 24 (2022) ("When [a Bill of Rights provision's] plain text covers an individual's conduct, the Constitution presumptively protects that conduct.").

The Fifth Circuit's approach, like that of the Seventh, Tenth, and Federal Circuits, is contrary to the text of the Fifth Amendment and, as explained below, to both this Court's modern Takings precedents and the historical record. Extensive scholarly literature in recent years also illustrates these courts' errors.[5]

A. The Fifth Circuit's decision directly conflicts with this Court's precedents.

This Court has repeatedly and explicitly rejected calls to find exceptions to the Takings Clause on the ground that the government was acting within its police power or pursuant to "necessity." An act might well be "within the State's police power * * *. **It is a separate question, however, whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid**." *Loretto* v. T*eleprompter Manhattan CATV*

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[5] See, *e.g.,* Case Comment, *Baker v. City of McKinney*, 137 Harv. L. Rev. 2408 (2024); Dandee Cabanay, *Baking Up A Taking: Why There Is No Categorical Exception to the Fifth Amendment Takings Clause for the Police Power*, 75 Baylor L. Rev. 778, 793 (2023); Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 143 (2022); Tristan Reagan, *Dude, Where's My House: The Interaction Between the Takings Clause, the Police Power, the Militarization of Law Enforcement, and the Innocent Third-Party Property Owner*, 58 Tulsa L. Rev. 99, 130 (2022); Zachery Hunter, *You Break It, You Buy It-Unless You Have A Badge? An Argument Against A Categorical Police Powers Exception to Just Compensation*, 82 Ohio St. L.J. 695, 706 (2021); Emilio R. Longoria, *Lech's Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 Wake Forest J.L. & Pol'y 297 (2021); Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 Wm. & Mary Bill Rts. J. 1145, 1196 (2021).

Corp., 458 U.S. 419, 425 (1982) (emphasis added); *Lucas*, v. *South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (rejecting claim that valid exercises of the police power are noncompensible); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). Similarly, this Court has recognized that although "private property may lawfully be taken possession of or destroyed" in emergencies, "[u]nquestionably * * * the government is bound to make full compensation to the owner." *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 134 (1851); see also *United States* v. *Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) ("[P]rivate rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.").

The decision below also misunderstands the entire point of the Takings Clause. The premise of the Fifth Circuit's ruling is that the government should not have to pay for property that it takes when it has a truly urgent need to take it. But as this Court has explained:

> [T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation "in the

> event of *otherwise proper interference* amounting to a taking."

Lingle v. *Chevron*, 544 U.S. 528, 543 (2005) (emphases in original). Under the Fifth Circuit's approach, the police could destroy the homes of two next-door neighbors, but if it were only "objectively necessary" to destroy one of the homes, then one homeowner would be compensated, while the other would not. "It would make little sense to say that the second owner has suffered a taking while the first has not." *Id*.

The decision below also violates the *Armstrong* principle—that the Takings Clause 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). One could hardly hypothesize a more straightforward case under that principle: Everyone agrees that the City of McKinney intentionally destroyed Vicki Baker's house in order to apprehend a dangerous criminal. It was lawful, even laudable, but the cost of securing public safety—the quintessential public good—"should be born be the public as a whole," and not by a completely innocent homeowner. Indeed, **even the opinion below** recognizes that "[*Armstrong*'s] relevance to Baker, who is faultless but must 'alone' bear the burdens of a misfortune that might have befallen anyone, is manifest." App. 24a–25a.

There are no governmental powers unconstrained by the Takings Clause. See *Sheetz* v. *County of El Dorado*, 601 U.S. 267, 276 (2024) (The Takings Clause "constrains the power of each 'State' as an undivided whole."). The "touchstone" for takings analysis,

therefore, is the burden on property rights, not the importance of the governmental objective. *Lingle*, 544 U.S. at 539. And "once there is a 'taking,' compensation *must* be awarded." *Knick* v. *Twp. of Scott, Pennsylvania*, 588 U.S. 180, 193 (2019).

B. The Fifth Circuit's decision is contrary to history and tradition.

Even setting aside this Court's modern precedents, the decision below is also contrary to history and tradition. As Judges Elrod and Oldham explained in their dissent, "public necessity" is a long-established individual defense to the tort of trespass. *See* Restatement (Second) of Torts § 197 (private necessity); *id.* at § 196 (public necessity) ("One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."). But necessity has no history as a governmental immunity for takings.

Early decisions from this Court and others drew a clear line between the individual tort defense of public necessity and the government's liability for takings:

> [T]he individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defence of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the

> sufferers would be entitled to compensation from the national government within the constitutional principle (Const. U. S. Art. 5, of the Amendments).

City of New York v. *Lord*, 17 Wend. 285, 291 (N.Y. Sup. Ct.), aff'd, 18 Wend. 126 (N.Y. 1837). Further decisions abound.[6]

The earliest surviving commentary on the Takings Clause also undercuts any notion of a necessity

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[6] See *Russell*, 80 U.S. at 629 ("[P]rivate rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."); *Mitchell*, 54 U.S. at 134 ("Unquestionably * * * the government is bound to make full compensation to the owner; but the officer is not a trespasser."); *Grant* v. *United States*, 1 Ct. Cl. 41, 47 (1863) ("taking of private property for use or destruction, when the public exigency demands it, * * * is an exercise of the right of eminent domain"); *Jarvis* v. *Pinckney*, 21 S.C.L. (3 Hill) 123, 140 (1836) ("[A]s the danger to human life was great, it might be destroyed upon the principle that private property may be taken for the public use[, but] * * * it can only be done upon just compensation."); *Bishop* v. *Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849) ("[I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be lawfully taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases, while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss."); *Hale* v. *Lawrence*, 21 N.J.L. 714, 728–29 (1848) ("Whether or not, a law authorizing the destruction of private property for public benefit or safety, is to be esteemed a taking * * * such a law is nevertheless an exercise of the right of eminent domain, and if it makes no provision for compensation to the owner, the law is [] unconstitutional[.]").

exception to the Takings Clause. St. George Tucker wrote that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305–06 (1803). John Jay had complained about such seizures in 1778. John Jay, *A Freeholder, A Hint to the Legislature of the State of New York* (1778), reprinted in 5 *The Founders' Constitution* 312; see also *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 359 (2015) ("[E]arly Americans bridled at appropriations of their personal property during the Revolutionary War, at the hands of both sides.").

Surely, the Revolutionary War was an emergency where it was "objectively necessary" for the military to seize those supplies, so the Fifth Circuit's holding below has to be wrong. This is not a case where the historical record is merely silent or ambiguous. Here, the history shows that the founders wanted to *specifically* ensure that "necessity" would not be used as a justification to avoid compensating people who were compelled to sacrifice their property for the greater good. See *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not create power.* * * The Constitution was adopted in a period of grave emergency.").[7]

[7] The same sentiment is echoed in other founding-era declarations of rights. The Northwest Ordinance of 1787 provided

III. The question presented is of great national significance.

The petition should also be granted because the question presented is important, for at least two reasons. First, as Judges Elrod and Oldham wrote, the decision below risks "turning the right to private property into 'a second-class right,'" App. 132a., by inventing a vague "necessity exception to the Takings Clause," while admittedly "mak[ing] no attempt to define the bounds of this exception." App. 24a-25a. That is an open invitation for government to argue that the public interest supports overriding constitutional protection of private property. Indeed, in circuits applying a "police power" exception, the Takings Clause gives way to any act sufficiently related to the public welfare. Just as Justice Holmes predicted a century ago, such reasoning allows an exception that eventually swallows the rule. *Penn Coal*, 260 U.S. at 415.

This approach makes the Takings Clause coterminous with the Due Process Clause, as the Federal Circuit explicitly recognized. *AmeriSource Corp*. v. *United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008) ("The limits [of the police power], however, are largely imposed by the Due Process Clause."). But the two clauses do different things. The Due Process Clause protects against arbitrary and oppressive government

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that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." The Massachusetts Constitution of 1780 spoke of compensated takings "whenever the public exigencies require" it. And the Vermont Constitution of 1777 speaks of compensated takings "when necessity requires it."

action (and can be enforced via injunctions). The Takings Clause ensures that entirely valid governmental action does not place disproportionate burdens on particular individuals. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The second reason the question presented is important is that destructive police action of the kind that occurred in this case is frequently ruinous to the affected individuals. The damage caused is almost never covered by standard homeowners' insurance policies, which contain exclusions for destruction caused by order of governmental authority. See Jordan Plitt et al., 10A Couch on Ins. § 152:22 (3d ed. 2024) (noting that loss associated with authorized acts of government are "typically excluded from most property insurance policies"). These exclusions have been interpreted to cover damage caused by lawful actions of the police, unless the damage was caused by an officer who "acts so egregiously that his behavior is not properly characterized as" government action. *Cal. Cafe Restaurant* v. *Nationwide Mut. Ins. Co.*, C.A. No. 92-1326, 1994 WL 519449 at *2 (C.D. Cal. Sept. 14, 1994); accord *Alton* v. *Manufacturers and Merchants Mutual Ins. Co.*, 624 N.E.2d 545, 546-47 (Mass. 1993).

Of course, the merits of petitioner's takings claim does not turn on whether she was able to insure herself against these losses. But the fact that American homeowners cannot insure themselves makes this issue pressing. For many, the home is their most valuable asset, and there is simply nothing they can do to protect themselves from the devastating financial consequences of a SWAT raid.

Allowing government to externalize the cost of these actions also disproportionately harms society's most vulnerable. Lower-income people are more likely to encounter law enforcement. See David Alan Sklansky, *Police Reform in Divided Times*, 2 Am. J. of L. & Equality 3 (2022). Thus, property located within a low-income area will be more likely to be taken without compensation, and it is more likely that the owner will be herself unable to absorb the costs. See, *e.g.*, *Pena* v. *City of Los Angeles*, CV23-5821-JFW(MAAx), 2024 WL 1600319, at *2 (C.D. Cal. Mar. 25, 2024) ("Plaintiff has been unable to afford to repair and replace his shop and his printing equipment[.]"). Meanwhile, businesses, unprotected by normal insurance policies, will be less likely to invest in low-income areas if they know that their property may be taken without compensation by law enforcement.

Even the panel below, while under the mistaken impression that it was hamstrung by precedent, acknowledged that its rule controverts "fairness and justice." App. 25a. Nobody thinks it's fair that Vicki Baker had to alone bear the cost of this government operation. As a society, we pay for police salaries, training, equipment, and the cost of running a criminal justice system. We should also pay for the damage that the police must sometimes inflict on innocent property owners. This is an important issue that warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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