APPENDIX

TABLE OF APPENDICES

Appendix A

United States Court of Appeals
for the Fifth Circuit

No. 22-40644

VICKI BAKER,
Plaintiff–Appellee,

versus

CITY OF MCKINNEY, TEXAS,
Defendant–Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
USDC No. 4:21-CV-176

Decided and Filed: October 11, 2023

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

When an armed fugitive held a 15-year-old girl hostage inside plaintiff-appellee Vicki Baker's home, City of McKinney (the "City") police officers employed armored vehicles, explosives, and toxic-gas grenades

to resolve the situation. The parties agree the officers only did what was necessary in an active emergency. However, Baker's home suffered severe damage, much of her personal property was destroyed, and the City refused to provide compensation.

Baker brought suit in federal court alleging a violation of the Takings Clause of the Fifth Amendment to the United States Constitution, which states that private property shall not "be taken for public use, without just compensation." The district court held that as a matter of law, the City violated the Takings Clause when it refused to compensate Baker for the damage and destruction of her property. The City timely appeals.

We conclude that, as a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons. Baker has maintained that the officers' actions were precisely that: necessary, in light of an active emergency, to prevent imminent harm to the hostage child, to the officers who responded on the scene, and to others in her residential community. Accordingly, and despite our sympathy for Ms. Baker, on whom misfortune fell at no fault of her own, we REVERSE.

I.

Baker was a long-time resident of McKinney,

Texas when she made plans to sell her house and retire. She had already moved to Montana at the time of the events in question, July 25, 2020, and her adult daughter, Deanna Cook, was staying in Baker's McKinney home to prepare it for final sale. Baker's dog was also present at the home.

On the morning of July 25, Cook saw a Facebook post that Wesley Little was on the run with a 15-year-old female "runaway." Cook recognized Little because he "did some work inside of [Baker's] home more than a year before the incident occurred." Baker had fired him at that time because of comments that made Cook uncomfortable.

That same morning, McKinney police spotted Little driving a Corvette with the 15-year-old girl. Officers began pursuit, but "[i]t was a very fast Corvette," and Little evaded police. He arrived at the Baker residence shortly thereafter with the 15-year-old girl and knocked on the door. Cook answered, and Little asked to come in and to put his car in the garage. Cook recognized the girl and, though frightened, formulated a plan to help: She agreed to let Little into the house, but then told him, falsely, that she had to go to the supermarket. Once away from the house, she called Baker and described the situation, and Baker called the police.

City police arrived soon after and, in the words of one of the officers, "set up perimeter on the home and essentially tr[ied] to secure it. And what we[] [were] doing [was] for the well-being of not only the 15-year-

old girl, but the community as a whole." Officers employed a BearCat, which is an "armored personnel carrier," and engaged in "loud hailing" using an intercom system. Soon after, Little released the girl and she exited the house. The girl told police that "he's in the ceiling; she had pulled down the attic so he could get up there; they had a lot of long guns, some pistols; and that he was obviously high on methamphetamine."

Little somehow "communicated to" police that he "had terminal cancer, wasn't going back to prison, knew he was going to die, was going to shoot it out with the police." Police proceeded to use explosive devices, the BearCat, a T-Rex (similar to the BearCat), toxic gas grenades, and a drone to try to resolve the situation. After some time, the drone was able to reach a vantage point to see that Little had taken his own life.

It is undisputed that police acted unimpeachably that day, and no party in this case has ever suggested otherwise. At trial, Baker's attorney made it a point on direct examination to underline that "there was some really good police work here," it "was a successful operation," "[e]veryone followed procedure," and "[e]veryone did what they were supposed to do," along with other affirmations that the officers acted irreproachably. Her attorney reiterated that the severe damage done to Baker's home "was necessary. No issue there." And in briefing, Baker makes clear she does not dispute that "it was necessary to destroy her house." In light of the way Baker has argued this case,

we do not ourselves evaluate whether the damage to her home was "necessary"; we grant the parties' shared contention that it was.

Nevertheless, the damage to Baker's home was severe. As the district court explained, quoting Baker's motion for summary judgment, "[m]uch of the damage went beyond what could be captured visually." Specifically,

> The explosions left Baker's dog permanently blind and deaf. The toxic gas that permeated the House required the services of a HAZMAT remediation team. Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet), and bricks needed to be replaced—in addition to the windows, blinds, fence, front door, and garage door. Essentially all of the personal property in the House was destroyed, including an antique doll collection left to Baker by her mother. In total, the damage . . . was approximately $50,000.

Baker filed a claim for property damage with the City, but the City replied in a letter that it was denying the claim in its entirety because "there is no liability on the part of the City or any of its employees." Baker's insurance "would not cover any damage caused by the City's police, including the structural damage." Baker received numerous donations from

businesses and others who had heard of her plight. She has maintained that if she should ever receive compensation from the City, she would pay back everyone who volunteered to help her.

On March 3, 2021, Baker filed suit against the City in federal court in the Eastern District of Texas for violations of the takings clauses of the United States and Texas Constitutions. She alleged liability under the Fifth Amendment directly because it "is self-executing" under *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019), and she also alleged liability under the Fifth Amendment via the vehicle of 42 U.S.C. § 1983. She contended the district court has jurisdiction over her federal constitutional claims under the federal-question statute, 28 U.S.C. § 1331, and supplemental jurisdiction over the state takings claim under 28 U.S.C. § 1367.

The City filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It argued that Baker has no cause of action under the Fifth and Fourteenth Amendments and that the City did not take Baker's property under the Fifth Amendment; that Baker's complaint failed to sufficiently allege *Monell* liability under § 1983;[1] that the district court lacks supplemental jurisdiction over the Texas Constitution claim; and that the Texas Constitution claim fails because "it is a sheer attempt to allege tort recovery in a claim wearing takings claim clothing."

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[1] *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

The district court denied the City's motion in full.

Baker filed a motion for partial summary judgment on her claims that the City is liable under the Fifth Amendment and the Texas Constitution. The district court granted it, holding that the City is liable directly under the Fifth Amendment and the Takings Clause of the Texas Constitution. The district court also held that "because the Fifth Amendment is self-executing, Baker's claim under the Fifth Amendment Takings Clause is not dependent upon the § 1983 vessel. Accordingly, the Court need not determine whether Baker established an official policy under *Monell*." (footnote omitted). But the district court explained in a subsequent order,

> because Baker also brought a claim under §1983, the Court considered this claim as well, ultimately finding an issue of fact that the Court declined to resolve at summary judgment. Further, the Court did not determine the amount of just compensation to which Baker is entitled. Accordingly, damages and the City's liability under § 1983 are issues that have been reserved for jury determination at trial.

At a pre-trial conference, the City "lodge[d] an objection on the *Monell* issues," claiming they have not "been adequately pled or presented in this case" and that the only thing left to try is the question of damages. The district court rejected this argument,

stating that § 1983 "most certainly was pled. Without question, it's pled in the alternative."

At that same conference, the district court also noted that the City made an offer to Baker for "the full amount of damages" to settle the case. Baker refused because, her attorney said, "she wanted a change in policy or some assurance that people in her position in the future wouldn't be subjected to similar denial of compensation, and the City wasn't willing to offer that so that was why she proceeded."

Two weeks before trial, Baker filed a motion *in limine* to exclude evidence of donations or insurance proceeds she received to help repair her home. She cited the collateral source rule, which is a fixture of tort law, and equitable considerations. The district court agreed with Baker and granted the motion in full.

Trial was held from June 20 to 22, 2022. On June 21, the City submitted a motion for judgment as a matter of law along with a supplemental brief arguing that (1) Baker did not adequately plead a plausible § 1983 claim against the City and (2) Baker failed to show that her alleged constitutional injury was caused by an official city policy or custom, or by a city policymaker. The district court denied the motion.

The jury found that the City was acting under color of state law when it refused to compensate Baker for her lost property and that the City's refusal proximately caused Baker's damages of $44,555.76

for her home and $15,100.83 for her personal property. Because the district court had already found that the Fifth Amendment is self-executing, that the City's refusal to compensate Baker was a violation of the Fifth Amendment, and that the City's refusal was a violation of the Texas Constitution, Baker was given the option to elect whether to pursue the judgment under the Fifth Amendment directly, under § 1983, or under the Texas Constitution. Baker chose § 1983.

The City submitted a motion for a new trial on July 20, 2022. The court denied it on August 26, 2022. The City timely filed a notice of appeal on September 23, 2022, challenging all the district court's unfavorable decisions and orders stretching back to its denial of the City's 12(b)(1) and 12(b)(6) motions.

II.

We begin with jurisdiction. The City contends that under our court's decision in *Devillier v. State*, 53 F.4th 904 (5th Cir. 2023), *cert. granted*, 92 U.S.L.W. 3063 (U.S. Sept. 29, 2023) (No. 22-913), federal courts lack jurisdiction over Baker's Fifth Amendment takings claim. This contention fails foremost because *Devillier* made no jurisdictional holding. *See id.* at 904. The district court was therefore correct to hold that it had federal-question jurisdiction in this case pursuant to 28 U.S.C. § 1331.[2]

[2] The City also contends that the district court lacked supplemental jurisdiction over Baker's Texas Constitution claim

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

III.

We turn now to the merits of Baker's Fifth Amendment claim.

a.

The City invites our court to adopt a broad rule: because Baker's property was damaged or destroyed pursuant to "the exercise of the City's police powers," there has been no compensable taking under the Fifth Amendment. We decline.

First, the City's broad rule runs afoul of our precedent. As we explained in *John Corp. v. City of Houston*:

> Appellants argue strenuously that their claims do not include a takings claim because they nowhere allege that the City used its power of eminent domain to take property for public use. Instead, Appellants assert that the city relied on its police powers to destroy their property. Such a distinction between the use of police powers and of eminent domain power, however, cannot carry the day.

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pursuant to 28 U.S.C. § 1367. This contention fails because it is explicitly predicated on the claim that the district court lacked federal-question jurisdiction.

> The Supreme Court's entire "regulatory takings" law is premised on the notion that *a city's exercise of its police powers can go too far, and if it does, there has been a taking.*

214 F.3d 573, 578 (5th Cir. 2000) (emphasis added). Indeed, the mere fact that Baker's property has been damaged or destroyed pursuant to the City's police power cannot decide this case.

Second, twentieth-century Supreme Court precedents cast doubt on the City's proposed rule. As the Court said in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), 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.'" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("But that cannot be accomplished in this way under the Constitution of the United States.")). Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), the Court noted that a given regulation might be "within the State's police power. . . . It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."

Third, the Court has noted that takings cases "should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to

blanket exclusionary rules." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). The City's proposed rule is an exceptionally broad exclusionary rule. And it is broader than any rule necessary to decide this case.

Fourth, the Court has increasingly intimated that history and tradition, including historical precedents, are of central importance when determining the meaning of the Takings Clause. *See Tyler v. Hennepin County*, 598 U.S. 631, 637-44 (2023) (determining the applicability of the Takings Clause from "[h]istory and precedent" reaching back to the Magna Carta); *Horne v. Department of Agriculture*, 576 U.S. 350, 357-61 (2015); *see also Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting) ("In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause . . . .").

The City's arguments for its broad rule are ahistorical. It relies primarily on recent precedents from our sister circuits, especially *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019) (unpublished). *See also Johnson v. Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed Cir. 2008). The City is correct that these precedents have endorsed the rule the City now invites our court to adopt. 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. *Compare Lech*, 791 F. App'x at 717 ("[We] hold 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.") *with John Corp.*, 214 F.3d at 578 ("[A] city's exercise of its police powers can go too far, and if it does, there has been a taking.").

Our own analysis of history and precedent, undertaken below, further explains why we decline to adopt the City's broad rule. But first, we turn to Baker's arguments.

b.

Much of Baker's briefing is devoted to explaining why we should reject any categorical "police power" exclusion from Takings Clause liability. In the absence of such an exclusion, she claims, "like every other time the government's agents destroy property, a Takings analysis applies." And "[i]n this case, that analysis is straightforward: The damage was intentional and foreseeable, it was for the public use, and no recognized exception to liability applies."

Baker attends more closely to historical precedent than does the City. She specifically relies on *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (11 Wall.) 166, 181 (1871), for the proposition that "where real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Pumpelly* was an

inverse condemnation case in the context of a dam, which Wisconsin had legislated to be built, that flooded the plaintiff's property. In that case, the Supreme Court said,

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the

> pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177–78.

But while we agree with Baker that *Pumpelly* further undercuts the City's proposed rule, it provides only limited help for Baker herself. To repeat, *Pumpelly* was a flooding case that dealt with a dam constructed pursuant to Wisconsin legislation. The facts of *Pumpelly* are facially distinct from those at bar, where officers damaged or destroyed Baker's property by necessity during an active emergency—an emergency that began as a hostage situation involving a child and evolved into a potential shootout in a residential neighborhood with a heavily armed fugitive.

What Baker needs, in other words, is historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded under the Takings Clause. But Baker provides no such authority.

c.

When we turn to "[h]istory and precedent," *Tyler*, 598 U.S. at 639, we find that historically oriented legal scholarship has widely converged on the thesis that a "necessity" or "emergency" privilege has existed

in Takings Clause jurisprudence since the Founding.[3]

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[3] *See, e.g.*, William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 Hastings L.J. 1061, 1092 (1994) ("American courts and commentators consistently referred to a line of English cases making it 'well settled at common law' that in cases of calamity (e.g., fire, pestilence, or war) individual interests, rights, or injuries would not inhibit the preservation of the common weal. Thus, private houses could be pulled down or bulwarks raised on private property without compensation when the safety and security of the many depended upon it."); Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 67 (2022) ("[T]he common law defense of public necessity bars the rights of property owners to obtain recourse or compensation when government destroys private property for the public good."); Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 391, 393 (2015) ("Remarkably, however, courts have repeatedly held that if the government destroys property to address an emergency, then a 'necessity exception' relieves the government of any obligation to compensate the owner of the property that was sacrificed for the public good. . . . Indeed, courts and scholars have said that [this] principle has been well-established law for centuries."); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 127 (2013) ("When government takes private property for a public purpose, the Fifth Amendment of the U.S. Constitution requires just compensation. Courts, however, have long recognized an exception to takings law for the destruction of private property when necessary to prevent a public disaster."); Derek T. Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 483–85 (2006) (describing the "privilege of necessity destruction" which reaches to back to the common law and allows that "the government may destroy property in times of necessity during law enforcement, such as burning down a home to capture a barricaded criminal" without providing compensation); Note, *Necessity Takings in the*

For example, in *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788), the Pennsylvania Supreme Court considered a claim for compensation for 227 barrels of flour that had been moved by the government to a depot and later lost to the British. The court asked whether "by reason, by the law of nations, and by precedents analogous to the subject before us," compensation could be awarded. The court answered no, on the ground that "the rights of necessity, form a part of our law." *Id.* at 362. It explained,

> Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure 2 Black. Com. 36. So, if a man is assaulted, he may fly through another's close. 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground. Dyer. 8. Brook. trespass. 213. 5 Bac. Abr. 175. . . . Houses may be razed to prevent the spreading of fire, because for the public good. Dyer. 36. Rud. L. and E. 312. See Puff. lib. 2. c. 6. sec. 8. Hutch. Mqr. Philos. lib. 2. c. 16. We find, indeed, a

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Era of Climate Change, 136 HARV. L. REV. 952, 953 (2023) ("Since the earliest days of the Republic, U.S. courts have sanctioned violations of private property rights without compensation under conditions of public necessity. The quintessential application of this doctrine has been in the destruction of private property to create a firebreak . . . . But the principle . . . . has expanded beyond classical paradigms…to include activities [such as] law enforcement.").

> memorable instance of folly recorded in the 3 Vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

Id. at 363. Given this principle of necessity, the court explained, "there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation . . . ." *Id.*

Sparhawk is a 1788 case. It is therefore directly on point to understanding the common law rights to just compensation against which the Fifth Amendment Takings Clause was ratified in 1791. And it articulates what appears to have been a guiding rationale for this common law necessity exception: the fear that if the state risks liability for the damage or destruction of property during a public emergency, then the state may not be so quick to damage or destroy it, and such hesitancy risks catastrophe.

The idea that public emergency allows the government to damage or destroy property without compensation remained prominent after *Sparhawk*. For example, in 1822, a committee of the 17th Congress

considered a petition for compensation from a Louisianan whose property was inundated due to American military action during the British invasion of Louisiana in 1814. *See* Property Destroyed During the Invasion of Louisiana by the British in 1814– '15, 17th Cong., 1st Session, No. 587 (1822).[4] As the congressional committee described, "the enemy had landed near the city of New Orleans, [and] in order to prevent him from bringing up his cannon and other ordnance to the city, General Morgan, commanding the Louisiana militia, caused the levee to be cut through at or near the plantation of the petitioner." *Id.* "In consequence, the petitioner suffered great losses in the destruction of his" property, to the tune of $19,250. *Id.* The congressional committee stated

> that this injury done the petitioner was done in the necessary operations of war, and that the United States are not liable for the individual losses sustained by that inundation; and therefore [the committee] recommend[s] the adoption of the following resolution: *Resolved*, That the prayer of the petitioner ought not to be granted.

Id.

Cases closer to the ratification of the Fourteenth Amendment demonstrate the longevity of the

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[4] Available at https://memory.loc.gov/cgi-bin/ampage?collId=llsp&file- Name=036/llsp036.db&Page=835.

necessity privilege.[5] For example, in *Field v. City of Des Moines*, 39 Iowa 575, 577–78 (1874), a plaintiff sought to recover against the city of Des Moines after it razed his house to prevent further spreading of a fire. The Iowa Supreme Court explained,

> In Dillon on Municipal Corporations, Sec. 756, the learned author states the common law doctrine as clearly and succinctly as it is any where to be found. He says: "The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an extensive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains." The ground of exemption from liability in such cases is that of *necessity,* and if property be

[5] *See also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring) (noting the "'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791").

> destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible.

Id. (emphases in original). Much the same analysis is found in numerous cases from the mid-nineteenth century. *See, e.g.*, *McDonald v. City of Red Wing*, 13 Minn. 38, 40 (1868) (listing cases); *The Mayor, &C. of N.Y. v. Rufus L. Lord*, 18 Wend. 126, 132–33 (N.Y. 1837).

And when this same issue reached the Supreme Court in *Bowditch v. City of Boston* in 1879, only eleven years after the ratification of the Fourteenth Amendment, the Supreme Court explained:

> At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: 'For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action.' There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied. 'The rights of necessity

> are a part of the law.' *Respublica* v. *Sparhawk*, 1 Dall. 357, 362. See also *Mouse's Case*, 12 Rep. 63; 15 Vin., tit. Necessity, sect. 8; 4 T. R. 794; 1 Zab. (N. J.) 248; 3 id. 591; 25 Wend. (N. Y.) 173; 2 Den. (N. Y.) 461.

In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. Burlem. 145, sect. 6; id. 159, c. 5, sects. 24–29; Puffendorf, B. 2, c. 6.

101 U.S. 16, 18–19 (1879).

Bowditch was a case about Massachusetts law, but its lessons have permeated the Federal Takings Clause context. Justice Holmes, for example, said:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980.

Pa. Coal Co., 260 U.S. at 415–16 (1922).

Indeed, whatever we might think about the principle underlying the necessity privilege, its basis in history and tradition is longstanding and long recognized. This recognition has extended to more recent precedents, as well. *See, e.g.*, *United States v. Caltex*, 344 U.S. 149, 154-55 (1952) ("[T]he common law ha[s] long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved. . . . [And the] terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war."); *Lucas*, 505 U.S. at 1029 n.16 ("[The State may be absolved] of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." (citing *Bowditch,* 101 U.S. at 18–19 and *United States v. Pac. R.R.*, 120 U.S. 227, 238–39 (1887))); *see also Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980) ("The defendant City of Houston may defend its actions by proof of a great public necessity. . . . Uncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence or other great public calamity.").

d.

In sum, history, tradition, and historical precedent reaching back to the Founding supports the existence of a necessity exception to the Takings Clause. Today,

we make no attempt to define the bounds of this exception. We hold only that in this case, the Takings Clause does not require compensation for Baker's damaged or destroyed property because, as Baker herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons. We need not determine whether the necessity exception extends further than this.

e.

We conclude by acknowledging two considerations that favor Baker's position, despite all we have said.

First, while scholars have converged on the empirical, historical thesis that a necessity exception to the Takings Clause has existed since the Founding, they have also tended to converge on the view that it wrongs individuals like Baker.[6] Second, and closely related, the Supreme Court has often stated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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), *quoted in Tyler*, 598 U.S. at

[6] In particular, see Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127 (2013), and Muller, *"As Much Upon Tradition as Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481 (2006).

647. This statement's relevance to Baker, who is faultless but must "alone" bear the burdens of a misfortune that might have befallen anyone, is manifest. As a lower court, however, it is not for us to decide that fairness and justice trump historical precedent, particularly Supreme Court precedent, where it has long recognized a necessity exception that excludes those like Baker from the protection of the Fifth Amendment's Takings Clause. Such a decision would be for the Supreme Court alone.

IV.

Because Baker opted to pursue relief under § 1983, we do not reach whether she succeeds under the Texas Constitution.

We REVERSE the district court's summary judgment order finding that the City's damaging or destroying Baker's house and personal property was a compensable taking under the Fifth Amendment. We therefore VACATE the § 1983 judgment in her favor and REMAND for further proceedings.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

VICKI BAKER,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	4:21-CV-00176
CITY OF MCKINNEY,	§	Judge Mazzant
TEXAS,	§	
Defendant.	§	
	§	
	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff Vicki Baker's Motion for Partial Summary Judgment (Dkt. #19). Having considered the motion and the relevant pleadings, the Court finds that Plaintiff's motion should be **GRANTED**.

BACKGROUND

On July 25, 2020, the City of McKinney Police Department (the "Department") destroyed Vicki Baker's ("Baker") home during a standoff with an armed fugitive. When Baker sought compensation for the destruction of her private property, the City refused to pay. This lawsuit followed.

Baker was a long-time resident of McKinney,

Texas when she made plans to sell her house and retire. She had already moved to Montana when she contracted with buyers to sell her McKinney home (the "House"). In Baker's absence, her daughter, Deanna Cook ("Cook"), was staying in the House to prepare it for final sale. On the morning of July 25, 2020, Cook learned that a man named Wesley Little ("Little") had kidnapped a fifteen-year-old girl and evaded Department officers. Cook recognized Little because he had previously performed odd jobs for Baker around the House.

Later that same day, Little arrived at Baker's front door with the fifteen-year-old hostage in tow. Little asked to hide out in the House and requested to hide his car in the garage. Cook acquiesced but, in a ploy to escape the House, convinced Little to allow her to go the grocery store. In the parking lot of a local Walmart, Cook called Baker, and together, the two called the McKinney police to report the situation. When Department officers arrived at Cook's location, Cook provided the officers with the code to enter the House and the garage door opener. Department officers then went to the House where Little remained in hiding with the teenage girl.

Upon arrival, Department officers surrounded the House and attempted to negotiate with Little. Little released the fifteen-year-old girl unharmed, but the girl informed Department officers that Little possessed multiple firearms and that he refused to leave the House alive. Following hours of unsuccessful negotiations, Department officers attempted to draw

Little out of the House through several forceful tactics, including the use of tear gas. Despite the Department's efforts, Little would not leave the House. Department officers then forcefully entered the home by breaking down both the front and garage door and running over the backyard fence with a tank- like vehicle known as a BearCat. Upon entry, Department officers found Little had taken his own life.

Department officers documented the damage to Baker's home in their police records. One officer documented the damage through photographs, which show "the toppled fence and battered front door; the broken windows; the damaged roof and landscaping; the blown-out garage door; and the garage ceiling, attic floor, and dry walls all torn through with gas canisters" (Dkt. #19 at p. 4). Much of the damage went beyond what could be captured visually:

> The explosions left [] Baker's dog permanently blind and deaf. The toxic gas that permeated the [H]ouse required the services of a HAZMAT remediation team. Appliances and fabrics were irreparable. Ceiling fans, plumbing, floors (hard surfaces as well as carpet), and bricks needed to be replaced—in addition to the windows, blinds, fence, front door, and garage door. Essentially all of the personal property in the [H]ouse was destroyed, including an antique doll collection left to [] Baker by her mother. In

> total, the damage . . . was approximately $50,000.

(Dkt. #19 at pp. 4–5). The prospective homebuyers backed out of the sale. As is typical for homeowners' policies, because the Department is a government entity and caused the damage, insurance denied the claim.[1]

Two weeks later, Baker filed a claim for property damage with the City of McKinney (the "City"). The City replied in a letter that it was denying the claim in its entirety because "the officers have immunity while in the course and scope of their job duties" (Dkt. #19-4 at p. 2).

On March 3, 2021, Baker filed suit against the City for violations of the takings clauses of both the United States and Texas Constitutions. Baker alleges that extensive damage to her House resulted from the Department's standoff with Little. Specifically, Baker claims that: (1) every window needed replacing; (2) a hazmat remediation team had to clean the House due to the tear gas; (3) various appliances were destroyed; (4) the front and garage door needed replacing (5) tear gas cannisters had destroyed parts of the drywall; and

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[1] Homeowner's insurance did cover the cost of damages caused directly by Little—specifically, the cleanup of his body. The $50,000 in alleged damages does not include the cost of this cleanup.

(6) carpets, blinds, and ceiling fans needed replacing.

On November 11, 2021, the Court denied the City's Motion to Dismiss (Dkt. #23). On September 20, 2021, Baker filed the present motion (Dkt. #19), and on October 12, 2021, the City responded (Dkt. #20). On October 19, 2021, Baker replied (Dkt. #21). The City filed a sur-reply on October 25, 2021 (Dkt. #22). On December 3, 2022, the City filed its Answer (Dkt. #25). On December 6, 2021, the Court referred this case to mediation (as is standard) (Dkt. #26), but on February 22, 2022, Baker filed a notice with the Court that the parties had not reached an agreement (Dkt. #28). The City followed Baker's notice with a demand for trial by jury (Dkt. #29) and an opposed motion to reopen discovery (Dkt. #30). This case is set for trial by jury to begin on May 11, 2022.

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Summary judgment is proper under Rule 56(a) of the Federal Rules of Civil Procedure "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Substantive law identifies which facts are material. *Id.* The trial court

"must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment." *Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981).

The party seeking summary judgment bears the initial burden of informing the court of its motion and identifying "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" that demonstrate the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c)(1)(A); *Celotex*, 477 U.S. at 323. If the movant bears the burden of proof on a claim or defense for which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure all of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Where the nonmovant bears the burden of proof, the movant may discharge the burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000).

Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248–49). A nonmovant must present affirmative evidence to defeat a properly supported motion for summary judgment.

Anderson, 477 U.S. at 257. Mere denials of material facts, unsworn allegations, or arguments and assertions in briefs or legal memoranda will not suffice to carry this burden. Rather, the Court requires "significant probative evidence" from the nonmovant to dismiss a request for summary judgment. *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982) (quoting *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 114 (5th Cir. 1978)). The Court must consider all of the evidence but "refrain from making any credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

ANALYSIS

Baker asserts she is entitled to summary judgment on both her Fifth Amendment and Texas state law takings claims. The Court will address the merits of both claims but will first dispose of the procedural arguments the City raised in its response.

I. The City's Procedural Arguments

First, the City argues Baker's filing is a non-dispositive motion in excess of fifteen pages and, therefore, in violation of Local Rule 7(a)(1). Baker concedes that she violated Local Rule 7(a)(1) when she filed a 19-page partial motion for summary judgment, which this Court considers a non-dispositive motion. *See* E. D. TEX. CIV. R. 7(a)(2) ("Non-dispositive motions include, among others, motions to transfer venue, motions for partial summary judgment, and motions for

new trial pursuant to Fed. R. Civ. P. 59."). But as Baker points out, "courts in this district rarely strike briefing solely for exceeding page limitations—particularly in cases of good faith" (Dkt. #21 at p. 5 (citing *Ocwen Loan Servicing, LLC v. Heiberg*, No. 4:17-CV-690, 2020 WL 949207, at *4 (E.D. Tex. Feb. 4, 2020); *Vanderbol v. State Farm Mut. Auto Ins. Co.*, No. 4:19-CV-119, 2019 WL 6117355, at *1 n.1 (E.D. Tex. Nov. 18, 2019); *United States v. Cramer*, No. 1:16-CR-26, 2018 WL 7821138, at *1 (E.D. Tex. June 6, 2018); *S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.*, No. 4:08- CV-96, 2010 WL 1375177, at *2 (E.D. Tex. Mar. 31, 2010); *Mettler-Toledo, Inc. v. Fairbanks Scales, Inc.*, No. 9:06-CV-97, 2009 WL 10677858, at *2 (E.D. Tex. Jan. 5, 2009)). Baker's counsel originally intended to file a dispositive motion for summary judgment and later amended it because there were factual disputes regarding damages (Dkt. #21 at p. 5 n.1). Counsel admits he did not realize that partial and dispositive motions have different page limits under this Court's local rules (Dkt. #21 at p. 1 n.1). Accordingly, such error was not made in bad faith, which is further indicated by the small excess—only four pages—over the limit. The Court will not strike the motion and will consider it in its entirety.

Second, the City argues the Court may not consider portions of Baker's affidavit or an attachment to the affidavit of Baker's counsel, Jeffrey Redfern ("Redfern") because they contain hearsay statements that do not fall within any exception. The attachment to Redfern's affidavit that the City complains of is an

audio recording made by Cook on July 25, 2020, marked as Exhibit E because the Department's own records supply the same information. Thus, the Court need not, and will not, consider Exhibit E in determining its ruling on this motion. Similarly, the portions of Baker's affidavit that the City objects to simply represent Baker's understanding of what happened July 25, 2020, as relayed to her by Department officers. Again, the Court need not even consider Baker's affidavits because the Department's own records supply the same information. Moreover, none of the facts that may give rise to a takings claim appear to be in dispute.

Finally, the City requests the Court either defer considering the current motion, deny the motion, or allow the City time to take discovery. As an initial matter, the Court will consider this request for additional discovery under Federal Rule of Civil Procedure 56(d), which permits the Court to defer consideration of the present motion, deny the present motion, allow time for discovery, or issue any other appropriate order—but only "[i]f [the] nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." FED. R. CIV. P. 56(d). That said, the Court denies the City's request.

Pursuant to the Court's Scheduling Order, discovery was set to close on November 29, 2021 (Dkt. #18). However, the City filed its motion to dismiss for lack of jurisdiction and failure to state a claim on April 14, 2021 (Dkt. #6). While waiting for the Court's order,

the City failed to take depositions, request necessary documents, seek an extension of the discovery window or seek modification of the Court's Scheduling, or request a stay pending resolution of the Motion to Dismiss. As such, on November 18, 2021, when the Court issued its Order denying the City's motion (Dkt. #23), the City had conducted little to no discovery. While the Court acknowledges there were only eleven days left in the discovery period at the time it entered its Order on the motion to dismiss, the City could have requested an extension. But it did not. Ultimately, the City dragged its feet on engaging in the discovery process, thereby failing to collect evidence to support its defenses. The City's own failure to conduct discovery is no reason to deny the partial summary judgment or decline to consider it on the merits.

Even if the Court reopened discovery, it would be futile for the purposes of the current motion. In his affidavit, Defendant's counsel Edwin Voss ("Voss") asserts that conducting further discovery would allow the City to determine factual details regarding: Baker's request for police assistance during the underlying events; "other matters related to the issues of consent and intent"; the relationship among Little, Baker, and Cook; the value of the House; and "financial contributions and other offsets [Baker] may have received from any organizations, insurance companies, friends, family, and other sources" (Dkt. #20-1 at p. 2). For the reasons given below, additional discovery on these points would change nothing about the Court's analysis or conclusions.

First, Baker's motion only seeks a ruling to the City's liability. The Court, therefore, need not consider the value of Baker's property or any offset she may have received following the destruction of her home. Second, issues of consent are irrelevant to Baker's claims regarding the City's liability. "Baker claims that a taking occurred not from the police's entry into her home but, instead, from their destruction of it" (Dkt. #21 at p. 7). That a person consents to the police's entry into her home does not equate to her consent that the police destroy it. *Cf. Palacios Seafood, Inc. v. Piling, Inc.*, 888 F.2d 1509, 1515 (5th Cir. 1989) (finding "that the plaintiff consented to the governmental activity that proximately caused injury" because the plaintiff lobbied for a restoration project and then "declined the [government's] offer to stop construction when damage first appeared"). Third, the City provides no reason as to why the relationship among Baker, Cook, and Little is relevant to the Court's determination of liability.

The City has, therefore, not shown that the facts it seeks to establish in further discovery are essential to justify its opposition to this motion. For these reasons, the Court will deny the City's request and turn to the merits of Baker's motion.

II. Fifth Amendment Claim

Baker argues she is entitled to summary judgment on her claim under the Fifth Amendment to the United States Constitution because the City intentionally caused damage to her property in its pursuit

of an armed fugitive and denied her compensation for that damage.[2] Specifically, Baker contends the Fifth Amendment: (1) "applies to property that is damaged or destroyed, as well as property that is formally appropriated" (Dkt. #19 at p. 6); (2) "requires compensation when private property is intentionally or foreseeably damaged for the public's benefit" (Dkt. #19 at p. 8); and (3) "applies to actions taken under the government's 'police power'" (Dkt. #19 at p. 14). The City, incorporating the arguments set forth in its Motion to Dismiss (Dkt. #6),[3] argues Baker cannot establish a substantive Fifth Amendment takings clause violation because "a legitimate exercise of the City's police power through the operations of its police department . . . does not constitute a taking under the Fifth Amendment" (Dkt. #20 at p. 8).[4]

The City asks this Court to adopt what would constitute a *per se* rule: destruction to private property resulting from the exercise of valid police power

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[2] Baker brings a federal takings claim under the Just Compensation Clause of the Fifth Amendment to the United States Constitution, made binding on the States through the Fourteenth Amendment. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 623 n.1 (1981) ("The Fifth Amendment's prohibition applies against the States through the Fourteenth Amendment.").

[3] For this reason, the Court will refer to portions of the arguments set forth in the City's Motion to Dismiss, even though that motion has been resolved.

[4] The City also argues Baker cannot establish municipality liability under § 1983 (Dkt. #20 at p. 8). However, because such argument is not responsive to Baker's arguments, the Court will address and dispose of this point later in its analysis.

cannot constitute a Fifth Amendment taking under any circumstance. Baker does not contest that the Department's actions were valid exercises of the State's police power. Instead, Baker posits that a taking may occur in situations other than through the traditional eminent domain power. Thus, in this case, liability under the Fifth Amendment turns on a purely legal issue: whether a taking can occur where the government's destruction of property was done pursuant to a valid exercise of its police power. If the Court answers in the affirmative, it must then determine whether a taking occurred when the Department officers destroyed the House.

A. Whether Destruction Resulting From Exercises of Police Power is Categorically Non-Compensable Under the Fifth Amendment

Police powers are the fundamental ability of a government to enact laws in the public interest, although the term eludes an exact definition. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("An attempt to define its reach or trace its outer limits is fruitless[.]"). That said, "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power." *Id.* Here, there is no dispute that the invasion onto Baker's private property in order to apprehend Little and save his hostage was a legitimate exercise of the City's police power. However, the parties disagree on the effect—namely, whether the City's exercise of its police power bars Baker's takings

claim. On the one hand, the City contends that because the officers destroyed the House pursuant to the police power, it is categorically exempt from the Takings Clause. On the other hand, Baker argues the City is not exempt from the Takings Clause—the police power and eminent domain powers may co-exist. Neither the Supreme Court nor the Fifth Circuit have squarely decided one way or another. Thus, the Court will undertake its own analysis to determine what outcome best aligns with the Supreme Court's Takings Clause jurisprudence.

1. Supreme Court Takings Clause Jurisprudence

The Fifth Amendment to the United States Constitution prohibits the government from taking private property for public use without just compensation, pursuant to the Takings Clause.

U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The guarantee of the Takings Clause was designed to bar the United States from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40 (1960).

The Supreme Court has stated that a taking, within the meaning of the Takings Clause, includes any action the effect of which is to deprive the owner of all or most of his or her interest in the subject matter, such as destroying or damaging it. *U.S. v. Gen.*

Motors Corp., 323 U.S. 373 (1945). More specifically, "a property owner has suffered a violation of [her] Fifth Amendment rights when the government takes [her] property without paying for it." *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019).

A taking in violation of the Fifth Amendment may come in two forms—physical or regulatory. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings."). A physical taking is a "direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner. *Tahoe-Sierra*, 535 U.S. at 323 (quoting *United States v. Pewee Coal Co.,* 341 U.S. 114, 115 (1951)). A regulatory taking generally occurs where a state regulation "denies an owner economically viable use of his land." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). The type of taking alleged is also an often-critical factor, as it is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *United States v. Causby*, 328 U.S. 256 (1946). These principles of law are fundamental in the Supreme Court's Takings Clause jurisprudence. *Ark. Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

Indeed, the Supreme Court's physical takings jurisprudence is "as old as the Republic." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (citing *Tahoe-Sierra*, 535 U.S. at 322).

While most takings claims turn on situation-specific factual inquiries, *see Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978), the Supreme Court has drawn a handful of brightline rules. *Ark & Game*, 568 U.S. at 24. Relevant here, even a minimal "permanent physical occupation of real property" requires compensation under the Takings Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point*, 141 S. Ct. at 2071 (citing *Tahoe-Sierra*, 535 U.S. at 321). Examples of physical takings include formally condemning a property through the power of eminent domain, taking possession of property without acquiring title, or even by recurrent flooding as a result of building a dam. *Gen. Motors*, 323 U.S. at 374–75; *United Sates v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951); *United States v. Cress*, 243 U.S. 316, 328 (1917). These sorts of physical appropriations constitute the "clearest sort of taking." *Palazzolo v. Rhode Island*, 533 U. S. 606, 617 (2001). As such, the Supreme Court "assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071 (citing *Tahoe-Sierra*, 535 U. S. at 322).

Ignoring this jurisprudence, the City asks the Court to adopt a new brightline rule: destruction resulting from a legitimate exercise of the City's police power does not constitute a taking under the Fifth Amendment (Dkt. #20 at p. 8). However, the Court need not adopt a brand-new *per se* rule when the Supreme Court has already stated, in no uncertain terms, that in the case of a physical taking, the government must pay for what it takes. *See Cedar Point*, 141 S. Ct. at 2071.

2. *Lech v. Jackson*

The City relies on decisions from other circuits that have wholly banned recovery as a matter of law where the destruction of property was the result of a valid exercise of police power. *See Lech v. Jackson*, 791 Fed. App'x. 711 (10th Cir. 2019); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331 (7th Cir. 2011); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008). The most factually analogous to the case at bar is *Lech*.[5]

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[5] For the same reasons the Court does not find *Lech* persuasive, *Johnson* and *Amerisource* similarly fail to sway the Court. First, they too rely on dicta from *Bennis v. Michigan*, 516 U.S. 442 (1996). *Johnson*, 635 F.3d at 336; *Amerisource*, 525 F.3d at 1154. The Court discusses in much further detail below why *Bennis* is neither controlling nor persuasive here. Second, these cases do not present the same factual issues as this case. *Johnson*, 635 F.3d at 332– 33 (affirming decision not to compensate for government's seizure of personal items and minor damage to home incidental to a murder investigation); *Amerisource* 525 F.3d at 1150–51 (affirming no compensation for the

Appendix B

In *Lech*, officers from the city's police department responded to a burglar alarm at the Lech home and learned that an armed criminal suspect who was attempting to evade capture by the Aurora Police Department was inside the home. 791 Fed. App'x. at 713. To prevent the suspect from escaping, the officers positioned their vehicles in the driveway as a barricade. *Id*. Negotiators attempted to convince the suspect to surrender. *Id*. After these efforts to negotiate proved unsuccessful, officers employed increasingly aggressive tactics: fired several rounds of gas munition into the home, breached the home's doors with a BearCat armored vehicle so they could send in a robot to deliver a "throw phone" to the suspect, and used explosives to create sight lines and points of entry to the home. *Id*. When these tactics failed, officers used the BearCat to open multiple holes in the home. *Id*. Officers were eventually successful in apprehending the suspect, but, as a result of the 19-hour standoff, the home was rendered uninhabitable. *Id*. The City offered to help with temporary living expenses when the Lech's demolished and rebuilt their home, but it otherwise denied liability for the incident and declined to provide any further compensation. *Id*. The Tenth Circuit held the damage caused in the course of the arrest was not a taking for public use, but rather an exercise of the police power. *Id*. at 717. Though the Court recognizes the facts are substantially similar to

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government's seizure and retention of drugs past their expiration date while it investigated the pharmacy's principals). Third, these decisions predate the unequivocal holding in *Cedar Point*. 141 S. Ct. 2063.

what happened at the House, the Court nevertheless is not persuaded to follow the *Lech* decision for the reasons set forth below.

First, this Court is not bound by an unpublished opinion from a different circuit.

Second, and more importantly, *Lech*'s decision rests on an untenable analysis of police power and eminent domain. The Tenth Circuit first held that in the police power context, there is no distinction between physical and regulatory takings, and any taking pursuant to a police power is categorically noncompensable. *Id.* at 717. Second, the Tenth Circuit decided that the destruction of the Lech's home was a valid exercise of the state's police power. *Id.* at 718–19. Accordingly, the Tenth Circuit denied the Lech's takings claim. *Id.* at 719. As to the first part of *Lech*'s holding, the Tenth Circuit relies on the Supreme Court's decisions in *Mugler v. Kansas*, 123 U.S. 623, 668 (1887), and *Bennis v. Michigan*, 516 U.S. 442 (1996). As detailed below, the Court disagrees with the Tenth Circuit's reading of *Mugler* to eliminate any distinction between physical and regulatory takings.

i. *Lech* Conflates Physical and Regulatory Takings

The Tenth Circuit characterized *Mugler* as the first time the Supreme Court acknowledged a "hard line between those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power . . . in the

context of regulatory takings." *Id.* (quoting *Mugler*, 123 U.S. at 668–69). But the Supreme Court made no such distinction. Indeed, the *Lech* court improperly extended the Supreme Court's purported holding in *Mugler* to physical takings cases, rather than treating physical takings differently than their regulatory counterparts. *Id.*

It should first be noted that *Mugler* simply denied what would be characterized today as a regulatory takings claim. 123 U.S. at 667–68 (denying the Petitioner's case because it did not implicate as severe an intrusion with private property rights as the one in *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1871)). However, at the time *Mugler* was decided, a regulatory takings claim did not even exist. *Lucas v. S.C. Coastal Counsel*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property . . . or the functional equivalent of a practical ouster of the owner's possession."). Yet, *Lech* ignored these important contextual details.

Second, in contrast to the Tenth Circuit's uniform application of *Mugler* to both physical and regulatory takings, the Supreme Court in *Mugler* actually emphasized that regulatory takings and physical takings *should* be treated differently. 123 U.S. at 667–68 (emphasis added). The Supreme Court noted that governmental entities have a broad police power to prohibit individuals from doing that which would be prejudicial to the health, the morals, or the safety of the

public." *Id*. at 669. Stated simply, governmental entities have a broad power to regulate in the name of the public good. Indeed, the Supreme Court held when the government is acting for the public good, it should not be "burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Id.*

This decision is prudent in the regulatory context where enactment of a rule or regulation by a state pursuant to its police powers is likely to have "tangential," "unanticipated," and unquantifiable effects on the private use of property. *Tahoe-Sierra*, 535 U.S. at 324. Moreover, these unquantifiable effects can often be justified by pointing to the benefit to the public good. *Id.* at 324. That is not the case in the context of physical takings. 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, 311 (2021) (criticizing *Lech* and its implications). Physical invasions of property made pursuant to a state's police powers—Baker's case here—are "relatively rare, easily identified, and usually represent a greater affront to individual property rights," *Tahoe-Sierra*, 535 U.S. at 324. These physical invasions represent such a greater affront to individual property rights—as compared to regulatory takings—because they often involve an "unoffending property [being] taken away

from an innocent owner" with few easily identifiable benefits in return. *Mugler*, 123 U.S. at 669. In such cases, the property owner should be compensated for forfeiting the property for a public use.

Ignoring these key differences, the Tenth Circuit uniformly applied *Mugler*'s distinction between "'the state's power of eminent domain'—under which 'property may not be taken for public use without compensation'—and state's 'police powers'—which are not 'burdened with the condition that the state must compensate [affected] individual owners for pecuniary losses they may sustain'" to both physical and regulatory takings. *Lech*, 791 Fed. App'x at 715, 717 (quoting *Mugler*, 123 U.S. at 668–69). If applied, the Tenth Circuit's interpretation of *Mugler* would work error in cases such as this one, where there is a physical invasion of private property, not a regulatory diminishment of value of property. Compounding this error, the Tenth Circuit then pulled dicta from *Bennis* to bolster its distinction between a non-compensable police power claim and a compensable takings claim.

ii. *Lech* Improperly Relied on *Bennis v. Michigan*

Bennis involved a Michigan court order for the forfeiture of a car on public-nuisance grounds that was jointly owned by a husband and wife when the husband was caught in the car engaged in sexual activity with a prostitute. 516 U.S. at 443. The wife argued that the forfeiture, as applied to her, was an unconstitutional taking, but the Court disagreed. *Id.* at 452.

Appendix B

The Supreme Court stated, "[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. The cases the City points to all relied on that statement when they decided a taking could not occur, even where the government completely destroyed private property.

In total, the segment of the *Bennis* opinion relating to the Fifth Amendment is three sentences long. *Id*. Those three sentences are more accurately described as dicta, as they were not central to the holding. Emilio R. Longoria, *Lech's Mess*, 11 WAKE FOREST J. L. & POL'Y 297, 306 (2021). Accordingly, the sentences in *Bennis* on takings claims are not binding on this Court or any subsequent court. *Obiter dictum*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/obiter_dictum (last visited April 27, 2022) (noting that dictum is not legally binding).

To begin, the Tenth Circuit's suggestion that this dicta about the Fifth Amendment "implicitly" supports a "distinction" between eminent domain cases and police powers cases in the context of "physical taking[s]," *Lech*, 791 Fed. App'x. 716, overstates the Supreme Court's holding. As Justice Marshall explained in *Cohens v. Virginia*, a case's holding is treated with reverence because "[t]he question actually before the Court is investigated with care, and considered in its full extent." 19 U.S. 264, 399–400 (1821). "Other principles which may serve to illustrate [a case's holding]," like dicta "are considered in

their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Id*. This Court thus declines to accord as much weight to *Bennis* as the other circuits. Second, drawing a brightline rule, as the court in *Lech* did and as the City now proposes, also ignores major concerns which guided the *Bennis* decision.

In explaining its holding in *Bennis*, the Supreme Court relied heavily on three Supreme Court forfeiture cases from the nineteenth and early twentieth centuries: *The Palmyra*, 25 U.S. 1 (1827); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877); and *Van Oster v. Kansas*, 272 U.S. 465 (1926)). 516 U.S. at 146–48. In each of these cases, the Supreme Court upheld the uncompensated forfeiture of personal property used in committing a crime. *See The Palmyra*, 25 U.S. at 17–18; *see also Dobbins's Distillery*, 96 U.S. at 401–02; *see also Van Oster*, 272 U.S. at 468. However, the Supreme Court affirmed forfeiture without compensation for four specific reasons, which the court in *Lech* did not consider.

One reason was that the forfeited items presented a threat in and of themselves. *The Palmyra*, 25 U.S. at 8 ("The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the Island of Porto Rico."); *see also Dobbins's Distillery*, 96 U.S. at 396 ("[T]he real and personal property" seized was a distillery and the items necessary to run it, which was illegal at the time); *see also Van Oster*, 272 U.S. at 466 ("vehicle[] used in unlawful

transportation of liquor"). Second, the forfeited property in each case was entrusted to the criminal perpetrators as part of the criminal enterprise. *The Palmyra*, 25 U.S. at 13 (seizing property of the alleged pirates); *see also Dobbins's Distillery*, 96 U.S. at 396 (seizing real and personal property used to run the still belonged to the alleged criminals); *see also Van Oster*, 272 U.S. at 465–66 (seizing vehicle that owner entrusted to an associate who used it to illegally transport liquor). Third, forfeiting the property achieved "punitive and remedial" goals. *The Palmyra*, 25 U.S. at 15 (forfeiting the vessel served as punishment to the pirates); *see also Dobbins's Distillery*, 96 U.S. at 401–03 (forfeiting the still and its appurtenances served as punishment to the distillers); *see also Van Oster*, 272 U.S. at 465–66 (forfeiting the vehicle served as punishment to the alleged criminal). Finally, the property in question was evidence in the subsequent criminal prosecutions. *See The Palmyra*, 25 U.S. at 8 (the ship was evidence of privateering); *see also Dobbin's Distillery*, 96 U.S. at 396 (the site and tools used to distill were evidence of the crime of illegal production of alcohol); *see also Van Oster*, 272 U.S. at 465–466 (the vehicle was evidence of the crime of illegal transportation of alcohol).

Thus, uncompensated forfeiture in those situations was therefore justified to serve certain policy goals, like the security of property, criminal deterrence, and punishment. Furthermore, *Bennis* emphasized the limits on the government's police power: that any uncompensated forfeiture be proportional to

the health, safety, or welfare goals purportedly being achieved by a state. *Bennis*, 516 U.S. at 450–51. Imposing a brightline rule based on three sentences from an otherwise nuanced and detailed opinion would undermine ample Supreme Court caselaw and lead to inconsistent results. Yet that is what the Tenth Circuit did in *Lech*. Once the *Lech* court determined that physical appropriation through some power other than eminent domain is non-compensable, the court then turned to whether the officers destroyed the Lech home pursuant to the government's police power.

iii. *Lech* Failed to Consider Whether Government Action Taken Pursuant to Police Power Falls Within the Fifth Amendment's Public Use

The *Lech* court held that when law enforcement causes damage in the course of arresting a fugitive, it does so for the public good pursuant to its police power. 719 Fed. App'x at 718. The analysis ended there, without a determination of whether such action could also be for the public use and therefore within the eminent domain power.

The flaw in the Tenth Circuit's reasoning is that it focuses solely on the scope of the police power. *See* Zachary 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, 703 (2021). By ending its inquiry

upon finding that the actions were taken pursuant to the state's police powers, the *Lech* court impliedly asserted that the public good and public use categories are mutually exclusive. 719 Fed. App'x at 717 (relying on *Mugler*, 123 U.S. at 669). An assertion that the categories are mutually exclusive, effectively, sets the outer limits of public use somewhere before public good. Zachary Hunter, *You Break It, You Buy It*, 82 OHIO ST. L.J. 695, 703 (2021). However, the Supreme Court has adopted a much broader understanding of public use.

Kelo v. City of New London, 545 U.S. 469 (2005), exemplifies the Supreme Court's broad understanding of "public use." In *Kelo*, the city planned to take the plaintiffs' property and then redistribute it to a private pharmaceutical company. *Id.* at 474–75 ("The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract."). The city claimed that doing so was part of an economic development plan that would revitalize the "economically distressed city." *Id* at 472. The Supreme Court's majority opinion held that the city's actions fell within the scope of public use because the plan was designed to serve a "public purpose." *Id.* at 484. In that case, the Court equated public use with its "broader and more natural interpretation . . . as 'public purpose,'" a concept that is defined broadly and one that provides deference to legislative judgments. *Id.* at 480. This interpretation provides state governments with the ability to directly condemn properties under their power of

eminent domain, so long as it will afford any appreciable benefits to the community's welfare—a concept within the purview of a state's police powers. *Id.* at 483–85 (concluding, based on precedent, that the concept of public welfare is within public purpose and that appreciable benefits to the community serves such a purpose).

Similarly, over two decades earlier, the Supreme Court in *Hawaii Housing Authority v. Midkiff*, made explicit that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. 229, 240 (1984). This holding meant that "whatever the state may legitimately achieve through its power to regulate property under the police power, it may instead choose to do through the power to take property through eminent domain." JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, Property Law: Rules, Policies, and Practices 1503 (Rachel E. Barkow et al. eds., 7th ed. 2017).

Hawaii Housing relied on principles derived in *Berman v. Parker*. 467 U.S. at 239. In *Berman*, the Supreme Court noted that to assess whether an act serves a public purpose, it deals with "what traditionally has been known as the police power." *Berman*, 348 U.S. at 26. Once such act is within that authority, the right to realize it through the exercise of eminent domain is clear. *Id.* at 33. Thus, the Supreme Court has made clear, since 1954, that the phrase "public use" is to be interpreted expansively and in a manner that is coterminous with a state's police power. *Haw.*

Housing, 467 at U.S. 240 (citing *Berman*, 348 U.S. at 33). This interpretation allows the government to take properties in a wide variety of circumstances. *See Kelo*, 545 U.S. at 472–81. Thus, the narrow holding in *Lech* that support's the City's position is incongruent with Supreme Court precedent. Furthermore, when the implications of both a narrow and broad definition of public use are combined, the ramifications have the potential to undermine takings law altogether. Particularly in a case such as this one.

"If government was exempt from paying just compensation every time it exercised the police power, there would never be just compensation; the exception would swallow the rule." J.P. Burleigh, *Just Compensation and the Police Power*, U. CIN. L. REV. (Apr. 8, 2020), https://uclawreview.org/2020/04/08/just-compensation-and-the-police-power/. Consider the following scenario: A state decides that it would like to directly condemn a piece of private property. Given the Supreme Court's expansive definition of public use, the state can directly condemn the property so long as they cite to a purpose that falls within its police powers, as such powers are coterminous with public use. Zachary Hunter, *You Break It, You Buy It*, 82 Ohio St. L.J. 695, 706 (2021). This will allow the state to satisfy the Fifth Amendment's public use requirement. *Id*. Nevertheless, in the same case, the state can also claim that they are immunized from takings liability, as under the categorical police powers exception, it is not required to provide just compensation. Thus, the private landowner is left with a

scenario where it both loses its property and receives nothing in return, given the conflicting definitions of "public use." Not only is such a result fundamentally unfair, but it is also inconsistent with the Supreme Court's Takings Clause jurisprudence.

"This prohibition against ad hoc inquiries into whether a government's use of its police powers effected a taking will create a fundamental shift in how we interpret the Takings Clause." Emilio R. Longoria, *Lech's Mess*, 11 WAKE FOREST J. L. & POL'Y 297, 322 (2021). Consider what would have happened had the brightline holdings the City relies on in *Amerisource*, *Johnson*, and *Lech* applied to various historic Supreme Court cases, using *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), as an example. In *Pewee*, the United States used its police powers to take over operations of a coal mine whose workers had recently gone on strike. *Id.* at 114. The government argued that had it not taken action, the strikes might have curtailed coal production, thus impacting other war industries dependent on the mines. *Id.* at 115–16. Although the government's operation of these private mines was clearly authorized under the government's police powers, the Supreme Court nevertheless held that these actions effected a taking. *Id.* But, according to the City, the Supreme Court was wrong.

More importantly, were this rule applied here, Baker's constitutional protections under the Fifth Amendment would disappear. It cannot be the case that public good could be done at the cost of the individual. When the Court reads the decisions in *Lech*,

Johnson, and *Amerisource*, the Court is left with one question: "What is more terrifying: the fact that the government would have to pay a just amount for the property it destroys pursuant to its police powers, or that it would be exempt from paying a dime, regardless of the motivations behind its actions?" Emilio R. Longoria, *Lech's Mess*, 11 WAKE FOREST J. L. & POL'Y 297, 306 (2021).

The brightline rule the City advocates for undermines the Supreme Court's characterization of its own caselaw as "provid[ing] no support" for an approach that would "essentially nullify . . . limits to the noncompensable exercise of the police power." *Lucas*, 505 U.S. at 1026; *see also First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.") (internal quotations omitted).

3. Conclusion

The Supreme Court has repeatedly stated that the Takings Clause prevents the 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.'" *Penn Central*, 438 U.S. at 123 (quoting *Armstrong*, 364 U.S. at 49). The Supreme Court has also articulated a *per se* rule that applies here: in the case of physical appropriations by the government, the government must pay for what it takes. *Cedar Point*, 141 S. Ct. at 2071. The Court is not persuaded

to deviate from physical takings jurisprudence "as old as the Republic," *Tahoe-Sierra*, 535 U. S. at 322, especially considering the decisions the City relies on cherry-picks dicta from *Bennis* to produce a rule that undermines decades of Supreme Court Takings precedent. Thus, the Court does not find that the total destruction of private property pursuant to the government's exercise of its police power is categorically non-compensable under the Fifth Amendment. Rather, as the Supreme Court makes clear, takings claims typically turn on fact-specific inquiries. *See Penn Cent.*, 438 U.S. at 124.

B. Takings Clause Analysis

"[A] [t]akings [c]lause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation." *Knick*, 139 S. Ct. at 2181 (Kagan, J., dissenting) (citing *Horne v. Dep't of Agric.*, 569 U.S. 513, 525–26 (2013)). But "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense"; difficulty exists in "trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable." *Armstrong*, 364 U.S. at 48 (collecting cases). Here, no one contests the lawfulness of the officers' actions. The issue is the nature of the invasion. *See Cress*, 243 U.S. at 328 ("[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question

whether it is a taking.").

As a starting point, damage resulting from government action does not constitute a taking if it is "strictly consequential" or incidental to the government's action. *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 593–94 (1906) ("If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution."). In *Bedford v. United States*, the Supreme Court affirmed the decision of the lower court denying compensation. 192 U.S. 217, 225 (1904). There, riparian landowners on the Mississippi River sued the United States for the erosion and flooding of their lands allegedly caused by government works upriver. *Id.* at 223. The work consisted of a revetment built along one bank of the river, which did not change the course of the river but operated only to maintain the current course of the river. *Id*. If the revetment had not been built, the river would have continued to widen toward the Louisiana bank of the river. *Id*. The Supreme Court reasoned: "In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years." *Id.* at 225.

By contrast, in *United States v. Causby*, the Court found that frequent overflights by low- flying United States military aircraft resulted in a taking because the flights deprived the property owner of the customary use of his property as a chicken farm. 328 U.S.

256, 266 (1946). The Court emphasized: "[T]he damages were not merely consequential. They were the product of a direct invasion of respondents' domain." *Id*. Similarly, in *Cress*, the government raised the water of the Cumberland river above its natural level through the operation of a lock and dam, so that lands not normally invaded were subjected permanently to frequent overflows. 243 U.S. at 318. This action reduced the property value in half. *Id*. The findings made it plain that it was not a case of temporary overflow or of consequential injury but a condition of "permanent liability to intermittent but inevitably recurring overflows" and it was held that such overflowing was a direct invasion, amounting to a taking. *Id*. at 328.

In a similar vein to the determination of whether damage to property is a direct result of government action, another key consideration to the takings inquiry "is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Ark. Game and Fish*, 568 U.S. at 39 (citing *John Horstmann Co. v. United* States, 257 U.S. 138, 146 (1921)). *Horstmann* involved the government's diversion of water from one watershed to another, resulting in a general increase in ground water level and a 19-foot increase in two lakes (whose water levels had not fluctuated more than two feet in 29 years). 257 U.S. at 142–43. The plaintiffs claimed that this flooding and groundwater-level increase destroyed the value of their property. *Id.* at 143. The Supreme Court denied just compensation because it

determined that the government could not have foreseen the plaintiff's subsequent alleged loss. *Id.* at 146–47.

Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125 (1922), provides another example of damage to property that does not amount to a taking because it was neither intentional nor foreseeable. There, the government blasted the bed of a stream on the side of a privately-owned pier, causing portions of the pier to break off and fall into the water. *Id.* at 126. Justice Holmes, writing for the Supreme Court, stated that there might have been a taking if the government had deliberately inflicted the damage to property. *Id.* at 126. However, "this [was] an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States." *Id.* at 127.

The Court also finds *Sanguinetti v. United States*, 264 U.S. 146 (1924) instructive here. In *Sanguinetti*, the government constructed a canal to connect a slough and a river. 264 U.S. at 146. The claimant's land was positioned between the slough and the river above the canal. *Id.* The year after the canal's construction, a "flood of unprecedented severity" caused the canal to overflow onto the claimant's land; less severe flooding and overflow occurred in later years. *Id.* at 147. The Court held there was no taking. *Id.* at 149. "This outcome rested on settled principles of foreseeability and causation." *Ark. & Game*, 568 U.S. at 34. The Court emphasized that the Government did not

intend to flood the land or have "any reason to expect that such [a] result would follow" from construction of the canal. *Sanguinetti*, 264 U.S. at 148. "It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government." *Id*. at 149–50.

Accordingly, the principles derived from these cases guide the Court's decision in determining the nature of the Department's invasion. *See Cress*, 243 U.S. at 328. As such, if the destruction of the House was a direct result of the government's conduct, and that result was intentional or foreseeable, then the Department's conduct amounts to a taking. such conduct intentionally or foreseeably caused the destruction. Further, having already determined the police power and eminent domain power may co-exist, the Court finds helpful the Fourth Circuit's decision in *Yawn v. Dorchester County*, which demonstrates how this inquiry functions in the police power context. 1 F.4th 191 (2021).

In *Yawn*, the local government planned an aerial mosquito-spraying operation, prior to which the government "issued a press release . . . to numerous media outlets, including local television stations, newspapers, radio stations, and social media platforms" informing citizens of the plans and warning they take precautionary measures. *Id.* at 193. The pilot undertaking the operation had a map of all known beehives in the area "to determine when to turn off the sprayer during the flight" in an effort to avoid the bees. *Id.*

Identical mitigation efforts had been previously successful—but this time, the communication efforts did not reach two of the beekeepers. *Id.* When the pesticide spray killed a number of these keepers' bees, the keepers brought suit alleging a Fifth Amendment taking. The Fourth Circuit analyzed whether the death of the appellants' bees was the intended or foreseeable result of the aerial pesticide spray—and ultimately concluded it was not. For one, the government had issued a press release warning citizens to take precautionary measures. *Id.* at 195–96. Additionally, the government itself took measures to avoid spraying the pesticide over areas marked as beehive zones. *Id.* at 196. Because these efforts had previously worked, it was not foreseeable that they would fall short on this particular occasion. *Id.*

Turning now to the case at bar, the Court finds in this case that the destruction to Baker's home was intentional and foreseeable. Baker provided an abundance of evidence establishing that Department officers, among other things: (1) stormed the House; (2) broke windows; (3) knocked down the garage door; (4) knocked down the backyard fence; and (5) fired dozens of explosive tear gas cannisters into the home. Such actions were intentional, even if the Department's motives were to secure a threat to public safety.[6] The City itself indicates "the [Department]

[6] It is crucial to this analysis that intention not be conflated with motive. One can intend a specific action but have varying degrees of motive. Homicide in criminal law provides an example. One can intend to shoot someone for a number of reasons,

dr[ew] up plans" before busting into Baker's home to apprehend Little (Dkt. #6 at p. 22). As Baker notes, "if for some reason the [H]ouse did not sustain damage . . . then the [Department's] plan necessarily would have failed" (Dkt. #9 at p. 12). The resulting damage, therefore, can hardly be considered "incidental consequence[s] of the City's actions" (Dkt. #6 at p. 27). Like *Causby*, the damage to the House was "the product of a direct invasion" of Baker's domain. 328 U.S. at 266.

Even if the government did not intend to damage Baker's property, it was foreseeable that such damage would result when Department officers stormed the House, broke windows, knocked down the garage door, rammed down the backyard fence with a tank-like vehicle, and fired dozens of explosive tear gas canisters into the home without a degree of certainty that such actions would cause damage to the property. *See Chicago B. & Q.*, 200 U.S. at 593–94. In *Bedford*, the object of the construction was to prevent the navigable channel of the river from receding farther from the city located on the opposite bank from the land at issue. 192 U.S. at 218. The government was

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including to exact unlawful revenge or to lawfully defend oneself. Both are intentional, but the motives differ drastically. Similarly, in the context of intentional torts, the tort of battery does not require an intent to injure. Rather, one must merely intend an offensive touching. Here, the relevant inquiry is whether the destruction of the House was intentional and foreseeable—not whether the motive of the Department's officers was to destroy the House.

blasting the riverbed in *Keokuk* to deepen the river channel to permit the passage of vessels. 260 U.S. at 126. Finally, in *Sanguinetti*, government engineers constructed a canal below the landowner's property to help carry away water, but after floods of unprecedented severity, the capacity of the canal proved to be insufficient and overflowed onto the landowner's property. 264 U.S. at 147. The overflow was the result of the flood, not the canal itself. *Id.* In contrast to these examples, the object of the destruction of the House was the apprehension of Little, and such destruction was a direct result of the officers' actions.

Thus, the first element of a takings clause violation has been established. *Knick*, 139 S. Ct. at 2181. The government took Baker's property through the total destruction of the House in its pursuit to apprehend an armed fugitive.

The government must also deny the property owner just compensation in order to succeed on a takings claim. *Knick*, 139 S. Ct. at 2181. No one denies the City denied Baker any compensation—let alone *just* compensation. Therefore, the second prong is met. *Id.* Baker has sufficiently established that the City took her property without just compensation in violation of the Fifth Amendment. The City has not shown that there is a genuine issue of material fact that would affect a finding of liability. Therefore, the City is liable under the Fifth Amendment as a matter of law. The Court will next dispose of the City's remaining argument on Baker's takings claim.

Appendix B

C. Section 1983

Generally, a plaintiff seeking to establish liability under § 1983 must show that: (1) an official policy or custom, (2) promulgated by the municipal policy-maker, (3) was the moving force behind the violation of a constitutional right. *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) (requiring a plaintiff to show that a protected right was violated by the execution of the municipality's policy or custom in order to establish § 1983 liability against the municipality)); *see also Culbertson v. Lykes*, 790 F.3d 608, 628 (5th Cir. 2015). The City argues Baker cannot establish municipal liability under § 1983. Indeed, Baker's motion does not even mention these § 1983 requirements. However, in Baker's complaint, she brings her Fifth Amendment claim under both 28 U.S.C. § 1983 and the Fifth Amendment itself (Dkt. #1 ¶ 36). Baker's partial motion for summary judgment asks the Court to determine whether the City is liable under the Fifth Amendment *only* (Dkt. #19 at p. 2). Thus, § 1983 and the *Monell* doctrine are not relevant at this stage. Moreover, Baker does not need § 1983 to proceed with her Takings Clause claim.

Baker has previously cited the Court to case law highlighting the "self-executing character" of the Fifth Amendment right to just compensation. *See* (Dkt. #1 ¶ 36; Dkt. #9 at p. 19 (quoting *First Eng.*, 482 U.S. at 315). This argument has merit. If the Fifth Amendment is "self-executing" as Supreme Court jurisprudence suggests, it would seem a plaintiff could

recover monetary damages without the § 1983 vessel when a plaintiff brings a Fifth Amendment takings clause claim. In *First English*, the Supreme Court indicated that "a Fifth Amendment takings claim is self-executing and grounded in the Constitution, such that additional [s]tatutory recognition [is] not necessary." 482 U.S. at 315 (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (internal quotation marks omitted)); *see also United States v. Dickinson*, 331 U.S. 745, 748 (1947). Additionally, "[i]f there is a taking, the claim is 'founded upon the Constitution,'" *Causby*, 328 U.S. at 267, and "'the act of taking' is the 'event which gives rise to the claim for compensation.'" *Knick*, 139 S. Ct. at 2170 (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). At bottom, "the [Supreme] Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First Eng.*, 482 U.S. at 316 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984)); *Causby*, 328 U.S. at 267; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304–06 (1923).

Accordingly, the Court holds that, because the Fifth Amendment is self-executing, Baker's claim under the Fifth Amendment Takings Clause is not dependent upon the § 1983 vessel.[7] Accordingly, the

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[7] Legal scholarship supports this holding as well:

> The modern development of § 1983 has obscured the fact that the federal question statute was once the preferred vehicle for enforcing constitutional limits on state and local governmental action.…This

Court need not determine whether Baker established an official policy under *Monell*. The Court will now turn to Baker's Texas Takings Clause claim.

III. Article I, Section 17 of the Texas Constitution

In addition to her Fifth Amendment claim, Baker also seeks a finding of liability under the Texas Constitution. "The Texas Constitution provides that '[n]o person's property shall be *taken*, *damaged* or *destroyed* for or *applied* to public use without adequate compensation being made." *Sheffield Dev. Co. v. City*

> question is of particular concern in light of the resurgence of litigation to enforce what may loosely be called "economic" rights under the commerce, contract, takings, supremacy, and interstate privileges and immunities clauses. It is at least arguable that § 1983 was not intended to cover these rights, despite its express reference to "any rights, privileges, or immunities secured by the Constitution." Before the modern revival of § 1983, and in the absence of diversity, many such "economic" rights would have been actionable in federal court under section 1331 only.

Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1495 (1989); *see also Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 960 (1976) ("The taking cases may be rationalized on the ground that the [F]ifth [A]mendment's prohibition of taking of property without 'just compensation' is *sui generis* among constitutional rights in that it explicitly provides for a monetary remedy.") (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 723 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971); *Jacobs*, 290 U.S. at 16)).

of Glenn Heights, 140 S.W.3d 660, 669 (Tex. 2004) (quoting TEX. CONST. art. 1, § 17) (emphasis added). By contrast, the Fifth Amendment provides in pertinent part: "nor shall private property be *taken* for public use, without just compensation." U.S. CONST. amend. V (emphasis added). Thus, the Texas Constitution's Takings Clause differs from the Takings Clause set forth in the United States Constitution.

That said, the Texas Supreme Court has described Article I, Section 17 of the Texas Constitution as "comparable" to the Takings Clause of the United States Constitution. *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006). In addition, the Texas Supreme Court has characterized caselaw on takings under Article I, Section 17 as "consistent with federal jurisprudence." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012). Even so, the Texas Supreme Court has also recognized that the Texas Takings Clause provides broader protection in certain areas. *See Steele v. City of Hous.*, 603 S.W.2d 786, 789–91 (Tex. 1980) ("The underlying basis for compensating one whose property is taken or damaged or destroyed for public use may . . . be the same . . . . But the terms have a scope of operation that is different."). In fact, the Fifth Circuit understands Section 17 to "confer[] upon property owners greater rights of recovery against the government than its federal [F]ifth [A]mendment counterpart." *Palacios*, 888 F.2d at 1513.

Despite Section 17's apparent broad application, the Texas Takings Clause applies only to *intentional*,

not *negligent*, damage. *See Hale*, 146 S.W.2d at 737; *Steele*, 603 S.W.2d at 790–91. A plaintiff seeking recovery for a taking under Texas law must prove the government "intentionally took or damaged their property for public use, or was substantially certain that would be the result." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)). As such, "a taking cannot be established by proof of mere negligent conduct by the government." *Id.* (citation omitted). Rather, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004) (citing *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99 (Tex. 1961)). Importantly, "[o]nly affirmative conduct by the government will support a takings claim." *Kerr*, 499 S.W.3d at 799.

The City argues that Baker's claim under Texas law fails "because it is a sheer attempt to allege tort recovery in a claim wearing takings claim clothing" (Dkt. #6 at p. 23).[8] Baker responds that she has not alleged a claim for negligence (Dkt. #19 at p. 16). The Court agrees.

While negligence cannot serve as the basis for a takings claim under the Texas Constitution, the Court has already determined that the Department's

[8] The City does not specify the type of tort it believes Baker has attempted to bring.

destruction of the House was intentional and foreseeable.[9] Again, the Department officers planned to, and actually did: (1) storm the House; (2) break windows; (3) knock down the garage door; (4) knock down the backyard fence; and (5) fire dozens of explosive tear gas cannisters into the home. Such actions were intentional, even if the City's motives were to secure a threat to public safety. Even if the government did not *intend* to damage Baker's property to apprehend Little, the City was substantially certain such damage would result. *Gragg*, 151 S.W.3d at 555. It is unreasonable for the City to suggest the Department officers stormed Baker's House, broke the windows, knocked down the garage door, rammed down the backyard fence with a tank-like vehicle, and fired dozens of explosive tear gas cannisters into the home without a degree of certainty that such actions would cause damage to the property.

Lastly, Baker has established that the City took her property for a public use: apprehension of a dangerous fugitive whose freedom threatened the public. *See Steele*, 603 S.W.2d at 792 ("That the destruction was done for the public use is or can be established by proof that the City ordered the destruction of the property because of real or supposed public emergency to apprehend armed and dangerous men who had taken refuge in the house."). Baker has sufficiently established a takings claim under the Texas Constitution. Thus, the City is liable under Article I, Section 17 of the Texas Constitution for refusing to

[9] *See supra* pp. [57a-64a].

compensate Baker for the damage it caused her home as a matter of law.

CONCLUSION

It is therefore **ORDERED** that Plaintiff Vicki Baker's Motion for Partial Summary Judgment (Dkt. #19) is **GRANTED**. The Court finds the City liable for a taking under both the Fifth Amendment of the United States Constitution, made binding on the States through the Fourteenth Amendment, and Article I, Section 17 of the Texas Constitution.

IT IS SO ORDERED.

SIGNED this 29th day of April, 2022.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

VICKI BAKER,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	4:21-CV-00176
CITY OF MCKINNEY,	§	Judge Mazzant
TEXAS,	§	
Defendant.	§	
	§	
	§	

FINAL JUDGMENT

On June 20, 2022, this action came for trial before a jury. Both sides announced ready for trial and, following the presentation of evidence, the jury was instructed to answer certain questions. The jury returned a verdict on June 22, 2022. The jury found Defendant City of McKinney, Texas acted under color of state law when it violated Plaintiff Vicki Baker's constitutional rights under the Fifth Amendment of the United States Constitution by depriving her of her property without providing just compensation, and that this proximately caused Plaintiff Vicki Baker's damages. The jury awarded Plaintiff Vicki Baker $44,555.76 in just compensation for the cost of repairs to her real property, and $15,100.83 in just compensation for the loss in market value to her personal property. Plaintiff Vicki Baker elected to recover

under her claim brought under 42 U.S.C. § 1983.

It is therefore **CONSIDERED, ORDERED, AND ADJUDGED** that Plaintiff Vicki Baker recovers from Defendant City of McKinney, Texas a total judgment of $59,656.59 plus pre- and post-judgment interest thereon at the rate provided by law. Additionally, all costs of court spent or incurred in this cause are adjudged against Defendant City of McKinney, Texas

IT IS SO ORDERED.

SIGNED this 22nd day of June, 2022.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

VICKI BAKER,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	4:21-CV-00176
CITY OF MCKINNEY,	§	Judge Mazzant
TEXAS,	§	
Defendant.	§	
	§	
	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant's Renewed Motion for Judgment as a Matter of Law (Dkt. #84). Having reviewed the motion, responses, and applicable law, the Court finds that the motion should be **DENIED.**

BACKGROUND

This case arises from the uncompensated damages to Vicki Baker's ("Baker") home following the City of McKinney Police Department's (the "Department") standoff with an armed fugitive. On July 25, 2020, Department officers attempted to draw a fugitive out of Baker's home. Despite the Department's efforts, the fugitive would not leave the home. Department officers then forcefully entered the home by breaking

down both the front and garage door and running over the backyard fence with a tank-like vehicle known as a BearCat. Upon entry, Department officers found the fugitive had taken his own life. Baker requested the City compensate her for the damages to her home. The City refused.

On March 3, 2021, Baker filed the instant action against the City alleging violations of the Takings Clause of the United States and Texas Constitutions. Baker asserted her federal claim through both the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983. At the summary judgment stage, the Court determined as a matter of law that the City's actions constituted a taking of Baker's property without just compensation in violation of her rights under the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution (Dkt. #51). Consequently, the only issues remaining for a jury to decide were (1) whether the City was liable under § 1983, and (2) the amount of just compensation Baker was entitled to for the City's violation of her constitutional rights.

On June 20, 2022, this case went to trial. Two days later, the jury returned its verdict (Dkt. #74). The jury found the City was liable under § 1983 because it acted under color of state law when it violated Baker's constitutional rights under the Fifth Amendment of the United States Constitution by depriving her of her property without providing just compensation, and that this violation proximately caused Baker's damages. The jury awarded Baker $44,555.76 in just

compensation for the cost of repairs to her real property, and $15,100.83 in just compensation for the loss in market value to her personal property. Baker elected to recover damages pursuant to § 1983.

During the trial, the City requested judgment as a matter of law on Baker's § 1983 claim. The City argued that Baker did not plead a § 1983 claim against the City, and that Baker did not establish § 1983 liability against the City (Dkt. #69). The Court orally denied the motion in full on June 22, 2022. On July 20, 2022, the City filed the present renewed motion for judgment as a matter of law (Dkt. #84). On August 3, 2022, Baker filed her response (Dkt. #90). On August 10, 2022, the City filed a reply in support of its motion (Dkt. #91).

LEGAL STANDARD

After "a party has been fully heard on an issue during a jury trial," the court may "grant a motion for judgment as a matter of law against the party" so long as "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). Upon a party's renewed motion for judgment as a matter of law following a jury verdict, the Court should properly ask whether "the state of proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict." *Am. Home Assurance Co. v. United Space All.*, 378 F.3d 482, 487 (5th Cir. 2004); FED. R. CIV. P. 50(a). "The grant or denial of a motion for judgment as a matter of law is a procedural

issue . . . reviewed under the law of the regional circuit in which the appeal from the district court would usually lie." *Finisar Corp. v. DirectTV Grp., Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). "A JMOL may only be granted when, 'viewing the evidence in the light most favorable to the verdict, the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at any contrary conclusion.'" *Versata Software, Inc. v. SAP Am., Inc.*, 717 F.3d 1255, 1261 (Fed. Cir. 2013) (quoting *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 838 (5th Cir. 2004)).

Fifth Circuit precedent requires a court be "especially deferential" to a jury's verdict. The court must not reverse the jury's findings unless substantial evidence does not support those findings. *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 499 (5th Cir. 2012). "Substantial evidence is defined as evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Threlkeld v. Total Petroleum, Inc.*, 211 F.3d 887, 891 (5th Cir. 2000). A motion for judgment as a matter of law must be denied "unless the facts and inferences point so strongly and overwhelming in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Baisden*, 693 F.3d at 498 (citation omitted). However, "[t]here must be more than a mere scintilla of evidence in the record to prevent judgment as a matter of law in favor of the movant." *Arismendez v.*

Nightingale Home Health Care, Inc., 493 F.3d 602, 606 (5th Cir. 2007).

In evaluating a motion for judgment as a matter of law, a court "cannot substitute other inferences that [the court] might regard as more reasonable." *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 451 (5th Cir. 2013) (citation omitted). Further, "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "[T]he court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* at 151 (citation omitted).

ANALYSIS

The City moves for judgment as a matter of law on two grounds: (1) Baker did not adequately plead a § 1983 claim against the City, and (2) Baker did not establish § 1983 liability against the City because she failed to show that her alleged constitutional injury was caused by an official City policy, practice, or custom promulgated by a City policymaker (Dkt. #84). The Court will address each issue in turn.

Appendix D

I. Whether Baker Adequately Pleaded a § 1983 Claim

On this issue, the City first contends that Baker did not adequately plead a claim under § 1983 in her complaint. Baker responds that the sufficiency of allegations made in a complaint becomes irrelevant after the issues have been tried and decided by a jury. However, the Court need not decide whether the sufficiency of the claims raised in Baker's complaint holds any relevance at this stage as this issue was definitively decided by the Court's Order on the City's Motion to Dismiss (Dkt. #23). There, the Court held that Baker's complaint adequately stated a claim for relief under § 1983 (Dkt. #23 at pp. 10–13). The Court will briefly summarize the grounds on which that decision was made.

Section 1983 provides a cause of action for individuals who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of state law. 42 U.S.C. § 1983. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

Under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), to establish § 1983 liability against a municipality, a plaintiff must show that the protected right was violated by the execution of the

municipality's policy or custom. A "policy" can be established by (1) "a policy statement formally announced by an official policymaker," or (2) a "persistent widespread practice of city official or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 168–69 (5th Cir. 2010) (quoting *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc.)).

The Supreme Court and the Fifth Circuit have recognized that many different forms of conduct and action can constitute a policy, practice, or custom depending on the circumstances. For example, "a single unconstitutional action by a municipal actor may give rise to municipal liability if that actor is a final policymaker." *Bolton v. City of Dall.*, 541 F.3d 545, 548 (5th Cir. 2008) (citing *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005) (emphasis added)); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) ("A municipality may be liable for a *single decision* by its properly constituted legislative body . . . because even a single decision by such a body constitutes an act of official government policy."). A policy can also be indicated by "formal rules and understandings . . . that . . . establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 469. Or the policy could be "conduct that has become a traditional way of carrying out policy and has acquired the

force of law." *Bennett v. City of Slidell*, 728 F.2d 762, 758 (5th Cir. 1984). Similarly, a custom includes unlawful acts that are "so widespread as to have the force of law," even if the acts have never been "formally approved by an appropriate decisionmaker." *Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown*, 520 U.S. 397, 404 (1997).

Baker stated in her complaint that she was bringing a constitutional claim for violation of her rights guaranteed by the Takings Clause of the Fifth Amendment under both the Fifth Amendment itself and § 1983. Baker then alleged that after the City's destruction of her property, she "requested compensation from the City of McKinney, but the City denied the request, stating that there was 'no liability on the part of the City or any of its employees'" (Dkt. #23 at pp. 12–13). The Court found these assertions sufficient to plausibly allege a "single unconstitutional action by a municipal actor"—that is, a denial of the constitutionally mandated just compensation following a taking by the government. *Bolton*, 541 F.3d at 548.

To warrant reconsideration of an issue, the movant must do something more than simply restate, recycle, or rehash arguments that were previously made. *Krim v. pcOrder.com, Inc.*, 212 F.R.D. 329, 331 (W.D. Tex. 2002) (citations omitted). Yet in the present motion, the City has not raised any arguments related to whether Baker adequately pleaded a claim under § 1983 in her complaint that the Court did not already consider and deny in its Order on the City's Motion to Dismiss. Accordingly, the Court finds

reconsideration of this issue is not warranted.

Next, and presumably in the alternative, the City contends that Baker failed to assert a claim under § 1983 in the Pretrial Order (Dkt. #56). Specifically, the City argues that because the Pretrial Order takes the place of the parties' underlying pleadings, and because Baker failed to assert a § 1983 claim or allege that her § 1983 injury was caused by a City custom or policy, the claim was waived and should be dismissed (Dkt. #84 at p. 12). The Court disagrees.

"A court may instruct the jury on an issue only if the issue has been properly tried by the parties." *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013) (citing *Thrift. v. Estate of Hubbard*, 44 F.3d 348, 355 (5th Cir. 1995)). It is well-settled that "a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial." *McGehee v. Certainteed Corp.*, 101 F.3d 1078, 1080 (5th Cir. 1996). As a result, "once the pretrial order is entered, it controls the course and scope of the proceedings under Federal Rule of Civil Procedure 16(e), and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint." *In re Katrina Canal Breaches Litig.*, 309 F. App'x 836, 838 (5th Cir. 2009) (quoting *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998)). "An issue or theory not even implicitly included in the pretrial order is barred unless the order is later amended 'to prevent manifest injustice.'" *Morris v. Homco Int'l, Inc.*, 853 F.2d 337, 332 (5th Cir. 1988).

Here, Baker's claim under § 1983 was not artfully pleaded in the Pretrial Order, but the Pretrial Order was not completely devoid of its mention either. On the first page of the Pretrial Order under the heading "Statement of Jurisdiction," Baker stated:

> Plaintiff brings this action under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, § 17 of the Texas Constitution

(Dkt. #56 at p. 1). Further, as included in the "contested issues of fact and law" in the Pretrial Order, the parties' agreed that at trial, the following contested factual and legal issues would be decided:

> 7. Whether there is an unlawful City policy, practice or custom that was the moving force behind any constitutional or statutory right violation alleged by Plaintiff
>
> 8. Whether the acts or omissions complained of by Plaintiff were proximately caused by any constitutionally defective policy, practice or custom of the City
>
> . . .
>
> 13. Whether the City of McKinney has a policy, practice or custom of compensating owners for property damage

> foreseeably resulting from lawful police activities

(Dkt. #56 at p. 5). Whether Baker could demonstrate the existence of a lawful City policy, practice, or custom was relevant only to her claim under § 1983. *See generally United States v. Shanbaum*, 10 F.3d 305, 312–13 (5th Cir. 1994) ("Whether the parties recognized that an unpleaded issue entered the case at trial often depends on whether the evidence that supports the unpleaded issue is also relevant to another issue in the case."). Thus, while Baker's allegations in the Pretrial Order related to her § 1983 claim were admittedly scant, the Pretrial Order more than implicitly indicated that Baker intended to pursue a claim under § 1983 at trial. *Morris*, 853 F.2d at 332; *see also Homoki*, 717 F.3d at 402 (quoting *Dussouy v. Gulf Cost Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981) ("So long as a pleading alleges facts upon which relief can be granted, it states a claim even if it 'fails to categorize correctly the legal theory giving rise to the claim.'")).

Moreover, a pretrial order is intended to "recit[e] the action taken" by the parties and the Court at the pretrial conference. FED. R. CIV. P. 16(d); *see also Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 n.13 (5th Cir. 1985) ("Each party has an affirmative duty to allege at the pretrial conference all factual and legal bases upon which the party wishes to litigate the case."). Accordingly, the Fifth Circuit has examined exchanges between the court and counsel during a pretrial conference to provide further support

for the appropriate interpretation of a pretrial order. *Flannery v. Carroll*, 676 F.2d 126, 130 (5th Cir. 1982).

Here, discussions at the pretrial conference with Baker's counsel, Jeffrey Redfern, demonstrate that Baker intended to pursue her § 1983 claim:

> The Court: . . . And, then, how much time do you want for opening statements?
>
> Mr. Redfern: I think, your Honor that depends on what issues there are to be tried. It's still not clear to us whether the *Monell* issue is open or if it's been mooted. We believe we get all the relief we need under the Fifth Amendment and under the Texas Constitution. We don't want to end up in a situation where we go up to the Fifth Circuit and the Fifth Circuit says, you know what, we don't think the Fifth Amendment is self-executing and you've waived your 1983 claim because you didn't try that.

> The Court: Well, I think that's really your choice because - - I mean, the Court held it was self-executing; but if the Fifth Circuit disagrees, you've alleged both in the alternative. So that's really up to you whether - -
>
> Mr. Redfern: Okay.
>
> The Court: - - you want to rest on it being self-executing and hope you win that.
>
> Mr. Redfern: If it's our choice, your Honor, then we'll try the *Monell* issue as well.

(Dkt. #58 at pp. 3:24–4:23). Further, based on statements from the City's counsel, Ed Voss, the City clearly understood this to be the case, despite disagreeing with the Court's decision on the matter:

> Mr. Voss: And if I could, just for the record, go ahead and lodge an objection on the *Monell* issues. I don't - - the City doesn't believe they've been adequately pled or presented in this case, so I just wanted to

let the Court know we are objecting to the *Monell* issue and we think that the only thing left to try, as presented in the motion for partial summary judgment after the takings claim determination, is - -

The Court: Well - -

Mr. Voss: - - the question of damages.

The Court: - - I mean, they pled in the alternative, so they pled a *Monell* claim.

Mr. Voss: Well, it's - - I'm just letting the Court know our position is they have not adequately pled a *Monell* claim.

The Court: Well - - and did you file a 12(b)(6) challenging it?

Mr. Voss: It wasn't pled so - -

The Court: No, it most certainly was pled. Without question, it's pled in the alternative. I mean, I pulled the

> Complaint; and they basically - - paragraph 36 says, "This constitutional claim is brought under both 28 USC, Section 1983, and the Fifth Amendment itself." So they have asserted, and the only way to assert 1983 is a *Monell* claim.
>
> Mr. Voss: Thank you, your Honor. I have nothing else to add to that.

(Dkt. #58 at pp. 7:9–8:10).

Based on these statements made by counsel at the pretrial conference, it cannot be argued that Baker no longer intended to pursue her claim under § 1983 at trial, or that the City lacked awareness that this claim would be adjudicated at trial. Thus, when the Pretrial Order is read in conjunction with the representations of the parties at the pretrial conference, it is evident that Baker did not waive her claim under § 1983 and that the City was on notice of it. *See, e.g.*, *Excel Modular Scaffold & Leasing Co. v. O.S.H.A.*, 943 F.3d 748, 755 (5th Cir. 2019) (holding defendant waived affirmative defense where defendant omitted defense from the pretrial order and repeatedly failed to mention its desire to pursue the defense at the pretrial conference despite being afforded multiple opportunities); *SRSB-IV, Ltd. v. Cont'l Savs. Ass'n*, 33

F.3d 1379, 1994 WL 487239, at *3 (5th Cir. 1994) (unpub.) (holding that party waived issues of liability and damages where party did not include the issues in the pretrial order *and* subsequently failed to raise the issues at the pretrial conference).

Furthermore, while it is true that pretrial orders generally control the course and scope of the issues presented at trial, *In re Katrina*, 309 F. App'x at 838, "[t]he decision to bind the parties to the [pretrial] order is viewed as a matter of judicial discretion." *Aker Sols., Inc. v. Shamrock Energy Sols., LLC*, No. CV 16-2560, 2019 WL 7288942, at *4 (E.D. La. Dec. 30, 2019), *aff'd sub nom.*, 820 F. App'x 243 (5th Cir. 2020) (quoting 6A CHARLES WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1527 (3d ed. 2010 & Supp. 2018)); *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1118 (5th Cir. 1983) (recognizing that "[a] trial court has broad discretion in deciding whether to admit evidence on an issue not included in the pretrial order."). The "proper treatment of the pretrial order after entry requires an appropriate balance between firmness to preserve the essential integrity of the order, and adaptability to meet changed or newly discovered conditions or to respond to the special demands of justice." *Central Distribs., Inc. v. M.E.T., Inc.*, 403 F.2d 943, 944 (5th Cir. 1968). Thus, in appropriate cases, a district court may require less than strict adherence to a pretrial order where, for example, an omission from the pretrial order was based upon a misunderstanding. *SRSB-IV, Ltd.*, 33 F.3d at *3.

Such is the case here. As represented at the pretrial conference, it was unclear to Baker's counsel whether Baker's § 1983 claim was fully resolved by the Court's Order on Plaintiff's Motion for Partial Summary Judgment. As soon as the Court confirmed that her § 1983 claim had not been fully resolved, Baker's counsel unambiguously indicated their intent to present the claim to the jury (Dkt. #58 at p. 4:22–23 ("If it's our choice . . . then we'll try the *Monell* issue")). Accordingly, to the extent the allegations in the Pretrial Order insufficiently pleaded Baker's claim under § 1983, the Court finds that the "special demands of justice" necessitate a less than strict adherence to the Pretrial Order. *Central Distribs., Inc.*, 403 F.2d at 944; *SRSB-IV, Ltd.*, 33 F.3d at *3. The Court finds, therefore, that the City is not entitled to judgment as a matter of law on this issue.

II. Whether Baker Established § 1983 Liability

The City makes two arguments on this point—(1) that Texas state law, not a City policy, required the City to deny Baker compensation, and (2) that Baker did not establish the City had a policy, custom, or practice promulgated by a City policymaker that led to the denial of her claim. The Court addresses each of these arguments below.

A. Whether Texas law precluded the City from justly compensating Baker under § 1983

The City first argues that any § 1983 injury to

Baker was not caused by a policy, practice, or custom of the City because Texas law, not City policy, required the City to deny compensation to Baker (Dkt. #69 at pp. 14, 16 ("The City denied her property damage claim because state law required non-payment.")). Baker responds that this Court correctly held that Texas law obligates the City to compensate Baker, and thus the denial of compensation to Baker is attributable to a City policy, not state law (Dkt. #90 at p. 2).

Throughout the pendency of this ligation, the City has maintained—and continues to do so—that it cannot compensate Baker for her damages without violating the Texas state law. First, the City maintains that the Texas Tort Claims Act shields a municipality from claims like Baker's. *See* TEX. PRAC. & REM. CODE § 101.025. Specifically, the City posits that where a municipality has not consented to being sued, the municipality is immune from liability for certain intentional torts, including "tortious intentional law enforcement actions" (Dkt. #84 at p. 14). Further, the City points to Article III, § 52 of the Texas Constitution, which states that "the Legislature shall have no power to authorize any county, city, [or] town . . . of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation, whatsoever." Based on these provisions, the City contends that because Baker's damages were caused by the intentional torts of Department officers, and the City did not consent to liability, the Texas Tort Claims Act precludes a liability finding

against the City under § 1983. Further, the City claims that were it to use public funds to compensate Baker anyway for a claim on which the City is not liable, this would constitute a gift or donation in violation of Article III, § 52 of the Texas Constitution.

The Court discussed the City's obligations under Texas law in its Order denying Defendant's Motion to Dismiss (Dkt. #23 at pp. 10–11). There, the Court rejected the very same argument the City now puts forth. The Texas Tort Claims Act is inapplicable to this case for a simple reason—Baker sought recovery not for the Department's entry into and damage of her home but, instead, from the City's denial of compensation for those damages which constituted a taking. *See John Corp. v. City of Hous.*, 214 F.3d 573 (5th Cir. 2000) (recognizing that "a violation of the Takings Clause does not occur until just compensation has been denied."). Put differently, Baker did not sue the City under § 1983 to recover for damages to her home on the grounds that the City was vicariously liable for the officers' actions. Had Baker brought such a claim, not only would that claim fall within the scope of the Texas Tort Claims Act, the claim would not be actionable under § 1983. *See Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009) (citing *Monell*, 436 U.S. at 691) (recognizing that the theory of *respondeat superior* is insufficient to establish a municipality's liability in § 1983 cases). But as the Court explained, because Baker sought to hold the City liable for denying compensation under the Fifth Amendment, rather than to hold the City vicariously liable for the officers'

actions in destroying her property, the City could be held liable under § 1983. Consequently, because the City is not immune from liability under the Texas Tort Claims Act, the City's argument that compensating Baker would violate Article III, § 52 of the Texas Constitution also fails.

B. Whether the City denied compensation based on a City policy, custom, or practice promulgated by a City policymaker

The City contends that Baker failed to establish that a policymaker of the City implemented or executed a policy, practice, or custom. Specifically, the City argues that "[c]ompliance with state law is not an actionable municipal 'policy' sufficient to satisfy § 1983 requirements" (Dkt. #84 at p. 14), and thus no City employee can be considered a final policymaker for the City on this issue. As made clear above, Texas state law did not mandate the City deny Baker's claim. Accordingly, the Court finds this argument is wholly without merit.

Regardless, Baker responds that she presented sufficient evidence at trial that the City's denial of just compensation was based on a City policy promulgated by a City policymaker. The Court agrees. During her case-in-chief, Baker called Tami Levens ("Levens") to testify, a senior risk analyst for the City. Levens testified that she is the only City official who handles claims brought against the City for property damages, and thus is the only employee of the City who would have information on the City's policies and

practices for handling such claims (Dkt. #87 at p. 119:4–13). Additionally, Levens stated that once she decides to deny a claim, there is no other individual or official at the City that is designated to review or question her decision (Dkt. #87 at p. 123:22–25). Therefore, once Levens denies a claim, that denial operates as the City's final decision on the claim.

Levens described the City's standard practice for processing claims. If an individual has a potential claim against the City for property damage, they are directed to contact Levens (Dkt. #87 at p. 120:8–22). Once Levens is contacted, Levens sends the claimant a claim form to fill out (Dkt. #87 at pp. 120:23–121:6). Once the claimant returns the claim form, Levens sends the form, as well as any associated police reports, to the City's insurance carrier, TML (Dkt. #87 at p. 121:11–17). However, the City's policy with TML only provides coverage for instances of non- intentional property damage (Dkt. #87 at p. 122:9–15). As a result, if a claimant submits a claim for damages intentionally caused by the City or its employees, TML will not cover the claim (Dkt. #87 at p. 122:13–16). If TML does not cover the claim, the City will not compensate the claimant for their damages (Dkt. #87 at p. 124:1–9). In other words, if TML does not cover the claim, the City will not otherwise examine whether it is liable for the claimant's losses. This has been the City's unwavering custom for at least fifteen years—that is, the entire time that Levens has worked for the City (Dkt. #87 at p. 121:19–22).

Levens then explained that these are the same

policies she followed in processing, and ultimately denying, Baker's claim (Dkt. #87 at pp. 126:2–129:13). Levens admitted that in her first communication with Baker—before Baker's claim form had even been submitted to TML— Levens stated that she did not think the City would pay for the damages to Baker's home (Dkt. #87 at pp. 126:22–127:2). Later in the process, TML notified Levens that Baker's claim was not covered under the City's policy with TML (Dkt. #87 at p. 129:19–20). Upon receiving this information, Levens filed the denial in Baker's case file and closed the claim (Dkt. #87 at p. 129:7–17).

According to Levens, the City denies claims like Ms. Baker's based on the City's belief that it is immune from liability under the Texas Tort Claims Act:

> Q: . . . I just want to clarify whatever the reason is for the City's policy, the City has a policy and practice of not compensating for intentional property damages. We do agree with that?
>
> A: Yes, sir. We do not pay for anything that we are not liable for.
>
> Q: And you never have.
>
> A: No, sir. We do not pay for anything that we are not liable for. Anything that we are immune from, we do not pay.

> Q: Anything the City thinks it's immune from, it doesn't pay for; correct?
>
> A: Anything that we think we are immune from, we do not pay for.

(Dkt. #87 at p. 133:6–20). Levens then concluded her testimony with an all-too-willing admittance that the City *never* pays claims like Ms. Baker's. In fact, Baker's counsel asked Levens if, according to the City's standard practice, should a claim identical to Ms. Baker's be filed tomorrow, whether the City would pay a dime (Dkt. #87 at pp. 133:25–134:3). Levens confidently and simply responded, "No, sir" (Dkt. #87 at pp. 133:25–134:4).

As the Court previously established, municipal liability under § 1983 can arise under many different types of a policy, practice, or custom depending on the surrounding circumstances. Levens' testimony sufficiently demonstrates that her conduct was taken in accordance with a City policy, practice, or custom. For example, a policy can be "formal rules and understandings . . . that . . . establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 469. Levens testified that for the past fifteen years, the City's standard policy applied to every claim for intentional damages is to request a claim form, open a file on the claimant, send the claim form to TML, then deny the claim and close the claimant's file once TML states coverage is lacking. A policy can be "conduct that has

become a traditional way of carrying out policy and has acquired the force of law." *Bennett*, 728 F.2d at 758. Levens testified that if TML states coverage is lacking on a claim for intentional damage, the City will never assess whether it is liable or should pay the claim anyway. Instead, the City will *always* deny the claim.

A policy can also arise from a single unconstitutional action by a municipal actor if that actor is a final policymaker. *Bolton*, 541 F.3d at 548; *Woodard*, 419 F.3d at 352; *Pembaur*, 475 U.S. at 480. However, "[t]he Supreme Court has cautioned that the existence of a policy or custom should not be inferred from a single act of a lower level [city] officer, but should only be found on evidence of wrong which can be fairly attributed to municipal policymakers." *Wooden v. City of Longview*, 683 F. Supp. 1108, 1114 (E.D. Tex. 1987) (citing *City of Okla. City v. Tuttle*, 471 U.S. 808 (1985)). But Levens was no low-level officer. Levens was the *only* City official with knowledge of the City's policies and practices for handling claims for property damage (Dkt. #87 at p. 119:4–13). Levens was the *only* City official responsible for intaking and processing claims for property damage caused by the City, including Baker's claim (Dkt. #87 at p. 121:3–22). And Levens was the *only* City official designated to make a final decision on these claims (Dkt. #87 at pp. 129:14–130:2). Thus, Baker's evidence sufficiently established at trial that, related to the City's denial of Baker's claim, Levens was the municipal policymaker. Therefore, Levens' actions taken in that role

may properly be considered a policy, practice, custom for purposes of establishing § 1983 liability. *Bolton*, 541 F.3d at 548; *Woodard*, 419 F.3d at 352; *Pembaur*, 475 U.S. at 469.

Levens unquestionably established that the City's policy or practice is to deny claims like Ms. Baker's based on the City's *belief* that it is immune from liability for these claims under Texas state law. But as the Court has concluded time-and-time again, Texas state law does not shield the City from liability under § 1983 in this case. Thus, the only reasonable conclusion left remaining is that it is simply the City's policy to refuse compensation for claims like Ms. Baker's, regardless of the circumstances. Such a policy flies in the face of the just compensation demands of the Fifth Amendment, and therefore, satisfies the requirements of § 1983. Accordingly, the City's motion for judgment as a matter of law on this issue is denied.

CONCLUSION

It is, therefore, **ORDERED**, that Defendant's Renewed Motion for Judgment as a Matter of Law (Dkt. #84) is **DENIED.**

IT IS SO ORDERED.

SIGNED this 26th day of August, 2022.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

VICKI BAKER,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	4:21-CV-00176
CITY OF MCKINNEY,	§	Judge Mazzant
TEXAS,	§	
Defendant.	§	
	§	
	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant's Motion for New Trial (Dkt. #85). Having reviewed the motion, responses, and applicable law, the Court finds that the motion should be **DENIED.**

BACKGROUND

This case arises from the uncompensated damages to Vicki Baker's ("Baker") home following the City of McKinney Police Department's (the "Department") standoff with an armed fugitive. On July 25, 2020, Department officers attempted to draw a fugitive out of Baker's home. Despite the Department's efforts, the fugitive would not leave the home. Department officers then forcefully entered the home by breaking down both the front and garage door and running over

the backyard fence with a tank-like vehicle known as a BearCat. Upon entry, Department officers found the fugitive had taken his own life. Baker requested the City compensate her for the damages to her home. The City refused.

On March 3, 2021, Baker filed the instant action against the City alleging violations of the Takings Clause of the United States and Texas Constitutions. Baker asserted her federal claim through both the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983. At the summary judgment stage, the Court determined as a matter of law that the City's actions constituted a taking of Baker's property without just compensation in violation of her rights under the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution (Dkt. #51). Consequently, the only issues remaining for a jury to decide were (1) whether the City was liable under § 1983, and (2) the amount of just compensation Baker was entitled to for the City's violation of her constitutional rights.

On June 20, 2022, this case went to trial. Two days later, the jury returned its verdict (Dkt. #74). The jury found the City was liable under § 1983 because it acted under color of state law when it violated Baker's constitutional rights under the Fifth Amendment of the United States Constitution by depriving her of her property without providing just compensation, and that this violation proximately caused Baker's damages. The jury awarded Baker $44,555.76 in just compensation for the cost of repairs to her real property,

and $15,100.83 in just compensation for the loss in market value to her personal property. Baker elected to recover damages pursuant to § 1983.

On July 20, 2022, the City filed the present motion for new trial (Dkt. #85). On August 3, 2022, Baker filed her response (Dkt. #89). On August 10, 2022, the City filed a reply in support of its motion (Dkt. #92).

LEGAL STANDARD

Under Rule 59(a) of the Federal Rules of Civil Procedure, a new trial can be granted to any party to a jury trial on any or all issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59(a). "A new trial may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). However, "[u]nless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party—is grounds for granting a new trial . . . At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." FED. R. CIV. P. 61.

To be entitled to a new trial, the movant must show that the verdict was against the great weight of the evidence, not merely against the preponderance of the evidence. *Taylor v. Seton Healthcare*, No. A-10-

CV-650, WL 2396880, at *2 (W.D. Tex. June 22, 2012) (citing *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 838–39 (5th Cir. 2004); *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982)). A jury verdict is entitled to great deference. *Dresser-Rand Co.*, 671 F.2d at 839. "Weighing the conflicting evidence and the inferences to be drawn from that evidence, and determining the relative credibility of the witnesses, are the province of the jury, and its decision must be accepted if the record contains any competent and substantial evidence tending fairly to support the verdict." *Gibraltar Savings v. LDBrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988). Ultimately, the propriety of granting a motion for new trial is a matter left to the sound discretion of the trial court.

ANALYSIS

Pursuant to Rule 59(a), the City moves for a new trial on the following grounds: (1) Baker's takings claims are invalid as a matter of law; (2) the Court improperly excluded evidence under the collateral source rule; (3) errors in the Court's charge caused the jury to render an improper verdict; and (4) the amount the jury awarded as damages for Baker's loss of personal property was not supported by evidence (Dkt. #85). The Court will address each of these issues in turn.

I. Baker's Takings Claims

As noted, the City argues the Court should have

dismissed Baker's takings claims (Dkt. #85 at p. 3). The City contends Baker has not established a takings claim as a matter of law under either the Fifth Amendment to the United States Constitution or Article I, § 17 of the Texas Constitution. Baker responds that the Court has already heard, and rejected, the City's arguments (Dkt. #89 at p. 1). Baker is correct. Indeed, the bulk of the City's arguments simply attack the Court's analysis contained in its Order on Baker's Motion for Partial Summary Judgment (Dkt. #51). Despite the fact that mere disagreement with a district court's order does not warrant reconsideration of that order, *see Krim v. pcOrder.com, Inc.*, 212 F.R.D. 329, 331 (W.D. Tex. 2002), the Court will nonetheless address and dispose of the City's arguments the same as it has before.

First, the City takes issue with the Court's reliance on *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (Dkt. #85 at p. 4). The City correctly points out that *Cedar Point* did not involve physical damage from law enforcement action. The Court was well aware of this point at the time it rendered its opinion. That said, the Court merely drew general principles from the Supreme Court's opinion to guide in the Court's own analysis. Moreover, the City emphasizes the Supreme Court "confirmed that the common law authorizes law enforcement to enter private property to avert public or private harm, arrest a suspect, or enforce criminal law without compensation to the property owner" (Dkt. #85 at p. 3 (citing *Cedar Point*, 141 S. Ct. at 2079)). Cherry-picking this one

quote from *Cedar Point*, the City makes the leap that "the Fifth Amendment does not apply to property damage caused by law enforcement when reasonably performing law enforcement tasks" (Dkt. #85 at p. 4). However, the Supreme Court in *Cedar Creek* confirmed law enforcement could lawfully *enter* property pursuant to the public interest—not *destroy* it, as law enforcement did to Baker's property. For these reasons, the Court is not persuaded to re-evaluate its prior reading of *Cedar Point* or change its holding that the Fifth Amendment applies here. Thus, the City is liable for Baker's takings claim under the Fifth Amendment, and the City is not entitled to a new trial on this ground.

Second, the City argues Baker's takings claim under the Texas Constitution fails because Baker's daughter consented to the taking, and lack of consent is an element of a valid state law takings claim (Dkt. #85, at p. 5). The City again ignores the distinction between entering property and taking property. As the Court explained in its opinion, issues of consent are irrelevant to Baker's claims regarding the City's liability. Baker claims that a taking occurred not from the entry into her home, but, instead, from the destruction of it. To be sure, Baker's daughter consented to law enforcement's entry onto the property, not the total destruction of the property. Thus, the evidence does show a lack of consent to the taking, and the Court will not reconsider its opinion on this basis.

Further, the City argues the evidence shows the City is immune under state law from Baker's claim

for damages. The City contends Baker's takings claim under the Texas Constitution is merely an attempt to "circumvent municipal liability" (Dkt. #85 at p. 6). The City relies on a two-part test outlined by the Federal Circuit for determining whether a claim constitutes a takings or tort claim (Dkt. #85 at p. 11 (citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356–57 (Fed. Cir. 2003))). The Court is not persuaded to rely on *Ridge Line* to determine matters of Texas state law. Because Baker brought this takings claim under the Texas Constitution, Texas law is controlling.[1] The City argues that the controlling Texas law Baker relies on—*Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980)—cannot be used to establish Baker's takings claim under the Texas Constitution. *Steele* recognized that a claim for the "taking, damaging or destruction of property for public use" constitutes a waiver of governmental liability, as contemplated by Article I, § 17 of the Texas Constitution. 603 S.W.2d at 791. Here, the Court has already ruled law enforcement destroyed Baker's property for the public use: apprehension of a dangerous fugitive whose freedom threatened the public (Dkt. #51 at p. 33). Therefore, *Steele* will not save the City from takings liability under the Texas Constitution. *Id.* Finally, the City asserts that law enforcement did not intentionally damage Baker's property in an "abusive manner" "as was the case in *Steele*" (Dkt. #85 at p. 7). In reading

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[1] Further, the Federal Circuit in *Ridge Line* conducted this two-part analysis for determining whether the plaintiff had a claim of inverse condemnation. *See Ridge Line*, 346 F.3d at 1355. Baker's claim here arises under the Texas Constitution.

Steele, however, the Court does not find any requirement that law enforcement act abusively. *See* 603 S.W.2d 786. The Court has already found *Steele* is controlling here and finds no reason to deviate from its position now (Dkt. #51 at p. 32). Accordingly, the City does not have immunity from Baker's takings claim under the Texas Constitution, and the City is not entitled to a new trial on this ground.

II. The Court's Order on Collateral Source Evidence

Prior to trial, Baker filed a motion in limine seeking to exclude any evidence of donations of items, money, and insurance proceeds that reduced the out-of-pocket expenses she incurred in repairing her home. The Court granted Baker's motion (*see* Dkt. #66). The City contends the Court granted this motion because it "found[ ] the application of the collateral source rule reasonable" (Dkt. #85 at p. 12). The City claims that this ruling "incorrectly and inconsistently applied tort principles despite previously ruling that this is not a tort case," and determined the City to be a tortfeasor in this takings case (Dkt. #85 at pp. 12, 14). The City further claims that the ruling prejudiced the City by "allowing Baker to testify about financial losses she did not suffer, then prevented the City from providing contrary evidence" (Dkt. #85 at p. 12). The City entirely misconstrues the Court's order.

First and foremost, the Court did *not* find the collateral source rule applied to this case. In fact, the Court expressly declined to opine on the matter: "the

Court finds it unnecessary to determine whether the collateral source rule as matter of law applies in a takings context" or specifically to Baker's claims (Dkt. #66 at pp. 7, 8). What the Court actually held is that the principles underlying the collateral source rule and the principles underlying just compensation in a takings context shared similar equitable principles, and both would have led the Court to exclude evidence of collateral benefits during the trial. Because of this, the Court did not need to decide whether the collateral source rule applied, nor rely on the collateral source rule in this case.

Like the collateral source rule, just compensation is founded on the idea that, in fairness and equity, the injury-causing party should be responsible for the costs of their conduct. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966). And under the Fifth Amendment, it is constitutionally mandated that the government pay just compensation for private property taken for public use. U.S. CONST. amend. V. Should the government fail to do so, the government is—at the very basic core meaning of the term—an injury-causing party. *See Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (recognizing that "a property owner [ ] suffer[s] a violation of [her] Fifth Amendment rights when the government takes [her] property without paying for it."). Therefore, as the Court indicated, the City is an injury-causing party because it violated Baker's constitutional rights by denying her just compensation after taking her

private property for a public purpose.

Finally, the City was not prejudiced by the Court's decision. In just compensation cases, courts have allowed the amount of compensation to be offset where the government is responsible for the collateral benefits. *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 358 (5th Cir. 2016); *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, No. 17-9001, 2022 WL 1284465 (Fed. Cl. Apr. 29, 2022). Where the government has contributed to or otherwise paid for the collateral benefit, denying the government an offset would result in the government paying twice for the injuries it caused and thus, on the flip side, a windfall to the plaintiff. But here, Baker received charitable or private donations, as well as insurance proceeds that she used to pay for some of the repairs to her home. These benefits were entirely voluntary and from private third- party payments or services. They were in no way funded or paid for by the City, nor has Baker ever been compensated by the City for her losses through any means. Thus, and as the Court so held, no argument can be made that excluding evidence of the benefits prejudiced the City by forcing the City to compensate Baker twice for the same injury.

On the other hand, that Court noted the injustice that would result to Baker if the City were allowed to admit evidence of private collateral benefits. Were the Court to adopt the City's position, government actors could completely forego paying any amount in just compensation by taking private property then waiting for a collateral third party to cover the owner's losses.

But the plain language of the Fifth Amendment is clear that "[i]t [is] the duty of the *government* to make just compensation as of the time when the owners [are] deprived of their property." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 305 (1923) (emphasis added). Thus, the gratuitous acts of private citizens to provide Baker with collateral benefits does not divest Baker of her constitutional entitlement to just compensation, nor does it excuse the City from its obligation to provide just compensation.

In sum, the City's interpretation of the Court's order is just that—an interpretation. The Court's order speaks for itself. Because the City has not presented any valid grounds for reconsideration of this order, the City is not entitled to a new trial on this basis.

III. Charge Errors

Under Federal Rule of Civil Procedure 51, a party may not later assert that there is an error in a given jury instruction if that party failed to properly object to it during trial. *See* FED. R. CIV. P. 51(d)(1); *see also Turner v. Baylor Richardson Med. Cir.*, 476 F.3d 337, 347 (5th Cir. 2008) (affirming the district court's denial of a motion for new trial on an issue that was not raised until the motion for new trial). Any objections to a court's jury instructions must be done on the record and must "stat[e] distinctly the matter objected to and the grounds for [the] objection." FED. R. CIV. P. 51(c)(1). A general objection to the court's jury instructions is insufficient. *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1272 (5th Cir. 1989). Further,

"[a] party cannot satisfy the requirements of Rule 51 by merely submitting to the court a proposed instruction that differs from the instruction ultimately given to the jury." *Russell v. Plano Bank & Trust*, 130 F.3d 715, 719 (5th Cir. 1997).

"Where the party challenging the district court's instructions has failed to raise the objection before the district court," the objection is consider waived absent a showing of plain error. *Id.* at 721. To demonstrate plain error, the movant has the burden of showing: "(1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; [and] (4) not correcting the error would 'seriously affect the fairness, integrity, or public reputation of the judicial proceedings.'" *Highland Ins. Co. v. Nat'l Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)). "The requirements of plain error are exacting and the plain error exception is a narrow one that applies only where 'the error is so fundamental as to result in a miscarriage of justice.'" *Id.* (quoting *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 424 (5th Cir. 1990)); *see also* 9A CHARLES WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2558 (2d ed. 1995) ("If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case when the error seriously has affected the fairness, integrity, or public reputation of the trial court's proceedings."); *Highland Ins. Co.*, 27 F.3d at 1032 (noting that "at a minimum" an alleged error must be

"clear under the law.").

At trial, the City raised several objections to the Court's Final Instructions. First, the City objected to the submission of Baker's § 1983 claim on the grounds that Baker failed to sufficiently plead a § 1983 claim against the City, and that Baker failed to present sufficient evidence to warrant submission of this claim to the jury (Dkt. #87 at pp. 213:18–214:5). Second, the City objected to the submission of a question on Baker's personal property damages on the ground that Baker did not present sufficient evidence to support this submission (Dkt. #87 at p. 214:6–12). Third, the City objected to the omission and failure to include a number of instructions provided in the City's proposed jury instructions. This included City proposed instruction number 25 on municipal liability; number 26 on takings claims brought under the Fifth Amendment; number 27 on takings claims brought under the Texas Constitution; number 28 on takings involving police action; numbers 30 and 32 regarding emergencies and the emergency exception; number 31 regarding government immunity under state law; number 33 regarding no liability under state law for intentional harm; number 34 regarding the Texas Constitution on prohibition when a city promises to indemnify future harms and create unfunded debt; and number 35 regarding the Texas Constitution's prohibition on government-funded gifts (Dkt. #87 at pp. 214:13–215:6). Fourth, the City objected to the failure to include its requested interrogatory number 1 from its proposed jury instructions and verdict form

(Dkt. #87 at p. 215:12–17). The City made no other objections to the charge. Baker made no objections to the charge.

In the present motion, the City alleges the Court's charge was erroneous because it (1) improperly instructed the jury to not consider any actions taken by the Department, (2) failed to include an instruction on the Texas Tort Claims Act and illegal donations under Texas state law, and (3) failed to properly state the law on municipal liability under § 1983. The Court addresses each of these arguments below.

A. Instructions on Texas State Law

In Court's Final Jury Instructions on Baker's § 1983 claim, the jury was instructed that the Court had already determined City violated Baker's constitutional rights by taking her property without just compensation (Dkt. #70 at pp. 7–8). The Court further instructed that "[a]ny actions taken by the McKinney Police Department are not relevant to your deliberations" (Dkt. #70 at p. 8). The jury was then told that it was tasked with determining whether the City was liable for this taking based on a City policy or custom. The City argues that it was error to instruct the jury to not consider actions taken by the Department, and that this instruction confused the jury and led to an erroneous verdict. The reason given by the City is that "the actions taken by the McKinney Police Department were the foundation of the City's denial of Baker's property damage claim" (Dkt. #85 at p. 15).

The City did not object to the inclusion of this instruction during trial; instead, the City raised an objection to this instruction for the first time in its present motion for new trial. A party challenging a jury instruction that failed to object to the instruction at trial has waived the objection absent a showing of plain error. *Russell*, 130 F.3d at 719. Therefore, the City's objection is properly considered waived unless the City has satisfied the exacting requirements to establish plain error. *See Highland Ins. Co.*, 27 F.3d 1032. The City made no attempt to establish plain error. The City, therefore, waived any objection to this instruction.

Further, it is not "clear or obvious" that this instruction was plainly erroneous. *Id.* As this Court has explained, the City's liability for Baker's § 1983 claim is not premised on the officers' actions in destroying her property, but on the City's refusal to provide her with just compensation. Thus, as to § 1983 liability—which the jury was charged with deciding—the actions taken by the officers are not directly relevant to the determination of this issue.[2] Whether the jury could consider the impact of the officers' actions on the City's decision to deny Baker just compensation is a different question altogether, and the City did not

[2] As the City acknowledged in its proposed instructions, the jury "may not consider the liability of any other person or entity" in this case other than that of the City or Baker (Dkt. #37 at p. 10). The City's risk manager and corporate designee in this case, Tami Levens also acknowledged during her testimony not asserting the police did anything wrong in going into the house" (Dkt. #87 at p. 143:1–6).

request an instruction on that issue. Thus, because the City waived this objection and failed to make any showing of plain error, the City is not entitled to a new trial on this basis.

B. Instructions on Municipal Liability Under § 1983

The Court's Final Jury Instructions did not include any instructions about the Texas Tort Claims Act, or instructions about Article III, § 52 of the Texas Constitution which generally prohibits a municipality from making unconstitutional donations. The City claims this omission was error because it was Texas law, not City policy, that required the City deny compensation to Baker (Dkt. #85 at pp. 15–16).

As the Court has discussed at length in its previous orders (Dkt. #23; Dkt. #51), as well as at trial (Dkt. #87 at pp. 143:7–145:3), there is no tort being asserted in this case. Rather, Baker brought constitutional claims under the United States and Texas Constitutions and § 1983. And, again, Baker did not bring her claim under § 1983 based on any tortious conduct, intentional or otherwise, taken by Department officers. Thus, the Texas Tort Claims Act and Article III, § 52 of the Texas Constitution are not applicable to this case and do not operate to bar the City from providing just compensation to Baker. Accordingly, it was not error for the Court to refuse to include instructions on these laws in its Final Jury Instructions. The City is not entitled to a new trial on this basis.

C. Instructions on Official Policy, Custom, or Practice Under § 1983

The City claims that the Final Instructions omitted two key elements of applicable law about municipal liability under § 1983. First, the City claims the Final Instructions "ignored that the word 'policy' implies a conscious choice among various alternatives" (Dkt. #85 at p. 16). Second, the City claims the Final Instructions "ignored that for a single act to give rise to § 1983 liability, the act must be a deliberate choice to follow a course of action made from various alternatives made by a final policymaker with authority over the subject area" (Dkt. #85 at p. 17).

The Court's Final Instructions accurately recited the law and were generally based on language taken from the Fifth Circuit's Pattern Jury Instructions. A "policy" can be a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the City's officers. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). A "custom" is a persistent, widespread practice of City officials or employees that, although not formally adopted, is so common and well-settled that it fairly represents City policy. *Pineda v. City of Hous.*, 291 F.3d 325, 328 (5th Cir. 2002). But to show a custom, the plaintiff must prove that either the municipality's governing body or some official with policymaking authority knew or should have known about the custom. *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381–82 (5th Cir. 2005). Finally, a plaintiff may also establish a custom or policy based on an isolated

decision made in the context of a particular situation if the decision was made by an authorized policy-maker in whom final authority rested regarding the action ordered. *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 124–25 (5th Cir. 1992); *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996). This is the law applicable to the determination of a policy, practice, or custom under § 1983. The Court recited this law exactly as worded above in its Final Instructions (*see* Dkt. #70), and the City has not sufficiently demonstrated that any of the above language constitutes an erroneous misstatement of the law. While the City may prefer the law be worded differently, "parties are not entitled to have the jury instructed in the precise language or form they suggest." *Wilson v. Zapata Off–Shore Co.*, 939 F.2d 260, 270 (5th Cir. 1991). Accordingly, the City is not entitled to a new trial on this basis.

IV.Baker's Personal Property Damages Award

In this case, the jury was asked to determine the amount of just compensation Baker was entitled to for the loss of her personal property that resulted from the City's taking. The Court instructed the jury that just compensation for personal property is measured by the "fair market value" of the property at the time of taking (Dkt. #70 at pp. 11–12). The Final Instructions defined "fair market value" as "[t]he amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling, and both sides are fully informed about all the

advantages and disadvantages of the property" (Dkt. #70 at p. 12). The Court explained that "[t]he burden is on the property owner to prove, by a preponderance of the evidence, the fair market value of the property on the date of the taking" (Dkt. #70 at p. 12). On these instructions, after hearing the testimony and evidence put on at trial, the jury awarded Baker $15,100.83 in just compensation for the loss in market value to her personal property, and the Court entered a final judgment in accordance with the jury's verdict (Dkt. #71).

In the present motion, the City claims Baker "provided absolutely no evidence to the jury about the fair market value of her alleged personal property damage" and thus asks the Court to set aside the jury's verdict and grant a new trial because "the verdict awarding Baker $15,100.83 for the loss of personal property was against the weight of the evidence because it is not supported by any evidence of fair market value" (Dkt. #85 at p. 18).

In response, Baker first argues that "it is doubtful that 'fair market value' is really the proper measure of damages for destroyed household goods" (Dkt. #89 at p. 8). However, prior to her response to the present motion, Baker never objected to the Court's charge, nor so much as even expressed concern that fair market value was an incorrect measure for her personal property damages. *See G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 953 (5th Cir. 1981) (recognizing that a party generally must object to a jury instruction at trial to preserve its ability to challenge it at a

later stage); *Henry's Marine Serv., Inc. v. Fireman's Fund Ins. Co.*, 193 F. App'x 267, 277 (5th Cir. 2006) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (recognizing that Rule 59 motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued.")). In fact, neither party objected to the Court's use of "fair market value" as the proper measurement for Baker's personal property damages, nor did either party object to the definition and instructions on "fair market value" provided in the Final Instructions. Thus, the question presently before the Court is not whether fair market value is the best measure of damages to calculate the monetary equivalent of just compensation for Baker's personal property losses. Rather, the Court need only consider whether the evidence on the record reasonably supports the jury's finding. The Court finds it does.

In the Fifth Circuit, "the owner of property is qualified by his ownership alone to testify as to its value." *LaCombe v. A-T-O-, Inc.*, 679 F.2d 431, 433 (5th Cir. 1982). This rule applies equally to testimony about real and personal property. *See, e.g.*, *Meredith v. Hardy*, 554 F.2d 764, 765 (5th Cir. 1977) (vehicles and personal property); *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) (personal property); *Unites States v. 329.73 Acres of Land*, 666 F.2d 281, 284 (5th Cir. 1982) (land); *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 359 (2015) (holding that "nothing in the history" of the Fifth Amendment's Takings Clause "suggests that personal property was any less

protected against physical appropriation than real property.").

In this case, Baker, as the owner, testified about the destruction of the personal property in her home. Baker stated that when the destruction of her home happened, she was out of town. She learned that due to the tear gas the Department used, the home could not even be entered until the damage from the tear gas was remediated (Dkt. #87 at p. 70:13–21). The tear gas had "permeated the walls, the floors . . . there were canisters stuck in the walls; those sections had to be removed[, a]nd the insulation on the inside had to be taken out and replaced" (Dkt. #87 at p. 74:11–15). Baker lamented that the hazmat team had to throw out "everything in that house"—including all of her furniture and other personal belongings—because the tear gas "seep[ed] into everything" (Dkt. #87 at pp. 74:21–75:5). By the time Baker was permitted to enter her home, "all the stuff that was in it had been thrown out" (Dkt. #87 at p. 75:6–9). No post-event photographs of her damaged personal property were taken before the items were removed from her home, and Baker was not provided an itemized list of everything that the hazmat team disposed of (Dkt. #87 at pp. 103:15–20, 108:17–24). As a result, Baker's testimony about the furniture and possessions in the home was based on her recollection of the home before the damage occurred.

Baker then detailed the personal property that had been destroyed and showed the jury pre- destruction photographs of each item she discussed.

She went through the home room-by-room, offering the jury relevant testimony from which they could award damages, candidly admitting the limits of her own knowledge. In some cases, she told the jury what she had initially paid for items, and how old the items were. For example, she testified that she lost two refrigerators that, when she bought them a few years prior, were worth between $2,500 and $2,700 each (Dkt. #87 at p. 84:1–12). In her bedroom, she lost a bedroom set including a dresser, nightstands, and a bed frame worth around $6,000 when purchased, bedding worth around $500 when purchased, and a twelve-year-old mattress worth around $4,000 when purchased (Dkt. #87 at pp. 86:21–87:8, 88:19–89:2). She also lost three TVs, one worth $800 when purchased and the others around $400 (Dkt. #87 at p. 84:15–25). In her living room, she lost a table worth around $1,000 when purchased, an entertainment center worth around $3,600 when purchased, two side tables worth around $400 to $500 each when purchased, a love seat worth around $600 when purchased, and barstools worth around $300 each when purchased (Dkt. #87 at pp. 85:19–86:20). From the other bedrooms in the home, she lost furniture worth at least $3,300 total when purchased, including multiple queen mattresses and bedding sets (Dkt. #87 at pp. 87:9–88:14). She also lost two bikes worth around $800 and $600 when purchased, several hundred dollars' worth of clothes, and several hundred dollars' worth of various knickknacks and personal items (Dkt. #87 at pp. 91:7–92:3).

For other items, she testified about the current replacement market value. For example, from her kitchen, she testified that she lost coffee makers, waffle makers, pots, pans, dish sets, and many other utensils and kitchen appliances that, in the present day, would cost around $1,500 to $2,000 to replace (Dkt. #87 at pp. 89:3–90:13). She also lost two antique books that would sell today for around $500 each (Dkt. #87 at pp. 90:14–91:6). Thus, based on Baker's testimony, the personal property she lost was worth, at a minimum, over $30,000 total when purchased.

Finally, for many of the items she lost, she informed the jury as to the quality of the items, so that the jurors might assess which items were likely to retain value over time. For example, she described her living room table as being "all wood" and having "granite on the top as all the pieces did" (Dkt. #87 at p. 85:16–17). For her living room side table, she stated she "got it at Ashley Furniture" and that it was "all wood" designed to look like "tomorrow's antiques" (Dkt. #87 at p. 86:9–12). And when speaking about the items she lost in her kitchen, she explained how four of her plates were 150-year-old "antique Bavarian plates that had belonged to [her] great aunt" that had a "beautiful pink and blue rim to them" (Dkt. #87 at pp. 89:19–90:3).

The City is correct that the general rule of just compensation measures the loss to the owner "as of the time of the taking." *Knick*, 139 S. Ct. at 2170 (citing *Jacobs v. United States*, 290 U.S. 13 (1933)). However, it is a well-established principle of law that a

plaintiff need not prove her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. *See Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993). The Supreme Court has held that, "when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, [the plaintiff can] plac[e] before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931) (citation omitted). And particularly "in those cases where exact loss is unascertainable, a just and reasonable estimate of the damage based on relevant data may be made and the verdict rendered accordingly." *Daniels Towing Serv., Inc. v. Nat Harrison Assocs., Inc.*, 432 F.2d 103, 106 (5th Cir. 1970). Such is the case here.

Because of the circumstances surrounding the destruction of her home, Baker had no opportunity to create an inventory of or take photographs of the personal items in her home before they were destroyed and removed, or to determine the exact value of those items as of the date the destruction occurred. By the time she was allowed to enter her home, all of her items were gone. The only method left available to her to rely on to describe the value of her losses was her own recollection of her items before they were

destroyed. While Baker is required to put on sufficient evidence of her losses, to require Baker to prove the precise value of her property on the day it was unexpectedly and completely destroyed would impose a greater burden on Baker than the law requires. *Story Parchment Co.*, 282 U.S. at 564; *Daniels Towing*, 432 F.2d at 106; *see also Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124; *United States v. Fuller*, 409 U.S. 488, 490 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law.")).

Based on this recollection, Baker provided testimony—to the best of her ability—about the value of her personal property at the time the taking occurred. True, Baker generally told the jury the value of the items when she first purchased them. But she made this fact clear to the jury, even on cross-examination (Dkt. #87 at p. 99:8–10). Moreover, she provided details about her items that would allow the jury to determine for themselves how the items would depreciate over time, such as how old the items were and the type of material the items were made of. And notably, as Baker points out in her response to the present motion, none of the property at issue in this case was exotic, or beyond the experience of the average juror. Rather, the destroyed property was mostly common household goods that the jurors could use their own common sense and experience to assign value to. *See*

Schulz v. Penn. R.R. Co., 350 U.S. 523, 527 (1956) ("Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.").

Additionally, the Court's Final Instructions made clear that the jury's duty was to determine Baker's losses as of the date of the taking. The jury was instructed that "'just compensation' is based on the fair market value of the property *at the time the taking occurred*" (Dkt. #70 at pp. 11–12). Further, the jury was instructed that it could "consider any aspect of the property that could affect the amount a reasonable buyer would pay" (Dkt. #70 at p. 12). And finally, the Court provided an instruction on depreciation to assist the jury in calculating the fair market value of Baker's personal property. The Court instructed that "[i]n calculating the fair market value of Ms. Baker's personal property," the jury could "consider any reasonable depreciation that would impact the property's value at the time of the taking" (Dkt. #70 at p. 12). These instructions and the evidence Baker presented were sufficient to permit the jury to conclude, based on common sense and reasonable inferences, the value of Baker's personal property as of the date of the taking.

"Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the

party seeking the new trial." *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999). The City has not met that burden here. Further, after a thorough review of the record, considering the overall setting of the trial, the character of the evidence, and the nature of legal principles involved, the Court finds that the jury was presented with sufficient information that would allow it to properly determine the value of Baker's personal property as of the date of the taking. Thus, the City is not entitled to a new trial on this ground.

CONCLUSION

It is, therefore, **ORDERED**, that Defendant's Motion for New Trial (Dkt. #85) is **DENIED.**

IT IS SO ORDERED.

SIGNED this 26th day of August, 2022.

/s/ Amos L. Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix F

United States Court of Appeals
for the Fifth Circuit

No. 22-40644

VICKI BAKER,
Plaintiff–Appellee,

versus

CITY OF MCKINNEY, TEXAS,
Defendant–Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
USDC No. 4:21-CV-176

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Decided and Filed: February 14, 2024

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at

the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, six judges voted in favor of rehearing (JONES, ELROD, GRAVES, HO, DUNCAN, and OLDHAM), and eleven voted against rehearing (RICHMAN, SMITH, STEWART, SOUTHWICK, HAYNES, HIGGINSON, WILLETT, ENGELHARDT, WILSON, DOUGLAS, and RAMIREZ).

JENNIFER WALKER ELROD and ANDREW S. OLDHAM, *Circuit Judges*, dissenting from denial of rehearing en banc:

"The Fifth Amendment[] . . . 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). So Vicki Baker understandably invoked that Amendment to recover from the City of McKinney the tens of thousands of dollars of property damage she suffered as a result of McKinney police efforts to protect the community from a fugitive that sought cover in her home.

The panel expressed "sympathy" for Baker. But it denied her claim based on the novel holding that history and tradition recognize a "necessity" exception to the otherwise broad protections of the Takings Clause. We are unsure whether such a privilege exists. Even if it does, we find the panel's reasoning unsatisfactory—perhaps unsurprisingly because the

panel reached its ostensibly originalist conclusion without the benefit of briefing on the historical evidence.[1] We therefore respectfully regret this court's decision to deny rehearing en banc.

I

On July 25, 2020, Wesley Little went on the run with a fifteen-year-old girl. Little evaded police and then turned up unannounced at Vicki Baker's residence. Baker was not there to greet Little because she had moved to Montana, but her adult daughter Deanna Cook was occupying the residence to prepare it for sale.

When Little knocked on the door, Cook knew something was amiss because she had seen a Facebook post that morning explaining Little was a wanted man. So Cook sprang into action: She let Little into the home but told him she had to go to the supermarket. Once Cook left the house, she called

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[1] As the panel recognized, the Supreme Court has increasingly emphasized the importance of history and tradition in determining the meaning of the Takings Clause. *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 639–42 (2023); *Horne v. Dep't of Agric.*, 576 U.S. 350, 357–59 (2015). Analysis of this kind is a tall order. "[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 856 (1989). Here, the panel engaged in the historical analysis of an issue of first impression without the benefit of the parties' views of what historical evidence might be relevant and how to interpret it.

Baker to describe the situation. Baker then called the police, who quickly arrived and "set up a perimeter on the home" to secure it.

The officers on scene made contact with Little using an intercom system, and before long he released the girl. But Little refused to give himself up. In fact, he explained he "had terminal cancer, wasn't going back to prison, knew he was going to die, [and] was going to shoot it out with the police." The officers knew a shootout would endanger both police and members of the general public, so they sensibly elected to shower the home with explosive devices and toxic gas grenades in hopes of forcing Little into surrender. Eventually, drone footage revealed Little had taken his own life, but not before Baker's property had been damaged to the tune of approximately $60,000.

Baker recognized the officers' conduct was beyond reproach. Still, her property was destroyed by state actors engaged in conduct designed to benefit "the community as a whole." So Baker filed a claim for property damage with the City. The City denied her claim on the ground that "there [was] no liability on the part of the City or any of its employees." When Baker's insurer likewise refused to indemnify her losses, she resorted to suing the City in federal court, contending it took her property without just compensation in violation of the Fifth Amendment. Baker moved for partial summary judgment on the question of the City's liability, and the district court granted her motion. A jury then determined Baker was

entitled to $59,656.59 in damages. On appeal, a panel of this court reversed the district court's liability determination.

II

A

The panel did not quibble with Baker's contention that the "plain text" of the Fifth Amendment suggests she is entitled to compensation. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *see* U.S. CONST. Amend. V ("[N]or shall private property be taken for public use, without just compensation."). Nor could it have. McKinney police destroyed Baker's property, and it did so for the public purpose of protecting the community of McKinney from a violent fugitive. It has been settled law for over 150 years that the destruction of property constitutes a taking. As the Supreme Court in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (11 Wall.) 166 (1871), explained:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of

> ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177–78.

The panel, though, concluded Baker could not rely on the plain text of the Fifth Amendment. In the panel's view, Baker needed to do something more—she needed to point to some "historical or contemporary authority that involves facts closer to those at bar and where the petitioner succeeded [in recovering] under the Takings Clause." Panel Op. at 11. But ordinarily when the plain text of a constitutional provision establishes an individual right—here, the right to compensation for confiscated property—it is *the*

government's burden to demonstrate a historically grounded exception. *See Bruen*, 597 U.S. at 17 ("[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, . . . *the government* must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.") (emphasis added).

By placing 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—the panel flipped the burden that typically governs in cases involving individual rights. Thus, we fear the panel's approach risks turning the right to private property into "a second-class right." *Id.* at 71.

B

Even if we could accept the panel's inversion of the ordinary burden with respect to constitutional rights, we would still have questions about its holding. In its *sua sponte* plumbing of the historical evidence, the panel discovered that "a necessity or emergency privilege has existed in Takings Clause jurisprudence since the Founding." Panel Op. at 12 (quotation omitted). And the panel proffered several citations to support its conclusion. *See id.* at 13–17 (citing, *inter alia*, *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788) and *Field v. City of Des Moines*, 39 Iowa 575 (1874)).

Just one problem: none of the panel's citations

establishes that a municipal government is absolved from the United States Constitution's just compensation requirement merely because the government destroyed property out of law enforcement necessity. We (1) explain the basis for the panel's holding. Then we (2) explain our skepticism.

1

At common law, any citizen could destroy property for the public use in a time of urgent necessity without subjecting themselves to liability—the so-called public necessity privilege. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 196 (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.").

The paradigmatic example of the privilege involved municipal fires. The destruction wrought by municipal fires before the rise of modern fire codes was often great, *see Respublica*, 1 U.S. at 363 (noting half of London was burnt in the great fire of 1666), and the razing of buildings was the principal means to stop the spread. But razing buildings is tortious. So absent some privilege, an individual—whether a public official or a private citizen—who razed a building would be individually liable in tort. Obviously, a rule that stuck individuals with liability for interventions taken to halt conflagrations would deter public promoting behavior from all but the most heroic, no matter how much good could have been achieved through

a well-calculated intervention. And it would seem unfair to hold people liable for doing what was necessary to cope with an emergency. So common law courts fashioned a rule to allow individuals to tear down property when doing so was reasonably necessary to prevent the spread of a fire. *See Field*, 39 Iowa at 577–78 (citing, *inter alia*, *Mouse's Case*, 12 Coke Rep. 63 (1608)); *see also Bowditch v. Boston*, 101 U.S. 16 (1879) (finding a public necessity privilege in Massachusetts law).

Analogizing to this fire exception, courts applied the privilege in other contexts, especially war. Consider for example *Respublica*. That case arose after the Pennsylvania Board of War ordered various property held by the citizenry removed to a secure location to prevent it from falling in the hands of invading British troops. 1 U.S. at 357–58. When the impending invasion did not occur as rapidly as expected, the Board resolved to return the property to its lawful owners. But before that process was complete, the British captured the storehouse, and with it 227 barrels of flour owned by the plaintiff. *Id.* at 358. The plaintiff sued the comptroller general, alleging he was entitled to compensation for the property the War Board effectively confiscated. But the Supreme Court of Pennsylvania disagreed, noting the taking "happened flagrante bello; and many things are lawful in that season, which would not be permitted in a time of peace." *Id.* at 362.

In sum, the public necessity privilege operated at *common law* actions to privilege actions taken during

certain emergencies that would otherwise have been tortious.

2

The panel held—on the basis of the *tort law* public necessity privilege—that citizens are not entitled to just compensation under the Takings Clause when their property is damaged by law enforcement officers, so long as the officers' conduct was reasonably necessary to prevent an imminent public emergency. We have doubts about that holding for three reasons.

First, the cases on which the panel relied most heavily—*Field* and *Respublica*—did not interpret the Takings Clause at all. That is because both of those cases involved claims predicated exclusively on state law, and they all arose before the Supreme Court's decision in *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), which incorporated the Takings Clause against the states. Thus, for obvious reasons neither of those cases so much as referenced the Fifth Amendment.

It is true that cases addressing the pre-constitutional scope of a right are often relevant to the breadth of constitutional guarantees. *See, e.g.*, *Bruen*, 597 U.S. at 34 ("Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.") (citation omitted) (emphasis in original). But it is unclear how to think about the interaction between common law limitations on property rights and the Takings Clause because it appears

that Clause effected a reversal of the pre-constitutional English common law rule that the government could take property without supplying any compensation. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 697 n.9 (1985) ("At the time of the American Revolution, the principle that the state was obligated to compensate individuals when it took their property had not won general acceptance in England.") (citing *British Cast Plate Mfrs. Co. v. Meredith*, 100 Eng. Rep. 1306 (1792)); *see also* Derek T. Muller, *As Much upon Tradition as upon Principle: A Critique of the Privilege of Necessity Destruction under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 497–498 (2006) ("At English common law, the government as sovereign owed no compensation for any taking, destruction or otherwise, unless parliament granted it.").

The Supreme Court has suggested the public necessity privilege has some implication for proper interpretation of the Takings Clause. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992). But the Court has never held that anything that would have been privileged by public necessity at common law is non-compensable under the Fifth Amendment.[2]

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[2] To the extent the Supreme Court has embraced a necessity exception to the Takings Clause, the Court has certainly never held that exception encompasses law enforcement necessity. *See* Muller, *supra* at 499–500 ("The federal issue of [law enforcement necessity] takings has been lightly skirted or flatly ignored, and the nagging question of the Fifth Amendment

And for good reason. The public necessity privilege makes sense enough if the burden of a public-serving intervention has to fall on either the victim of property destruction or the heroic intervenor. But the Supreme Court has told us the Takings Clause was designed precisely to ensure the burden of a public-serving interference with an individual's right to the enjoyment of his property is borne not by the individual alone but rather "by the public as a whole." *Armstrong*, 364 U.S. at 49. And today, unconstitutional takings are most often remedied through suits against governmental entities, not individual officials. In fact, it is disputed whether individual officials may be individually liable in damages for violating the Takings Clause at all. *See Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) ("[W]e can find [no case] that suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment."). *But see O'Connor v. Eubanks*, 83 F.4th 1018, 1026 (6th Cir. 2023) (Thapar, J., concurring). So it is unclear whether or to what extent the public necessity privilege should inform our takings jurisprudence.[3]

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remains unaddressed in these cases where necessity has been invoked.").

[3] If individual officials can be liable in damages for violations of the Takings Clause, the public necessity privilege may supply a basis for immunizing officials from liability. *Cf. Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) ("There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with

Second, and relatedly, it seems to us that 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. In fact, common law courts justified the privilege by baldly exclaiming "that a private mischief is to be endured rather than a public inconvenience." *Field*, 39 Iowa at 577 (citation omitted). Or alternatively, that "*[s]alus populi suprema est lex*"—the welfare of the people shall be the supreme law. *Ibid.* But of course all takings are calculated to eliminate a public inconvenience or to serve the public welfare; that is the logic of the public use requirement. Thus, if the bare maxim that the welfare of the people shall be the supreme law could be invoked to render a taking non-compensable, compensation would never be required.

Consider for example *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In that case the Court held that the Hawaii legislature was permitted to take property on the ground that the welfare of the public would be served by eliminating the "social and economic evils of a land oligopoly." *Id.* at 241–42. Could the legislature also have invoked the necessity privilege to avoid the compensation requirement? After all, the legislature thought the taking was necessary precisely because the pre-existing distribution of

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a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; *but the officer is not a trespasser*." (emphasis added)).

property inconvenienced the public, and it is apparently a maxim of the law "that a private mischief"—like losing title to one's land—"is to be endured rather than a public inconvenience." *Field*, 39 Iowa at 577 (citation omitted).

Fanciful as that reasoning may sound, it could at least plausibly be grounded in common law precedent. Consider *The Case of the King's Prerogative in Salt-Peter*, 12 Coke Rep. 12 (1606). There, Lord Coke held the King could enter private lands to dig for saltpeter—a necessary component of gunpowder. And he justified that holding in part by analogy to the fire exception. In Coke's view, men "shall suffer damage" for the Commonwealth, "as for saving of a City or Town a house shall be plucked down if the next be on fire." *Id.* at 13 (quotation omitted). That principle, Coke explained, suggests men shall suffer the Crown's "taking of saltpeter" because it "is a purveyance of it for the making of gunpowder necessary for the defense and safety of the realm." *Ibid.* (quotation omitted). In other words, Coke apparently thought the principle that a man must suffer the loss of his home when necessary to stop the spread of a fire could be extended such that a man must also suffer the King's officers entering his land to take his property when necessary for the safety of the country.

The Pennsylvania Supreme Court employed similar reasoning in *Respublica*. Like Coke, the Court explained the legislature could impress "articles that were necessary to the maintenance of the Continental army," and they could do so without providing just

compensation. *Respublica*, 1 U.S. at 363.

There is no conceivable reading of the Fifth Amendment under which the government could confiscate private property to supply the military without compensating the owner. As George Tucker explained, the confiscation of private property to supply the Continental army is probably the thing that gave rise to the Takings Clause in the first place. *See* 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) (noting the Takings Clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army . . . without any compensation whatever"). Surely the fact that common law courts extended the necessity principle so far as to privilege takings that unequivocally require compensation under our Constitution raises some questions about the constitutional viability of a public necessity exception to the Takings Clause.

Third, even assuming the panel's principal citations help to establish the scope of the Takings Clause, they would not necessarily establish the broad law enforcement necessity exception the panel read into them.

Field held only that a plaintiff was not entitled to compensation after an officer of a municipal government tore down his house amidst a conflagration raging through the city. *See* 39 Iowa at 577–78. But the

fire exception differs materially from the panel's law enforcement necessity exception. That is because if public officials declined to preemptively destroy some buildings amidst a conflagration, those buildings were likely to go up in flames anyways, and more with them. Victims could hardly claim an entitlement to compensation when public officials did to their buildings what the fire was already likely to do. In fact, one might say when an official destroyed property to halt a conflagration, the destruction was really caused by the fire, and the intervening official merely hastened it.

Similarly, the holding of *Respublica* was merely that under Pennsylvania law as it existed in 1788, the Pennsylvania Congress was permitted, in times of war, to "direct the removal of any articles that were . . . useful to the enemy, and in danger of falling into their hands." *Id.* at 363. That makes sense. If a citizen is likely to lose his property to an invading enemy, he cannot really complain when his elected representatives take it first.

All the Supreme Court's cases countenancing the public necessity exception share this characteristic of inevitable loss. Consider *United States v. Caltex*, 344 U.S. 149 (1952). There, the Supreme Court held the government had no obligation to compensate a plaintiff whose property was destroyed by the army amidst a military invasion. *Caltex* referenced the public necessity privilege, but it by no means elevated that privilege to the status of a constitutional principle. Instead, the basis of the Court's holding was that the

government is privileged to order the destruction of property in wartime "to prevent the enemy from realizing any strategic value from an area which he was soon to capture." *Id.* at 155.[4] In other words, the Court explained that when government destroys property an invading enemy was likely to seize anyways, it is not really the government that causes the loss. Rather, the loss is caused by the invading enemy, and so it "must be attributed solely to the fortunes of war, and not to the sovereign." *Id.* at 155–56. For that reason, the Takings Clause supplies no remedy.[5]

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[4] The Court was careful to limit its holding. It explained that "[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." *Id.* at 156.

[5] *Caltex* cited *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), but that was not a public necessity case. In that case the Court considered whether the United States had a constitutional obligation to compensate a corporation for property the army destroyed to prevent the spread of Yellow Fever in Cuba during the Spanish-American War. The Court held the Fifth Amendment required no compensation, but it did not do so on the basis of some public necessity privilege. Rather, the Court explained that the "corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted." *Id.* At 306. And even if the corporation's property was not properly regarded as enemy's property, the taking might nonetheless have been justifiable on the ground that property that endangers the public health effects a public nuisance. *See, e.g.*, *Mugler v. Kansas*, 8 S. Ct. 273, 287 (1887) ("The right to compensation

McKinney police, in contrast, did not merely hasten a loss that would have inevitably befallen Baker. But-for their intervention, Baker's home would have remained in her possession, and in pristine condition to boot. It therefore appears to us this case differs substantially from the paradigmatic example of a public necessity at common law, and from any exception to the Takings Clause the Supreme Court has ever embraced.

III

In sum, while McKinney police acted shrewdly, their actions also left Baker $60,000 in the hole. There is no doubt the McKinney community was better off because its officers ravaged Baker's home. But it is at least peculiar to say that because the officers' conduct benefited the community, the community can avoid compensating Baker for the inconveniences she incurred on its behalf. The panel apparently thought that was the result the law required. If the panel was right, so be it. But there can be no denying that the text of the Fifth Amendment and the Supreme Court's precedents at least *suggest* otherwise. *See, e.g.*, *Armstrong*, 364 U.S. at 49. Thus, it should have been the City's burden to establish its conduct was excepted from the strictures of the just compensation requirement. And even assuming the panel was entitled to shoulder that burden on the City's behalf, we are not

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for private property taken for public use is foreign to the subject of preventing or abating public nuisances.").

sure the panel carried it.

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This case undoubtedly presents difficult questions.[6] The panel's answers left Vicki Baker to bear a $60,000 burden on behalf of her community. Respectfully, we are not sure the panel got it right, so we would give Baker a chance to make her case before our en banc court.

[6] Because not all damage results in a taking and because there are a variety of exceptions to the Takings Clause, reconsideration of the panel's interpretation does not risk opening the floodgates to suits for minor damage. Nor does it risk a flood of liability against individual officers.