No. 23-1363

In the
Supreme Court of the United States

VICKI BAKER,

Petitioner,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

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

BRIEF OF PROFESSORS JAMES W. ELY, JR., SHELLEY ROSS SAXER, AND DAVID L. CALLIES AS AMICI CURIAE IN SUPPORT OF PETITIONER

ERIK R. ZIMMERMAN
H. HUNTER BRUTON
Counsel of Record
CLARA NIEMAN
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
(919) 328-8850
hbruton@robinsonbradshaw.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

Professors James W. Ely, Jr., Shelley Ross Saxer, and David L. Callies respectfully submit this brief as amici curiae in support of Petitioner Vicki Baker.[1]

Professor Ely is the Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University. He is a nationally renowned property law expert and legal historian who has written extensively about the Takings Clause and just compensation. This Court, twenty-one other federal courts, and twenty-nine state supreme courts have relied upon Professor Ely's scholarship. He has written numerous articles dealing with the history of property rights, including *"That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1 (1992) (recently cited by this Court in *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024)), and *"All Temperate and Civilized Governments": A Brief History of Just Compensation in the Nineteenth Century,* 10 Brigham-Kanner Prop. Rts. J. 275 (2021). Professor Ely has also authored a number of books, including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3d ed. 2008). Professor Ely was awarded the Brigham-Kanner Property Rights Prize in 2006, and he has frequently lectured before the Supreme Court Historical Society.

---

[1] Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of intent to file this brief.

Professor Saxer is the Laure Sudreau Chair in Law at Pepperdine University Caruso School of Law. She is a nationally recognized scholar in the field of property rights and takings, and has published numerous articles on these topics, including *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60 (2023), *The Aftermath of Takings*, 70 Am. U. L. Rev. 589 (2020), and *Judicial State Action:* Shelley v. Kraemer*, State Action, and Judicial Takings* (Symposium), 21 Widener L.J. 847 (2012). Professor Saxer has contributed to numerous amicus briefs in this Court, and her scholarship has been cited by both state and federal courts.

Professor Callies is the Benjamin A. Kudo Professor of Law, Emeritus, at the University of Hawaii's William S. Richardson School of Law, where he received the University of Hawaii Board of Regents' Excellence in Teaching Award. He was awarded the Brigham-Kanner Property Rights Prize for his lifetime contribution to property rights law in 2017, and the Crystal Eagle Award for his contributions to the law of property rights in 2015. Among Professor Callies' twenty-one books are *Property Law and the Public Interest* (Carolina Press, 4th ed., 2016) (with Daniel R. Mandelker and J. Gordon Hylton) and *Taking Land: Compulsory Purchase and Land Use Regulation in Asian-Pacific Countries* (University of Hawaii Press, 2002, republished in Japanese, 2007) (with Tsuyoshi Kotaka).

As scholars of property law and legal history, amici have a keen interest in ensuring that property law develops in a way that is both sound and historically accurate. Amici have a particular interest in this case because the Fifth Circuit panel stated that its decision was supported by history and legal scholarship,

including the scholarship of one of the amici here. *See* Pet. App. 15a-16a n3. Amici submit this brief to show that the decision below conflicts with the relevant historical record and thus raises an important question that calls for this Court's review.

SUMMARY OF ARGUMENT

The police destroyed Vicki Baker's home while apprehending a fugitive who had taken refuge there. Ms. Baker is due just compensation under the Takings Clause.

The panel below disagreed. It noted its sympathy for Ms. Baker, acknowledging that she is a "faultless" homeowner, and that denying her compensation would violate traditional notions of "fairness and justice." Pet. App. 25a. But the panel stated that it was constrained by "historical precedent" to deny Ms. Baker just compensation. *Id.* That is because, according to the panel, the historical record requires courts to apply a broad, atextual public necessity exception to the Takings Clause. Based on that exception, the panel left Ms. Baker alone to bear the burden of actions that benefitted the public at large.

The panel, however, misread the historical record. In doing so, the panel mistakenly opened the door to a potentially limitless exception to the requirement of just compensation.

This brief sets out the historical evidence on three key points. These points show that Ms. Baker is entitled to just compensation for the destruction of her property, despite the fact that the police action in this case was justified by public necessity.

First, the Takings Clause enshrines the common law principle of just compensation. This well-estab-

lished principle safeguards individuals from government overreach by requiring the state to compensate them when it takes their property, and its protective purpose was construed broadly both before and after the Founding.

Second, numerous historical precedents emphasize that the government's deliberate destruction of private property is just as much a compensable taking as the government's seizure of that property for public use.

Third, exceptions to the Takings Clause must be grounded in history and tradition. It is true that history and tradition show that a public necessity allows the government to *take* private property. But as history and tradition show, a public necessity does not relieve the government of its obligation to *compensate* the property owner for the taking.

In sum, a broad necessity exception to the Takings Clause lacks support in history. As this case shows, that exception is also unjust to individual property owners like Ms. Baker.

ARGUMENT

I. THE JUST COMPENSATION PRINCIPLE PROTECTS INDIVIDUAL RIGHTS.

The just compensation principle has deep historical roots. It was first established in the common law and later incorporated in the Fifth Amendment. As the historical record shows, the just compensation principle exists to safeguard individuals from being singled out to carry a disproportionate share of burdens incurred to benefit the community.

The just compensation principle was well settled in both natural law and English common law long before being written into the Bill of Rights. Its origins can be traced to 1215 and the Magna Carta. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (3d ed. 2008).

For example, in his *Commentaries on the Laws of England*, William Blackstone treated compensation as an established common law principle. *See* James W. Ely, Jr., *"All Temperate and Civilized Governments": A Brief History of Just Compensation in the Nineteenth Century,* 10 Brigham-Kanner Prop. Rts. J. 275, 276 (2021). Blackstone wrote that property is an "absolute right" that includes "the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land." 1 William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-69* 134 (Univ. Chi. Press 1979). Blackstone then emphasized the corollary principle of just compensation: When an owner is compelled to relinquish property for the common good, such owner must receive "a full indemnification and equivalent for the injury thereby sustained." *Id.* at 135.

The prominent natural law jurist Samuel Pufendorf explained the compensation norm in terms of equal treatment. He wrote that "equity is observed" when each individual "contributes only his own share, and no one bears a greater burden than another." Samuel Pufendorf, *On the Law of Nature and of Nations* 1285-86 (C.H. Oldfather & W.A. Oldfather trans., 1934). Seizure "for the necessities of the state," Pufendorf argued, is equitable only if "whatever exceeds the just share of the owners [is] refunded by other citizens." *Id.*

The compensation norm was also widely accepted in America long before the adoption of the Constitution. The historical evidence shows broad agreement in practice with the compensation norm in colonial America. James W. Ely, Jr., "*That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 1-13 (1992).

After the Revolution, the states and Congress began to embed the principle of just compensation into founding law. The influential Massachusetts Constitution of 1780 provided that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, pt. I, art. X. Following suit, in the Northwest Ordinance of 1787, Congress declared that if "the public exigencies make it necessary, for the common preservation, to take any person's property . . . full compensation shall be made for the same." Northwest Ordinance of 1787, art. 2.

The common law principle of just compensation was ultimately codified in the Fifth Amendment of the U.S. Constitution. As Joseph Story explained, the Takings Clause of the Fifth Amendment was "an affirmation of a great doctrine established by the common law for the protection of private property." Joseph Story, *Commentaries on the Constitution of the United States* 661 (1833). This principle was "founded in natural equity, and [was] laid down by jurists as a principle of universal law." *Id.*

Like most other provisions of the Bill of Rights, the Fifth Amendment was designed to safeguard individuals from government abuse. As this Court stressed in *United States v. Russell,* "there are few

safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation," which "is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent." 80 U.S. 623, 627 (1871).

The Takings Clause provides that: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. By its plain terms, this text guarantees compensation for *all* public takings.

This straightforward conclusion has been supported by leading United States jurists since the Founding. Justice William Paterson, a member of the Constitutional Convention, saw the compensation requirement as relieving an individual from carrying a societal burden alone. In *VanHorne's Lessee v. Dorrance*, he observed that "no one can be called upon to surrender or sacrifice his whole property real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large." 2 U.S. 304, 310 (1795).

State court judges likewise ruled that individual owners should not be singled out to bear a disproportionate share of burdens incurred for community benefit. For instance, Henry Saint George Tucker, president of the Virginia Court of Appeals, declared that the Virginia Constitution "makes compensation for what it takes; it does not put a charge upon him which others do not bear; it aims to place the public burdens equally upon all, by paying the proprietor for that

which is taken from him." *James River & Kanawha Co. v. Turner,* 36 Va. 313, 339 (1838).[2]

This Court emphatically endorsed this understanding of the protective purpose of the Fifth Amendment's just compensation provision in the landmark early takings case, *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893). Speaking for a unanimous court, Justice David Brewer analyzed the right to compensation in terms of equity, holding that this right "prevents the public from loading upon one individual more than his just share of the burdens of government." *Id.* at 325. This sharing of burdens is justified because when an individual "surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Id.*[3]

Decades later, Justice Hugo Black famously reiterated this principle in *Armstrong v. United States*: "The 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." 364 U.S. 40, 49 (1960).

This Court has recently reaffirmed *Armstrong*'s statement of the just compensation principle. *See*

---

[2] *See also Sutton's Heirs v. City of Louisville*, 35 Ky. 28, 33 (1837) (expressing the view that common benefits should be paid for by the equal distribution of public burdens).

[3] *See also* James W. Ely, Jr., *"All Temperate and Civilized Governments": A Brief History of Just Compensation in the Nineteenth Century,* 10 Brigham-Kanner Property Rts. J. 275, 275-81 (2021) (examining the sources and rationale for the compensation principle).

Sheetz v. County of El Dorado, 601 U.S. 267, 273-74 (2024); *Tyler v. Hennepin County*, 598 U.S. 631, 647 (2023).

In sum, the historical record from the early days of the English common law to the present shows that the just compensation principle has always been meant to protect individuals from being forced to carry a disproportionate burden from government actions that benefit the community as a whole.

To be sure, the panel below acknowledged that this equitable principle exists and that it supports Ms. Baker's request for compensation, especially because she is "faultless" in this case. Pet. App. 24a-25a. The panel ultimately refused, however, to be guided by the just compensation norm, instead holding that because the police acted out of public necessity, the damage to Ms. Baker's home was a cost that she must bear alone. As discussed below, the panel's interpretation of the historical evidence to support a broad necessity exception to the Takings Clause was erroneous.

II. A GOVERNMENT'S INTENTIONAL DESTRUCTION OF PROPERTY IS A PRIMA FACIE TAKING.

Parts of the panel's opinion might be read to suggest that, as a historical matter, a government's *destruction* of private property was treated differently from a government's *seizure* of private property for purposes of deciding whether just compensation was required. *See* Pet. App. 13a-23a. That suggestion is incorrect. As historical precedent shows, a government's deliberate destruction of property is just as much a

compensable taking as the seizure of property for government use.

This Court has often noted that the destruction of property requires just compensation, because it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *United States v. Gen. Motors Corp.,* 323 U.S. 373, 378 (1945). Justice Holmes agreed, stating that property "may be taken by simple destruction for public use." *A.W. Duckett & Co. v. United States,* 266 U.S. 149, 151 (1924). As one scholar succinctly concluded, "deliberate destruction is simply another way of using tangible property." Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 Stan. L. Rev. 617, 623 (1968).[4]

This principle is firmly grounded in historical precedent. For example, in the nineteenth century, a series of flooding cases emphasized that government destruction of private property is a compensable taking. In the seminal case of *Pumpelly v. Green Bay & Mississippi Canal Co.,* this Court broadly equated acquisition and destruction of property for purposes of awarding just compensation. 80 U.S. 166 (1871). The Court stated that it would be "a very curious and unsatisfactory result" if the government's destruction of property were not considered a compensable taking, because "in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would

[4] State courts agree as well. For example, the Supreme Court of Florida recognized that a "taking of private property for a public purpose which requires compensation may consist of an entirely negative act, such as destruction." *Dep't of Agric. v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 103 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988).

pervert the constitutional provision into a restriction upon the rights of the citizen." *Id.* at 177-78.[5]

The conclusion that destruction is a compensable taking has additional support in the historical discussion of the government's deliberate destruction of physical property in wartime.

Emer de Vattel, a prominent natural law jurist influential in the early United States, provided a helpful guide to the rights of private parties in war. Vattel wrote that individuals who suffer losses caused by a battle or by enemy forces have no right to reimbursement from the state. 2 Emer de Vattel, *The Law of Nations* § 232 (1769). By contrast, individuals whose property is seized and destroyed by the state to prevent it from falling into enemy hands "are to be made good to the owner, who should bear only his quota." *Id.* Under this dichotomy, the Takings Clause does not give citizens rights against a foreign sovereign, but it does give citizens rights against their own government.

Similarly, Pufendorf maintained that compensation is payable when "in sieges the dwellings and trees of private citizens" are destroyed "that they may not work to the benefit of the besiegers." Samuel Pufendorf, *On the Law of Nature and of Nations* 1285 (C.H. Oldfather & W.A. Oldfather trans., 1934).

This understanding, and especially Vattel's reasoning about a citizen bearing "only his quota," is consistent with the just compensation principle discussed above. In war, as in other contexts, injury caused by

---

[5] *See also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32-38 (2012) (citing *Pumpelly* and holding that even temporary flooding can be a compensable taking of property).

the state in service of the public good should not be borne solely by one individual, but should be shared by the community through payment of compensation to the owner.

This Court and others have historically agreed that the wartime destruction of property to bar its capture by hostile forces requires payment of compensation. "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 . . . the government is bound to make full compensation to the owner; but the officer is not a trespasser." *Mitchell v. Harmony,* 54 U.S. 115, 134 (1851).

Similarly, in *United States v. Russell*, this Court asserted that although in the extreme circumstances of wartime private rights "must give way for the time to the public good," "the government must make full restitution for the sacrifice" of individuals whose property is appropriated or destroyed by the government in wartime. 80 U.S. at 629.[6]

It is true that the opinion below cited some wartime cases that superficially support a different view: that public necessity during wartime justifies the government's taking of private property without just compensation. Pet. App. 17a-19a, 23a. For example, the panel relied on *Respublica v. Sparhawk*, a decision of the Supreme Court of Pennsylvania that predated the ratification of the Constitution and the Bill of Rights. 1 U.S. 357 (Penn. 1788).

---

[6] *See also Grant v. United States,* 1 Ct. Cl. 41, 50 (1863) (holding that the government must compensate a claimant whose property was destroyed on the order of a Union officer to prevent it from falling into the hands of Confederate sympathizers).

For two reasons, however, these cases do not support the broad public necessity exception that the panel adopted here. [7]

First, these cases suggest at most that there may have been some historical disagreement or confusion about whether the wartime destruction of property required compensation.[8] As noted below, however, to establish an exception to the Takings Clause, the government has the burden to show that the exception is grounded in history. *See infra* p. 15. The government cannot meet that burden by pointing to historical am-

---

[7] The panel's reliance on *Sparhawk* is also troubling for a historical reason: *Sparhawk* gave currency to a dubious account of the Great London Fire of 1666 as justification for a necessity exception. The *Sparhawk* court alleged that the mayor of London hesitated to destroy dwellings to halt the spread of the fire due to liability concerns, and that this hesitation allowed the fire to spread. *Sparhawk*, 1 U.S. at 363. But that account is inaccurate; after careful investigation, one scholar derided the "mythic conception created by the *Sparhawk* court that the mayor could have stopped the fire with a necessity privilege doctrine." Derek T. Muller, Note, *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, 491 (2006).

[8] For example, the panel cited *United States v. Caltex*, 344 U.S. 149 (1952), a case in which the majority held that the government owed no compensation for property seized in wartime. Pet. App. 23a. Because *Caltex* was decided in 1952, it does not itself shed light on the original meaning of the Takings Clause. The Court's holding in *Caltex* was also disputed by a powerful dissent, which stated that "the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss." *Caltex*, 344 U.S. at 156 (Douglas, J. and Black, J., dissenting).

biguity or disagreement. And in any event, any ambiguity on the law in this area would only highlight the need for this Court's guidance.

Second, even if the decisions that the panel relied on could be understood to establish an exception for the destruction of property in wartime, those decisions would not support the creation of a far broader exception for the destruction of property in other contexts, such as the law-enforcement context at issue here.

In sum, a government cannot avoid the just compensation requirement of the Fifth Amendment merely because it destroys property, as opposed to seizing that property. To the extent that the Fifth Circuit concluded otherwise, its misreading of the historical record highlights the need for this Court's review.

III. A PUBLIC NECESSITY DOES NOT GIVE THE GOVERNMENT FREE REIN TO DESTROY PROPERTY WITHOUT PAYING JUST COMPENSATION.

The panel in this case ultimately held that the just compensation requirement of the Takings Clause has a broad exception for takings that are "objectively necessary." Pet. App. 23a-24a. The panel relied on this asserted public necessity exception to deny compensation to Ms. Baker.

The panel's analysis on this point was flawed. The panel stated that the historical evidence supported a broad exception to the Takings Clause for public necessities. The panel, however, misunderstood the historical evidence. That evidence shows that necessity is a defense to *personal* liability for the destruction of property, but not a defense to *government* liability for just compensation.

The panel's misunderstanding of the historical record on this point is important and calls for this Court's review. Given the long-standing consensus that the just compensation principle exists to safeguard individuals from being singled out to carry a disproportionate burden of actions taken to benefit the community, the Takings Clause leaves no room for an expansive public necessity exception.[9] The panel's decision to adopt this broad exception conflicts with the protective purpose of the just compensation mandate and threatens to nullify the constitutional guarantee against the uncompensated confiscation of property.

A. A broad public necessity exception lacks a basis in history and tradition.

This Court has been clear that history and tradition must guide the analysis of constitutional text. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). Further, the government bears the burden of demonstrating historical exceptions to the plain text of the Bill of Rights. *Id.* at 24.

This Court has recently emphasized these principles in the specific context at issue here by holding that exceptions to the Takings Clause that lack support in history and precedent cannot stand. In *Sheetz v. County of El Dorado*, the Court unanimously held that an alleged "legislative exception to the ordinary

---

[9] *See, e.g.*, Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 143 (2022) (stating that the Fifth Amendment requires just compensation even though "[p]ublic necessity will likely justify the government's action," because "necessity should not preclude judicial review of whether the challenged action constitutes a taking of private property or is otherwise unconstitutional").

takings rules" failed because it "finds no support in constitutional text, history or precedent." 601 U.S. at 280. Likewise, in *Cedar Point Nursery v. Hassid*, the Court held that it would follow the "traditional rule" for physical invasions of property when analyzing whether a state-imposed requirement of access to private property was a compensable taking. 594 U.S. 139, 156 (2021).

Here, these principles bar the broad public necessity exception adopted by the panel below. That is the case because this exception lacks support in history and tradition.

It is true, as the panel noted, that historical cases frequently discussed the concept of necessity. But the panel misunderstood the teachings of these cases. As these cases show, the common law doctrine of necessity was a defense to *individual* tort liability. It was not, and cannot be transformed into, a broad exception that allows *the government* to deny compensation whenever it destroys private property based on a public necessity.[10]

---

[10] Amici note that the panel stated that Professor Saxer's article, *Necessity Exceptions to Takings*, supported the panel's adoption of a broad necessity exception to the just compensation principle. *See* Pet. App. 15a-16a n3. But far from supporting a broad necessity exception to the Takings Clause, Professor Saxer's article describes pre-Founding common law necessity exceptions, and then analyzes how those necessity exceptions have been improperly incorporated into regulatory takings jurisprudence. *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 66-67, 80-114 (2022). The article ultimately advocates *against* a broad necessity exception that would allow the government to seize private property without paying just compensation whenever a necessity arises. *Id.* at 143-44.

At common law, individuals had the right, in situations of dire emergency, to destroy property for the protection of the community. But this was a private right that, if exercised reasonably, afforded a defense against personal tort liability for damages.[11] This right to destroy private property did "not appertain to sovereignty, but to individuals" and was "essentially a private and not a public or official right." *Hale v. Lawrence*, 21 N.J.L. 714, 729 (1848).[12]

Historically, the concept of necessity often arose when buildings were demolished to halt the spread of a fire. *Mayor of New York v. Lord,* cited by the panel below, is an example. 17 Wend. 285 (N.Y. Sup. Ct. 1837), *aff'd* 18 Wend. 126 (N.Y. 1837).

In *Lord*, the New York appellate court carefully differentiated between individual and governmental responsibility for destroying property. The appellate court affirmed the lower court's holding that compensation was owed to the property owner in that case, whose property had been destroyed by the government to prevent the spread of a fire. *Lord*, 18 Wend. at 130, 135.

The *Lord* court reasoned that, although destruction of property is lawful if public necessity exists, the

---

[11] Revealingly, John F. Dillon treated individual responsibility in fire destruction cases in a section on tort actions, pointing out that the individual had no liability for monetary damages if such action was reasonably necessary. 2 John F. Dillon, *The Law of Municipal Corporations* 865 (2d ed. 1873).

[12] *See also* 1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* 17 (3d ed. 1909) ("This right is plainly distinguishable from the right of eminent domain. It is a right of which exists in the individual, and not the State.").

owner is still "entitled to compensation from the national government within the constitutional principle (Const. U.S. Art. 5, of the Amendments)." *Lord,* 17 Wend. at 291.[13] The owner's property in *Lord* was "destroyed for the use and benefit of the city," and so "in reason and justice he [was] entitled to a full compensation from its common funds." *Id.* at 292.

Many other historical decisions agreed that the public necessity defense was only a defense to individual liability. For instance, the Georgia Supreme Court recognized that individuals may destroy property to prevent the spread of fire without liability for trespass, but declared that "the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss." *Bishop v. Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849).

Similarly, the Supreme Court of Connecticut stated: "Public necessity may justify the taking, but cannot justify the taking without compensation." *Platt v. City of Waterbury*, 45 A. 154, 162 (Conn. 1900). "[H]owever great the necessity may be," the court emphasized, "it can have no effect on the right to compensation for property taken. The mandate of the constitution is intended to express a universally accepted principle of justice." *Id.*[14]

---

[13] These quotations are from the opinion of the lower court, of which the appellate court majority wrote approvingly: "I so fully concur with the able and conclusive reasoning" of the court below "that it appears to be almost a useless waste of time to attempt to go over any part of the same ground." *Lord*, 18 Wend. at 129.

[14] *See also* Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 564-65 (1904) ("Where property is destroyed in order to save other property of greater value, a provision for indemnity is a plain dictate of justice, and of the principle of equality."); *Trenton Water-Power Co. v. Raff*, 36 N.J.L. 335,

The panel here overlooked the historical limitation on the necessity defense. Indeed, the panel even erroneously cited *Lord* for the proposition that the government may destroy property for public necessity without providing compensation to the owner. Pet. App. 21a.

Because a broad public necessity exception to the Takings Clause lacks a basis in history and tradition, the government cannot carry its burden of demonstrating that such an exception exists.

B. A broad public necessity exception conflicts with the protective purpose of the Takings Clause.

The expansive public necessity exception also conflicts with the protective purpose of the just compensation mandate, harming individual property owners in direct violation of the Fifth Amendment's promise of compensation when property is taken. Here, forcing Ms. Baker alone to bear the cost of police activity that benefited the community at large is irreconcilable with the principle that individuals should not be the forced 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. at 49. Indeed, the panel below recognized that the outcome here violated notions of "fairness and justice." Pet. App. 25a.

---

343 (1873) ("The destruction of private property, either total or partial . . . is a taking within the meaning of the constitutional provision, and the power can only be exercised under the right of eminent domain, subject to the constitutional limitation of making just compensation."); *Dayton v. City of Asheville*, 115 S.E. 827, 828-29 (N.C. 1923) (citing numerous cases for the proposition that a lawful taking is nonetheless compensable).

This conflict with the purpose of the Takings Clause underscores the importance of this case and calls for this Court's review.

Many legal scholars have emphatically rejected the notion that the government can rely on a dubious assertion of public necessity to circumvent the constitutional obligation to pay compensation when police demolish an innocent party's property. Such uncompensated destruction by the police "erodes the constitutional protections for property upon which our society depends" and "seriously jeopardizes the constitutional right to just compensation." 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, 305 (2021). Instead, "the only fair and just interpretation of the Takings Clause that reflects the *Armstrong* Principle is to fairly compensate the unlucky property owners who fall victim to these kinds of police raid damages." Dandee Cabanay, Note, *Baking Up a Taking: Why There is No Categorical Exemption to the Fifth Amendment Takings Clause for the Police Power,* 75 Baylor L. Rev. 778, 806 (2023).[15]

---

[15] *See also* Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. Haw. L. Rev. 60, 95 (2022) (arguing that law enforcement activities should not be shielded from takings liability when private property rights are damaged or destroyed to achieve a public purpose); Zachery Hunter, Note, *You Break it, You Buy It-Unless You Have a Badge? An Argument Against A Categorical Police Powers Exemption to Just Compensation,* 82 Ohio St. L.J. 695, 701-703 (2021) (arguing that courts should reject a categorical police power exception to the just compensation norm); C. Wayne Owen, Jr., Note, *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation When Property Is Damaged During the Course of Police Activities?,* 9 Wm. & Mary Bill Rts.

Additional practical considerations illustrate the significance of the panel's holding that damage inflicted to property by police action can be immune from compensation when it is objectively necessary. Even local police forces have gained access to highly sophisticated military equipment under the Pentagon's 1033 Program, which disposes of obsolete military property. *1033 Program FAQs*, Def. Logistics Agency, https://www.dla.mil/Disposition-Services/Offers/Law-Enforcement/Program-FAQs/ (last visited July 23, 2024). Police access to more powerful equipment and weaponry means that damage to private property from necessary police action is likely to increase both in frequency and in serious consequences to innocent parties.

Under these circumstances, local governments should not be allowed to escape takings liability by invoking a notion of public necessity that conflicts with the history and purpose of the Takings Clause. If the decision below is allowed to stand, other innocent bystanders will soon find themselves in Ms. Baker's sit-

---

J. 277, 300 (2000) ("Courts that deny compensation to the innocent landowner when his or her property is destroyed as a result of government action are not acting in compliance with the demands of the Fifth Amendment. . . . The clear mandate of the Just Compensation Clause is to provide recompense for the innocent third party whose property has been damaged by government action."); Derek T. Muller, Note, *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, 525-26 (2006) ("[P]roperty owners harmed to benefit the public should receive compensation. . . . The text, history, and policy of the Fifth Amendment cannot support the continued expansion of this [necessity] privilege.").

uation: injured by property damage caused by the police responding to emergencies, yet uncompensated for the taking and destruction of their property.

CONCLUSION

The necessity exception adopted by the decision below threatens to swallow the just compensation mandate of the Takings Clause. It is not difficult for governmental units to assert that any action diminishing the rights of property owners was necessary. A broad necessity exception thus opens the door for the government to eviscerate the just compensation requirement altogether.

A broad necessity exception to the Takings Clause does not, however, have support in the text or history of the Fifth Amendment. It also conflicts with the amendment's equitable and protective purposes. As a result, amici ask that this Court grant review and ultimately reverse the decision below.

August 1, 2024.

Respectfully submitted,

ERIK R. ZIMMERMAN
H. HUNTER BRUTON
Counsel of Record
CLARA NIEMAN
ROBINSON, BRADSHAW &
HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
(919) 328-8850
hbruton@robinsonbradshaw.com

Attorneys for Amici Curiae