No. 25-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2025

SARAH JONES, INDIVIDUALLY
AND ON BEHALF OF HER MINOR SON, A.J.

PETITIONER,

v.

THE CITY OF LAURENTON,
THE CITY OF LAURENTON POLICE DEPARTMENT

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR THE RESPONDENTS

Team 10
Counsel for *Respondents*

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment impose liability on state actors for the injuries inflicted by private parties pursuant to the so-called state-created danger doctrine, when the clause does not require the state to guarantee a minimum level of safety from private violence?

2. Does the Takings Clause require a state actor to pay compensation for damaging property when the damage was inflicted out by the exercise of valid police power—not eminent domain power—and out of necessity to prevent potentially catastrophic injury to public health and safety?

STATEMENT OF THE CASE

I. FACTUAL SUMMARY

Petitioner Sarah Jones called 911 when her ex-boyfriend, Mark Baker, was threatening her and their son. R. at 2. Jones informed the responding officers that Baker had a professional background in explosives and that he owned a handgun and other weapons. *Id.* One officer informed Jones that she and her son could remain in the house if they wanted to because Baker would be in custody overnight due to an outstanding warrant. *Id.* But pursuant to a city policy, the officers later seized Baker's handgun and released him, without informing Jones, because the county jail was over capacity. *Id.*

Subsequently, Baker retrieved two homemade explosive devices from his basement and packaged them before planting one on Jones's front porch and the other on her back porch. *Id.* Believing the package in the front to be an Amazon delivery, Jones attempted to open it. *Id.* at 2–3. The resulting explosion injured Jones and her son and caused minor damage to the front porch. *Id.* at 3. Responding to a call about the explosion, LPD officers observed the second package on the back porch and called the LPD Bomb Squad. *Id.* The bomb squad ensured everyone was at a safe distance before assessing the package with a specialized robot. *Id.* The robot was equipped with X-ray technology and a tool designed to disrupt explosives. *Id.* at 3, 3 n.3. X-ray confirmed that the package was a remote-detonation explosive *Id.* at 3. The explosive was uncontrollable because Baker was not in police custody, so the bomb squad had to try to disrupt it using the robot. *Id.* The device was "highly sophisticated" and designed to thwart disruption, so detonation was a plausible outcome. *Id.* Despite the bomb squad's best efforts, the disruption was unsuccessful and the explosion rendered the house uninhabitable and structurally unsound. *Id.*

II. PROCEDURAL HISTORY

A. District Court's Summary Judgment in Favor of the City

Jones filed suit against the City of Laurenton and the LPD (collectively, the "City") in the Eastern District of New Virginia under 42 U.S.C. § 1983. R. at 4. She alleges that the City is liable (1) under the Due Process Clause because the City "affirmatively create[ed] the danger that led to her injuries," and (2) under the Takings Clause because the City damaged her house without compensation. *Id.* After drawing all reasonable inferences in favor of Jones, the district court granted the City summary judgment on both issues. *Id.* Judge Ashland held (1) that there is no state-created danger doctrine because the Due Process Clause does not impose liability on the state when it affirmatively acts to create or increase the risk of private violence; and (2) that property destroyed through the exercise of police powers is not subject to the Takings Clause. *Id.*

B. Thirteenth Circuit's Affirmation

The Thirteenth Circuit affirmed both holdings after Jones filed a timely appeal. *Id.* at 4, 8. The majority declined to adopt the so-called state-created danger doctrine, instead reaffirming that, under the Due Process Clause, a state only has an affirmative duty to protect against violence by private actors if the state has restrained the target's liberty such that they cannot act for themselves. *Id.* at 5–7. As to the Takings Clause issue, the majority found summary judgment proper because Jones's property was damaged pursuant to the City's exercise of its police powers, rather than its eminent domain power, making the Takings Clause inapplicable. *Id.* at 8. Judge Hart's concurrence took the position that the public-necessity doctrine "provides an additional, independent basis for dismissal of the Takings Clause claim." *Id.* at 8–9. Judge Merritt was the only one of the four lower court judges to disagree with either holding. *Id.* at 9.

The dissent argued that this Court's ruling in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 187 (1989), implies the existence of the state-created danger doctrine and that recognizing the doctrine is necessary to "give effect to the Due Process Clause." R. at 9. Judge Merritt also dissented on the Takings Clause holding because it forced Jones to bear a burden that, in the judge's view, should be borne by the public. *Id.* at 11. Judge Merritt also expressed concern about categorically exempting police-power actions from the Takings Clause and would instead subject exercises of police power to an "intended or foreseeable result" test to determine if an action is subject to the Takings Clause. *Id.* at 11–12. Finally, the dissent was skeptical about the existence of the public-necessity doctrine as applied to the Takings Clause, but argued that if it does exist, it does not apply to the present case. *Id.* at 12.

Both claims are now before this Court on Writ of Certiorari. *Id.* at 13.

SUMMARY OF THE ARGUMENT

Jones has no remedy under the so-called state-created danger doctrine because no such doctrine exists under the Constitution, nor should the Court recognize it now. First, although many circuit courts have extrapolated this doctrine from two out-of-context sentences in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 187 (1989), but those sentences did not create a new doctrine. They merely explained why a different exception did not apply to that case's facts. Second, the Due Process Clause does not support this doctrine because the clause does not create an affirmative duty for the state to prevent private violence but only restrains government power. Finally, the Court should reject this purported doctrine because it violates principles of federalism by replacing state tort law with federal constitutional claims, and it hinders law enforcement and social services by creating perverse incentives for state actors.

Jones also has no remedy under the Takings Clause. First, the detonation of the bomb is outside the scope of the clause. There is a distinction between police power and eminent domain power. Generally, an exercise of police power is not a Taking, but it can become a Taking by going "too far." Whether an action went "too far" is determined by ad hoc factors (i.e., the *Penn Central* test). Unlike *permanent* physical intrusions, which go "too far" *per se*, *temporary* physical intrusions are subject to the *Penn Central* test. The detonation of this bomb was an exercise of police powers that resulted in a temporary physical intrusion without going "too far" under the *Penn Central* test.

Second, even if the detonation were within the scope of the Takings Clause, the public-necessity doctrine provides an affirmative defense that creates a compensation exception. The doctrine is deeply embedded in American history and tradition and its application to the Takings Clause has been recognized by this Court on multiple occasions. Under the doctrine, the government owes no compensation when it damages private property out of public necessity. The uncontrollable bomb that damaged Jones's house was a threat to public health and safety, so disposing of it safely was a matter of public necessity.

This Court should affirm the ruling of the Thirteenth Circuit and hold that there is no state-created danger doctrine and that Respondents owe no compensation to Jones under the Takings Clause.

ARGUMENT

I. JONES DOES NOT HAVE A REMEDY UNDER THE SO-CALLED STATE-CREATED DANGER DOCTRINE BECAUSE THE DOCTRINE'S EXISTENCE IS NOT SUPPORTED BY THE PRECEDENT THAT COURTS HAVE USED TO CREATE IT, THE DUE PROCESS CLAUSE ITSELF, OR BY PUBLIC POLICY.

A. *DeShaney* Does Not Support the State-Created Danger Doctrine.

Like all state-created danger doctrine cases, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 187 (1989), had tragic facts. Joshua DeShaney was a young boy whose father physically abused him for years. *Id.* at 191–92. In January 1983, Joshua was admitted to the hospital with injuries the examining physician suspected were from child abuse. *Id.* at 192. The County's Department of Social Services (DSS) immediately obtained an order from a juvenile court temporarily placing Joshua in the hospital's custody. *Id.* A few days later, several DSS caseworkers and other local officials determined there was not enough evidence to keep Joshua in the court's custody. *Id.* DSS entered into a voluntary agreement with Joshua's father in which he promised to cooperate with them. *Id.* Upon the local officials' recommendation, the juvenile court then dismissed the child protection case and returned Joshua to his father's custody. *Id.*

Over the following months, a DSS caseworker visited the DeShaney home several times, where she noticed that Joshua had suspicious head injuries and was not enrolled in school. *Id.* at 192–93. DSS "took no action" in response to this situation, even when notified by the emergency room that Joshua had been treated once again for injuries the staff believed were caused by child abuse. *Id.* at 193. Finally, Joshua's father beat him "so severely that he fell into a life-threatening coma" and suffered permanent brain damage. *Id.* Joshua and his mother brought a section 1983 action against the County, DSS, and some of the DSS employees, alleging that the State had deprived Joshua of his liberty without due process by failing to protect him from his father's abuse, a risk that they knew or should have known about. *Id.*

1. The DeShaney *Court Did Not Create a New Doctrine, but Merely Explained Why the "Special Relationship" Exception Did Not Apply to the Case's Facts.*

The Court rejected DeShaney's argument that the Due Process Clause imposes an "affirmative obligation on the State to provide the general public with adequate protective services." *Id.* at 197. The Court acknowledged that "in certain limited circumstances," though, the Constitution does impose affirmative duties of care on the state, and it looked at whether, "such a duty" arose out of a "'special relationship[]' created or assumed [with DeShaney] by the State." *Id.* DeShaney's argument in this regard was that by undertaking, "by word and by deed," to protect Joshua from danger, "the State acquired an affirmative 'duty,' enforceable through the Due Process Clause, to do so in a reasonably competent fashion." *Id.* Its failure to protect Joshua was thus an abuse of power that constituted a substantive due process violation. *Id.*

The Court rejected this argument as well, and *in the context of explaining why the "special relationship" exception did not apply to Joshua's circumstances*, it wrote the two sentences that some circuit courts have since used to create the state-created danger doctrine:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Id. at 201. From the Court's observations that the State had no role in creating the dangers and did nothing to make Joshua more vulnerable to them, many circuit courts have reasoned that if the State *had* created or increased the danger to Joshua, then he could have prevailed on his substantive due process argument. *See, e.g.*, *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) ("*DeShaney* thus suggests that had the state created the danger, Joshua might have recovered.").

But rather than creating a new constitutional exception, the *DeShaney* court was simply fleshing out its special relationship analysis and explaining why that exception did not apply. The standard special relationship case involves the State taking someone into custody and consequently having a due process duty to guarantee their safety and well-being. *See, e.g.*, *DeShaney*, 489 U.S. at 199–200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being," (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982))). This exception has a clear rationale—if the State limits someone's liberty by detaining him, then it has an obligation to ensure his safety, so that it does not "deprive [that] person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 2; *see DeShaney*, 489 U.S. at 200. When the *DeShaney* Court mentioned that the State had not created or increased the dangers Joshua faced, it was reasoning in terms of a standard special relationship scenario in which the State takes someone into custody. *Murguia v. Langdon,* 73 F.4th 1103, 1110 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc) ("It's no mistake that the language the Court uses—which courts now use to justify the state-created danger exception—also fits neatly within the special relationship exception."). After all, if the State detains someone and puts them in an unsafe setting or exposes them to heightened danger, then "the State is to blame for creating those dangers and for rendering that person more vulnerable to them." *Id.* (citation modified). But the *DeShaney* Court explained that the State's temporary custody of Joshua did not change its analysis. *DeShaney*, 489 U.S. at 201. The Court then observed that by "undertaking to protect Joshua" from child abuse, "[i]t may well be that . . . the State acquired a duty *under state tort law*" to protect him adequately. *Id.* at 201–02 (emphasis added). But the Court specifically rejected the idea that such a claim could arise under the Due

Process Clause. *Id.* at 202 ("[A]s we have said many times, [the Due Process Clause] does not transform every tort committed by a state actor into a constitutional violation.").

2. Creating a New Constitutional Doctrine from* Deshaney *Stretches Its Dicta Too Far.

Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and neither does this Court. *Murguia,* 73 F.4th at 1110 (Bumatay, J., dissenting from denial of rehearing en banc). Even if the relevant selection is removed from its context, it is doubtful that the *DeShaney* Court itself believed it was creating a new constitutional doctrine via two incidental sentences found in the middle of a paragraph. *See DeShaney*, 489 U.S. at 201. This Court recently reaffirmed that when working out the protections of substantive due process, courts must "exercise the utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The circuit courts that have articulated a state-created danger doctrine have not exercised this care, but have gone too far, stretching incidental language from one precedent into a doctrine the Court could not reasonably have been promulgating.

It is no wonder that, as circuit courts have extrapolated this doctrine from two sentences in *DeShaney*, they have come up with numerous ways of formulating it. *See Murguia,* 73 F.4th at 1112–13 (Bumatay, J, dissenting from denial of rehearing en banc). "Practically every circuit that's endorsed the state-created danger exception has come up with a different test for when it should apply." *Id.* at 1112; *see also id.* at 1113 (providing a chart of the varying tests circuit courts have given). These tests result in widely differing requirements for finding a state-created danger. Some circuits require that the state's conduct "shock the conscience," but the Sixth and Ninth do not. *Id.* at 1113 (first citing *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d

485, 491–92 (6th Cir. 2019); and then citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064–65 (9th Cir. 2006)). The Third Circuit requires that there be a relationship between the State and the person injured, but the other circuits do not. *Murguia*, 73 F.4th at 1113 (citing *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018)). In the Eighth and Tenth Circuits, the plaintiff must be a "member of a limited and definable group," but in the other circuits, this is unnecessary. *Murguia*, 73 F.4th at 1113 (first citing *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 512 (8th Cir. 2015); and then citing *Est. of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014)). Taking *DeShaney* to be a blank canvas, the courts have produced a multitude of portraits. As *DeShaney* recognized, "[j]udges and lawyers . . . are moved by natural sympathy in a case like this to find a way for [victims] to receive adequate compensation for the grievous harm inflicted upon them," but that sympathy does not mean courts are free to create a source of relief through "expansion of the Due Process Clause." 489 U.S. at 202–03. This Court should clarify that *DeShaney* does not provide for a state-created danger doctrine and leave it to the democratic branches to provide additional redress for injuries resulting from "the failure[s] of a state or local governmental entity or its agents." *Id.* at 194.

B. The State-Created Danger Doctrine Is Not Supported by the Text or History of the Due Process Clause.

In general, the Constitution restricts the actions of government actors, but "provides no relief to those injured by private parties." *Murguia*, 73 F.4th at 1103 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc). When "[f]aced with tragic facts, [courts] may be tempted to expand the scope of constitutional rights to injured parties." *Id.* But the fact that a party deserves redress does not mean the Constitution actually provides for it. The Court's duty in the present case is to determine the scope of the constitutional protections and remedies available and leave the availability of redress by other means to the democratic political process.

The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The clause's plain text restrains governmental power. It does not create an affirmative duty for the state to regulate the conduct of private parties. The clause is "phrased as a limitation on a State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. In sum, nothing in the clause's language "requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.*

Early cases interpreting the Due Process Clause likewise held that its purpose is to limit state power. In 1875, the Supreme Court explained that the Due Process Clause "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment *by the states* upon the fundamental rights which belong to every citizen as a member of society." *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (emphasis added). Similarly, the Court held in 1884 that the clause "secure[s] the individual from the arbitrary exercise of the powers of the government." *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)).

The *DeShaney* case itself, from which many circuit courts have incorrectly fashioned variations of the so-called state-created danger doctrine, articulates this understanding of the Due Process Clause as well. The *DeShaney* Court wrote that the Due Process Clause was "intended to prevent government from abusing its power, or employing it as an instrument of oppression." 489 U.S. at 196 (citation modified). Accordingly, the Court's precedents "have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* And to be more specific, *DeShaney* held that "as a

general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

For more than a century after the Fourteenth Amendment's ratification, no court recognized a so-called state-created danger doctrine. *Murguia*, 73 F.4th at 1107–08 (9th Cir. 2023) (Bumatay, J., dissenting from denial of rehearing en banc). When circuit courts began creating various versions of this doctrine, they rooted them in the substantive component of the Due Process Clause. *See, e.g.*, *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 427–28 (2d Cir. 2009); *White v. Lemacks*, 183 F.3d 1253, 1256 (11th Cir. 1999). But this Court has warned lower courts to tread carefully on substantive due process because it is "a disfavored doctrine prone to judicial improvisation." *Fisher v. Moore*, 73 F.4th 367, 373 (5th Cir. 2023). In *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), this Court wrote that it "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Thus, the burden is firmly on Petitioner and other would-be proponents of the state-created danger doctrine to demonstrate why the Court should expand substantive due process in this way.

Petitioner does not meet that burden. The Due Process Clause limits the government's power to "deprive" a person of "life, liberty, or property"; it does not create a positive duty for the government to prevent private actors from depriving citizens of those interests. U.S. Const. amend. XIV, § 1; *see DeShaney*, 489 U.S. at 195. This understanding of the clause is demanded by its plain text, was articulated by the Court in early precedents interpreting the clause, and was reaffirmed in *DeShaney*, the very case often used to justify the purported state-created danger doctrine. The Court should reject the state-created danger doctrine and hold that Petitioner is not entitled under the Due Process Clause to relief from the City.

C. The State-Created Danger Doctrine Violates Constitutional Principles of Federalism by Replacing State Tort Law with Federal Constitutional Claims.

One reason this Court has long been careful to delimit the protections of the Due Process Clause is to keep its procedural guarantees from becoming a "font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). In *DeShaney* itself, the Court suggested that the State may have "acquired a duty under *state* tort law" to give Joshua "adequate protection" when it voluntarily protected him against an external danger. 489 U.S. at 201–02 (emphasis added). But the Court further specified that the claim in *DeShaney* was "based on the Due Process Clause . . . which, as [the Court has] said many times, does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202.

State law is the proper avenue for providing redress against negligent actions by state actors. Many states have a detailed statutory system providing "relief to plaintiffs for injuries caused by State officials' tortious conduct." *Murguia*, 73 F.4th at 1108 (Bumatay, J., dissenting from denial of rehearing en banc) (citing Cal. Gov't Code § 820). The state-created danger doctrine displaces this traditional province of state law, whether it be statutory or common law. *See Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 919 (10th Cir. 2012) (noting the state-created danger doctrine's "osmotic, ill-considered tendency to invade the province of both common law negligence and state tort law."). The Court should leave redress for state officials' harmful conduct to the traditional realm of state tort law and affirm the Thirteenth Circuit's ruling that there is no state-created danger doctrine under the Constitution.

D. The State-Created Danger Doctrine Hinders Law Enforcement and Social Services by Creating Perverse Incentives for State Actors.

The state-created danger doctrine creates perverse incentives for state actors trying to carry out their duties, like enforcing the law and protecting the best interests of children. The clearest consequences of this doctrine are those for police, but they also apply to decisions made in public schools, the foster care system, drug treatment programs, and other settings. On the one hand, this doctrine can incentivize inaction. Because the doctrine is triggered by a state actor's affirmative acts, authorities may *avoid* intervening in risky, fraught situations to avoid liability. Examples include domestic disputes and aiding people who suffer from mental illnesses or homelessness. On the other hand, once police do become involved in fraught situations, this doctrine can incentivize them to act more aggressively and intrusively than needed. *See Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995) (noting that a constitutional "obligation of the state to protect private citizens . . . would engender a variety of perverse incentives. Local officials faced with ambiguous circumstances would be forced to inject themselves into private affairs to foreclose the complaint that they should have done more."). If the authorities act, but not firmly enough, they may incur liability under this doctrine for creating or increasing danger even when trying to stop a private party from inflicting injury. Thus, the state-created danger doctrine puts state actors in a Catch-22 that hinders them from serving and protecting the public.

Determining the appropriate scope of liability when the State fails to act means making trade-offs between competing social, political, economic, and moral interests. The Constitution entrusts this sort of policy-making to democratic bodies. This balance should not be "thrust upon [the people] by this Court's expansion of the Due Process Clause." *DeShaney*, 489 U.S. at 203. Instead, this Court should affirm the Thirteenth Circuit's ruling, reject the state-created danger doctrine, and allow the democratic branches of government to strike an appropriate balance.

II. THE DAMAGE TO JONES'S PROPERTY DOES NOT CONSTITUTE A "TAKING" BECAUSE IT WAS INCURRED THROUGH THE EXERCISE OF A LAWFUL POLICE POWER, BUT EVEN IF IT DID, THE CITY HAS A VALID DEFENSE UNDER THE PUBLIC-NECESSITY DOCTRINE.

A. Jones Has No Remedy Under the Takings Clause for Damage to Property Incurred as a Consequence of the Lawful Exercise of the City's Police Powers.

The Fifth Amendment's Takings Clause, which applies to the states through the Fourteenth Amendment, *see Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897), provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. But the Takings Clause is not applicable to the case at bar because Petitioner's house was not damaged in the City's exercise of eminent domain power; it was instead damaged by a reasonable and temporary intrusion via the City's common law police powers. Because police powers are separate from eminent domain power, and because the intrusion was only temporary, the Takings Clause is not applicable and no compensation is owed.

1. The Damage to Jones's House Was Caused by an Exercise of Police Power, Not Eminent Domain.

a. This Court Recognizes a Distinction Between Police Powers and Eminent Domain Powers.

"[T]he Supreme Court . . . has drawn a distinction on the one hand between the exercise of the police power to enforce the law to remove or restrict nuisances, blights, and other unlawful use of property and, on the other hand the government 'taking property for public use.'" *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017) (first quoting *Mugler v. Kansas*, 123 U.S. 623, 669 (1887); and then citing *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928)). The policy reasons for this distinction are evident. States must be able to—and have an "acknowledged right" to—"control their purely internal affairs, and, in doing so, to protect the health, morals, and safety of their people." *Mugler*, 123 U.S. at 659. A government cannot function effectively and efficiently if it is hindered in these pursuits by providing compensation each time it engages in basic

governmental functions. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

b. Defining the Distinction: Police Powers Are for the Public Good, Eminent Domain Powers Are for Public Use.

While it is well established that there *is* a distinction between police powers and eminent domain powers, the line between them is not always clear. As the Federal Circuit described it, "the precise contours of [the police power] are difficult to discern." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008). But *difficult* is not *impossible*. Perhaps the clearest characterization of the distinction is that the police power "controls the use of property by the owner for the public *good*," while the eminent domain power "takes property for public *use*." *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971) (emphases added) (first citing *Chi., Burlington, & Quincy Ry. Co. v. Illinois* ex rel. *Grimwood*, 200 U.S. 561 (1906); and then citing *Appeal of White*, 143 A. 409 (Pa. 1926)); *see* U.S. Const. amend. V (Takings Clause); *see also Lech v. Jackson*, 791 F. App'x 711, 717–18 (10th Cir. 2019) (explaining that actions taken for the safety and benefit of the public do not burden the government with providing compensation to affected property owners).

Lamm's public *good* / public *use* distinction has been applied both within the Tenth Circuit and without. In both *Lech* (Tenth Circuit) and *Bachmann* (Federal Claims) (1) the plaintiffs' real property was destroyed as a result of law enforcement officers attempting to apprehend criminal suspects who were hiding inside, (2) the homeowners sought compensation for their damaged property under the Takings Clause, and (3) the court rejected the claim that there was a Taking. *See Lech*, 791 F. App'x at 713; *Bachmann*, 134 Fed. Cl. at 695, 697. In reaching its conclusion that the law enforcement actions were pursuant to police power, rather than eminent domain, the

Bachmann court reasoned that the actions responsible for the property damage were performed "deliberately for the public's safety, to protect the public from a wanted suspect who was perceived by law enforcement to be a danger to the general public," and that "the only reason . . . law enforcement officials were concerned with plaintiffs' property was because a fugitive was using the house as his hideout." *Bachmann*, 134 Fed. Cl. at 697 (citation modified). Because the damage "was incident to securing the safety and welfare of both plaintiffs' property and the community at large," the damage "was not a taking for public use, but rather an exercise of the police power." *Id.* Coming to the same conclusion, the *Lech* court cited the *Bachmann* analysis as evidence that the police actions at issue before them were for the public *good*, rather than for public *use*. *Lech*, 791 F. App'x at 718 (noting that *Bachmann* rejected the argument that "when law enforcement officials damage private property in the process of enforcing criminal law, they take private property for public use." (citation modified)). This Court has independently supported the reasoning in *Lech* and *Bachmann* by acknowledging that "where public interest is involved preferment of that interest over the interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Miller*, 276 U.S. at 279–80.

c. The Damage to Jones's House Was for the Public Good, Not for Public Use.

The detonation of the bomb that damaged Jones's house was unfortunate, but undoubtedly for the public *good*. In *Lech* and *Bachmann*, both courts reasoned that because the relevant law enforcement actions were taken deliberately to secure public safety from an imminent threat, the resulting property damage was for the public *good*, and thus a use of police power. *See Lech*, 791 F. App'x at 718; *Bachmann*, 134 Fed. Cl. at 697. Applying this reasoning to the present case, "the only reason . . . law enforcement officials were concerned with [Jones's] property" was because

they needed to "neutralize what officers reasonably believed to be an immediate threat to life." *See Bachmann*, 134 Fed. Cl. at 697; R. at 8. They had no further interest in or use for the property and it was "not altered or turned over for the public benefit." *Bachmann*, 134 Fed. Cl. at 696. Further, because the bomb was detonated to prevent public harm, this Court explicitly recognizes the government's right to detonate as "one of the distinguishing characteristics of every exercise of the police power which affects property. *Miller*, 276 U.S. at 280. As such, the bomb squad's response to the threat was purely for the public *good* and not for public *use*, and the damage to Jones's house was an exercise of police power, not eminent domain.

2. In the Most Extreme Cases, Police Action Can Go "Too Far" and Become a Taking, but the Action That Damaged Jones's House Did Not.

Distinguishing between police and eminent domain powers is further complicated by this Court's precedent that if the use of police power goes "too far," then the action becomes a Taking. *See Pa. Coal Co.*, 260 U.S. at 413, 415 ("When [the police power] reaches a certain magnitude, there must be an exercise of eminent domain and compensation to sustain the act."). This Court understands the police and eminent domain powers to exist on a spectrum, where an exercise of police power can become a Taking if the invasion exceeds a certain point. The Court further acknowledges that (1) it "has been unable to develop any 'set formula' for determining" when a government action has gone "too far," and that (2) whether a particular action triggers the Takings Clause will depend "largely upon the particular circumstances in that case." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation modified). But to provide some guidance, this Court developed a fact-intensive ad hoc test with three primary factors, which are (1) the economic impact, (2) the extent to which the government action interferes with distinct investment-backed expectations, and (3) the character of the government action. *Id.*

a. The Economic Impact to Jones's Property Did Not Push the Exercise of Police Power "Too Far" Such That It Became a Taking.

The first factor calls for a court to compare the market value of the property *prior* to the government action with the estimated value of the property *after* the government action. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Env't. L. & Pol'y 171, 180 (2005). In making their calculations under this factor, courts do "not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," but rather on the "extent of the interference with rights in the parcel as a whole." *Penn Cent.*, 438 U.S. at 130–31. Unless the entire parcel has been stripped of "*all* economically beneficial or productive use," this factor will not be dispositive. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (emphasis added). *Contrast id.* ("[W]e have found categorical treatment [as a Taking] appropriate where regulation denies *all* economically beneficial use of land." (emphasis added)), *with* Echeverria, *Making Sense of* Penn Central *supra*, at 180, 180 n.35 (collecting Supreme Court cases where no Taking was found when the value of property was diminished by 75%, 85%, and 92.5%).

The record does not indicate that the damage to the house deprived the parcel of "all economically beneficial productive use," *Lucas*, 505 U.S. at 1015, and there is no indication that it cannot continue to be used for residential purposes if a new house is constructed. *See* R. at 1–12. Therefore, this factor leans heavily favors a finding that the police action did *not* go too far.

b. The LPD's Exercise of Police Power Fully Satisfied Jones's Investment Backed Expectations Such That It Did Become a Taking by Going "Too Far."

The second *Penn Central* factor requires courts to consider (1) what, if any, restrictions there were on the property's use when it was purchased and (2) whether any subsequent restrictions were reasonably foreseeable. John D. Echeverria, *What Is a Physical Taking?*, 54

U.C. Davis. L. Rev. 731, 741–42 (2020) (first citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); then citing *Palazzolo*, 533 U.S. at 633 (O'Connor, J. concurring); and then citing Echeverria, *Making Sense of* Penn Central, *supra*, at 183–86). This factor is intended to reflect "the notion that government routinely affects property interests, and dealing with such impacts is one price of 'living in a civilized community.'" Echeverria, *What Is a Physical Taking?*, *supra*, at 742 (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979)).

This factor concerns whether the damage resulted from a government action that was reasonably foreseeable at the time Jones purchased her house. It did not. While it is not reasonable to foresee a bomb being planted at one's home, the police were not the ones who planted it. *See* R. at 2. In contrast, it *is* reasonable to expect that, if a bomb is placed outside a home, the police will respond rationally and professionally to protect public health and safety. That is exactly what the LPD did. Upon observing the bomb, officers called the LPD Bomb Squad. *Id.* at 3. The bomb squad proceeded to "secure[] the area, ensuring everyone was at a safe distance." *Id.* They then assessed the bomb and determined that it was not controllable. *Id.* Knowing it could be detonated remotely at any time, the bomb squad acted in the best interest of public safety by attempting to defuse it. *Id.* Because the bomb was sophisticated, they knew that they were might not succeed, *id.*, but if the bomb was going to detonate, it was better that it happen in a controlled environment under police supervision where everyone could be kept as safe as possible. None of the LPD's actions violated the expectations Jones should reasonably have had about how police would respond to the presence of a bomb at her home.

c. The LPD's Use of Police Power Did Not Go "Too Far" and Become a Taking Because It Prevented Public Harm and Primarily Benefited Jones.

The final *Penn Central* factor, while inquiring into the purpose generally, is particularly concerned with (1) whether the government action was designed to protect the public from harm

and (2) whether the action was designed to confer benefits on both the claimant and others. Echeverria, *What Is a Physical Taking?*, *supra*, at 742–43 (first citing *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 488 (1987); and then citing *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 533 (1914)). This factor recognizes that there is a "reciprocity of advantage" to government actions and that "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from restrictions that are placed on others." *Keystone Bituminous*, 480 U.S. at 491; *see also* Echeverria, *What Is a Physical Taking?*, *supra*, at 742. Further, the balance of this reciprocity need not be measured under this factor because

> [t]he Takings Clause has never been read to require the states or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Keystone Bituminous, 480 U.S. at 491 n.21.

The damage to Jones's house was caused by an exercise of police power that was intended to (1) protect the public from harm and (2) confer benefits primarily on Jones herself. The presence of an uncontrollable bomb is inherently a risk to public safety because of the potential for anyone to be within its blast radius when it detonates without notice. And given that the bomb was planted on her back porch, R. at 2, Jones was the one whose safety was most at risk, so if anyone benefited from the government's action to ensure public safety, it was her. Additionally, while the Court does not necessarily balance the reciprocity of the harm incurred against the benefit received, any reasonable person would find that the benefit of not suffering death or severe bodily injury far outweighs the harm of damage to some physical property.

d. "Intended and Foreseeable Results" Are Additional Penn Central Factors, Not an Alternative Standard, and They Further Indicate That the City Did Not Go "Too Far."

In the dissent below, Judge Merrit indicated a preference for the Fourth Circuit's "intended or foreseeable" test to evaluate whether a government action has gone "too far." R. at 12 (citing *Yawn v. Dorchester Cnty.*, 1 F.4th 191, 195 (4th Cir. 2021)). Under this test, if the government's "invasion is not intended or foreseeable, then it does not constitute a taking." *Yawn*, 1 F.4th at 195 (first citing *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 39 (2012); and then citing *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005)). But recall that while the *Penn Central* test focuses *primarily* on the three factors analyzed above, it is a fact-intensive ad hoc inquiry into the unique circumstances of each case. *See Penn Cent.*, 438 U.S. at 124. Courts are free to emphasize the intent and foreseeability of the government's intrusion, but those are only additional factors to consider when evaluating the circumstances of the intrusion as a whole. To the extent that this Court chooses to consider them in the present case, these factors do not change the outcome of the analysis.

i. <u>The City Did Not Intend to Detonate the Device.</u>

When the LPD Bomb Squad assessed the explosive device, they "deployed a robot equipped with an X-ray system with an energetic tool." R. at 3. After determining that the device was an uncontrollable explosive, they "attempt[ed] to disrupt the device." *Id.* They knew that detonation was possible, but disruption, not detonation, was still their underlying intent. *Id.*

ii. <u>The Foreseeability Factor Should Be Given Little to No Weight Because the City Had No Reasonable Alternatives.</u>

The LPD Bomb Squad was aware that the likelihood of disruption was low because "the device was highly sophisticated and set up to evade disruption." *Id.* As such, the foreseeability of their intrusion was quite high. However, even if it were certain that the device would detonate,

this factor should be given no weight because there were no reasonable steps the City could have taken to mitigate the damage. If the device were detonated remotely, the house would have suffered identical damage. If it were never detonated, Jones's property would have truly been Taken because she would never be able to use, enjoy, or possess it without coming within potentially lethal range of the device. If the City attempted to move the device to a safer location for detonation, any number of things could have accidentally detonated it during transit, risking the lives and safety of the transporters. So because likely detonation was the only realistic option that the police had, the fact that it was foreseeable should not be considered, or at the very least should not outweigh the other factors.

3. The Distinction Between Police and Eminent Domain Powers Applies to Both Regulatory and Physical Takings.

There is no dispute that this Court recognizes a distinction between police and eminent domain powers in the context of *regulatory* actions. *See Penn Cent.*, 439 U.S. 883 (considering the impact of a building permit on the value of Grand Central Terminal); *Pa. Coal*, 260 U.S. 393 (considering the impact of a legislative act on the value of a coal mine); *Mugler*, 123 U.S. 623 (considering the impact of a constitutional amendment on a brewery). And both policy and jurisprudence indicate that physical and regulatory actions should be analyzed the same. But although lower courts routinely apply the distinction to both types of intrusion, *see Lech*, 791 F. App'x at 715–16 ("[A]t least three of our sibling courts and the Court of Federal Claims have expressly relied upon the distinction . . . in cases involving the government's direct physical interference."), this Court "has never expressly invoked this distinction in a case alleging a physical taking." *Id.* at 716. It must do so now and should find that the distinction between police and eminent domain powers applies to both regulatory *and* physical invasions.

a. Permanent Physical Invasions

Those who oppose applying the distinction to physical invasions will point to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that the installation of cable boxes and wires on the roof of a building constituted a Taking), as creating a rule that all physical invasions are *per se* Takings. But this position is jurisprudentially inaccurate and far too narrow. *Loretto* was very clear that only *permanent* physical invasions establish *per se* Takings. *Id.* at 428 ("[T]his Court has consistently distinguished between . . . cases involving permanent physical occupation, on the one hand, and cases involving more temporary invasion . . . on the other. A taking has always been found only in the former situation."); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–48, 150–52 (2021) (collecting cases in which the Court held that a physical invasion constituted a *per se* Taking, all of which involved permanent intrusions). *Loretto* went on to explain that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking." 458 U.S. at 435 n.12. Additionally, the Court clarified that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not dispossess the owner of his rights to use, and exclude others from, his property." *Id.* In short, not all physical invasions of property by government amount to a *per se* Taking, only *permanent* invasions do.

b. Temporary Physical Invasions

Sometimes it is wrongly assumed that the *Penn Central* test is only applied to regulatory takings. For example, in the Thirteenth Circuit's dissenting opinion below, Judge Merritt noted that "the Supreme Court's regulatory takings jurisprudence 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." R. at 11–12

(citation modified). By singling out the Court's regulatory jurisprudence, especially in a case having to do with a *physical* invasion, Judge Merritt implies that the Court's jurisprudence regarding temporary physical invasions is different. That is not so.

This misconception stems from the fact that the Supreme Court has, prior to now, never considered a case in which it "squarely" contended with the distinction between police and eminent domain powers for a physical invasion. *See Baker v. City of McKinney*, 145 S. Ct. 11, 11, 13 (2024) (Sotomayor, J., statement concurring in the denial of certiorari); *see also Lech*, 791 F. App'x at 716. But even though the Court has not considered the issue *directly*, it did address it in *Penn Central*, where the Court indicated that the "too far" analysis should be the same for both regulatory and temporary physical invasions, albeit with slightly different standards. 438 U.S. at 124. In *Penn Central*, the Court stated that, when applying the "too far" test, "a 'taking' may *more readily* be found when the interference with property can be characterized as a physical invasion by government." *Id.* at 124 (citation modified) (emphasis added). The "more readily" language indicates that there is a higher bar to prove that a regulatory taking went "too far," but more importantly, it demonstrates that the Court intended for the *Penn Central* test to be applied to both regulatory *and* temporary physical invasions.

c. Lower Courts Have Improperly Relied on Bennis *to Exempt* All *Police-Power Physical Intrusions from the Takings Clause, but a Proper Interpretation Still Recognizes That* Temporary *Physical Intrusions Are Exempt.*

As the dissent below highlights, the majority of lower courts to have considered the distinction for physical intrusions have gone a step further than the Supreme Court permitted in *Penn Central*. Rather than subjecting physical invasions to the "too far" test, they have instead held that "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of

eminent domain." *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011) (citing *AmeriSource*, 515 F.3d at 1154); *see also, e.g.*, *Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018) ("Zitter lacks a viable Takings Clause claim because Defendants acquired the property pursuant to a lawful [police power]." (first citing *Bennis v. Michigan*, 516 U.S. 442, 452 (1996); and then citing *Manitowoc Cnty.*, 635 F.3d at 333–36)); *AmeriSource*, 525 F.3d at 1154 ("[S]o long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment." (citing *Bennis*, 516 U.S. 442, 453)). The courts reason that there is no need to apply the "too far" test because physical invasions under the police power are *per se* exempt from the Takings Clause. In reaching this conclusion, the lower courts inevitably rely on *Bennis v. Michigan*.

In *Bennis*, a Michigan court ordered that an automobile be forfeited to the government for being a public nuisance. 516 U.S. at 443. The owner challenged that order under the Due Process Clause and the Takings Clause. *Id.* The Court's opinion focused mostly on the due process claim, but its holding on the Taking claim was very straightforward: "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* at 454.

In its more recent *Cedar Point Nursery* opinion, however, the Court reaffirmed that all permanent physical intrusions are *per se* Takings. *See* 594 U.S. at 151. So, despite its own fact pattern, *Bennis* must only be precedential for *temporary* physical intrusions. But within that context, the plain text of the opinion still leaves only one possible interpretation: The Takings Clause does not require the government to compensate owners for property that it has physically acquired, on a temporary basis, through the exercise of authority other than eminent domain.

d. The Damage to Jones's House was Caused by a Temporary Physical Intrusion That Did Not Go "Too Far."

There is no question that the intrusion on Jones's house was physical, not regulatory. But a physical invasion is not a *per se* Taking unless it is permanent. *See Lucas*, 505 U.S. at 1015 ("In general (at least with regard to *permanent* [physical] invasions) . . . we have required compensation (emphasis added) (citing *Loretto*, 458 U.S. 419)). The physical invasion of Jones's property in the case at bar was not permanent; it was temporary. After the bomb detonated, the police left, and Jones was free to do whatever she wanted with her property. She was not "absolutely dispossess[ed] of h[er] right to use," nor was she dispossessed of her right to "exclude others from," her property. *Loretto*, 458 U.S. at 435 n.12. As such, the detonation and ensuing damage do not constitute a *per se* taking and the issue is properly subject to "a more complex balancing process"—the *Penn Central* test—to determine whether the invasion was purely an exercise of the police power or whether it went "too far" and became a Taking. *Id.* As discussed *supra*, the action did not go too far and was therefore not a Taking.

B. Under the Public-Necessity Doctrine, the Takings Clause Does Not Require Compensation if It Was Objectively Necessary for Officers to Damage Property to Prevent Imminent Harm During an Emergency.

As Judge Hart noted below, an independent and alternative ground on which to resolve the Takings Clause issue is through the public-necessity doctrine. R. at 8. Public necessity is a common law doctrine that this Court applies to the Takings Clause. R. at 8; *see United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154–56 (1952). The doctrine holds that "no compensation is owed when property is destroyed in good faith to prevent imminent public disaster." R. at 8–9 (citing *Caltex*, 344 U.S. at 154); *accord* Restatement (Second) of Torts § 196 (A.L.I. 1965). Doctrinally, the public-necessity doctrine can be thought of as an exception to the Takings Clause or may be analogized to a privilege or defense in tort law; if a court finds that all

elements of a Takings claim have been satisfied, it can still hold that no compensation is owed because the relevant actions were justified by public necessity.

1. The Public-Necessity Doctrine is Entrenched in American History, Tradition, and Jurisprudence.

The public-necessity doctrine is firmly rooted in American history and tradition, including jurisprudence that predates the Constitution. In 1788, the Supreme Court of Pennsylvania held that, during the Revolutionary War, the government was justified in seizing and removing private property "useful to the enemy, and in danger of falling into their hands." *Respublica v. Sparhawk*, 1 Dall. 357, 362–63 (Pa. 1788) ("The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a trespass."). As rationale, the court explained "that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law." *Id.* at 362. As a counter example, that court noted that during a fire in 1666, half of London burned down because the mayor refused to level forty houses for fear of trespass. *Id.* at 363. The court further noted that because the government acted "lawfully" under the public-necessity doctrine, "there is nothing in the circumstances of the case, which . . . entitles the Appellant to a compensation for the consequent loss." *Id.* Given that *Sparhawk* was decided in 1788, the case is "directly on point to understanding the common law rights to just compensation against which the Fifth Amendment Takings Clause was ratified in 1791." *Baker v. City of McKinney*, 84 F.4th 378, 386 (5th Cir. 2023).

Sparhawk's parable about the Fire of London is particularly telling, as it lays the cornerstone for the public-necessity doctrine: "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." *Baker*, 84 F.4th at 386. The

rationale of "allow[ing] the government to damage or destroy property without compensation remained prominent after *Sparhawk*," *Baker*, 84 F.4th at 386–87, and even found its way into this Court's opinions numerous times throughout the nineteenth and twentieth centuries. *See, e.g.*, *Lucas*, 505 U.S. at 1029 n.16 (acknowledging that the state may be absolved of "liability for the destruction of real and personal property . . . to prevent . . . grave threats to the lives and property of others" (citation modified)); *Caltex*, 344 U.S. at 154 (acknowledging as a binding interpretation of the Takings Clause "that in times of peril . . . the sovereign [can], with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"); *Bowditch v. City of Boston*, 101 U.S. 16, 18–19 (1879) ("At the common law everyone had the right to destroy real and personal property, in cases of actual necessity . . . and there was no responsibility on the part of the destroyer, and no remedy for the owner.").

In the dissent below, Judge Merritt dedicated all of one sentence to this issue, relying exclusively on a single page of a dissent from a denial of rehearing en banc. R. at 12 (citing *Baker v. City of McKinney*, 93 F.4th 251, 257 (5th Cir. 2024) (Elrod, J., dissenting from denial of rehearing en banc). And that *Baker* dissent is woefully unpersuasive. On that lone page, Judge Elrod relied heavily on the opinion of a single law professor in an attempt to demonstrate that three select cases do not impute the public-necessity doctrine onto the Takings Clause. *See Baker*, 93 F.4th at 257. If one sentence, based on that foundation, represents the full extent of the dissent regarding the existence of the public-necessity doctrine and its applicability to the Takings Clause, this Court should feel confident and comfortable adopting Judge Hart's concurrence.

2. The City Owes Jones No Compensation Because Detonating an Uncontrollable Bomb Was a Public Necessity.

The device that damaged Jones's house "was an explosive with a remote detonation." R. at 3. Because the remote was not in police custody, the device was "not controllable" and thus a significant threat to public health and safety. *Id.* As such, contending with it in as safe and controlled an environment as possible was a public necessity because failure to do so could be catastrophic. An uncontrollable bomb could cause severe injuries or death if not dealt with quickly and appropriately. If risking damage to some physical property was the price of keeping the public safe, that is a price we want our police to be willing to pay. *See Lucas*, 505 U.S. at 1029 n.16. Situations exactly like these are why the public-necessity doctrine privileges the government to damage or destroy property without providing compensation, because "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." *Baker*, 84 F.4th at 386.

As the dissent below—and dissents in many similar cases—is happy to remind us, the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." R. at 11 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *accord, e.g.*, *Penn Cent.*, 438 U.S. at 140 (Rehnquist, J., dissenting); *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting); *Keystone Bituminous*, 480 U.S. at 512 (Rehnquist, C.J., dissenting); *Ark. Game & Fish Comm'n*, 637 F.3d at 1382 (Newman, J., dissenting). This sentiment is undoubtedly true, but like all things, it has limits. If a case falls outside the bounds of the Takings Clause, for example, then its protections cannot be applied. If history, tradition, jurisprudence, and sound policy have baked an exception or defense into the Takings Clause, then that is a limit too. The Takings Clause can and does

prevent people from bearing public burdens alone, but not when the government's action was a reasonable and temporary intrusion under the police powers, or when the action was taken pursuant to public necessity. For both of those reasons, the LPD's actions are beyond the reach of the Takings Clause and the City of Laurenton owes no compensation to Jones.

CONCLUSION

This Court has never recognized a state-created danger doctrine, and it should not do so now. Additionally, reasonable police-power actions are outside the scope of the Takings Clause, and even if the City did go "too far," it is exempt from providing compensation under the public-necessity doctrine. For the foregoing reasons, this Court should affirm the decisions of the Thirteenth Circuit and the District Court for the Eastern District of New Virginia granting the City's Motion for Summary Judgment.

Respectfully Submitted

Team 10

Counsel for *Respondents*