No. 25-178

In the Supreme Court of the United States

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

v.

THE CITY OF LAURENTON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

TEAM NO. 16
Counsel of Record
25TH ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment, a state actor is liable pursuant to the state-created danger doctrine for injuries inflicted by private parties when the state affirmatively creates or increases the danger to an individual.

2. Whether the destruction of property pursuant to a lawful exercise of the government's police power constitutes a "taking" under the Fifth Amendment that requires just compensation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Other Authorities:

Other Authorities—Continued: Page

Constitutional Provisions:

STATEMENT

1. On September 8, 2023, Petitioner phoned 911 to report that her ex-boyfriend, Mark Baker, was intoxicated and threatening her and their ten-year-old son, A.J. R. at 2. Two Laurenton police officers arrived at her home shortly thereafter and spoke with her about Baker's threats. *Id.* Petitioner told the officers that Baker owned a handgun and other weapons and that he had military training in explosives. *Id.* She asked whether she and A.J. should leave the home for the night. *Id.* One officer—aware that Baker was the subject of an outstanding arrest warrant for domestic assault in a neighboring county—told Petitioner that Baker "will be locked up until at least the morning." *Id.*

Under city policy, officers executing out-of-county arrest warrants were first required to confirm that the county jail had space to hold the arrestee. R. at 2. Following that policy, the arresting officer contacted the jail and learned it was over capacity. *Id.* Because the officers could not lawfully execute the warrant under those circumstances, they transported Baker to the house he was renting, seized his firearm, and released him there. *Id.*

In the early morning hours of September 9, Baker—acting alone and without Respondents' knowledge—constructed two improvised explosive devices at his rental home. R. at 2. He placed one on Petitioner's front porch and another on the back porch. *Id.* When Petitioner awoke and saw a package on her front porch, she assumed it was a delivery from Amazon. *Id.* As she began to open it, the device detonated, severely injuring her and A.J. *Id.* at 2–3. A neighbor immediately reported the explosion to the police. *Id.* at 3.

Laurenton police officers and emergency personnel responded within minutes, secured the scene, and transported Petitioner and A.J. to the hospital. R. at 3. While clearing the area, officers found the second package and summoned the department's bomb squad. *Id.* The squad arrived promptly, followed established procedures, and deployed a remote-controlled robot equipped with

an X-ray system and an energetic tool. *Id.* The X-ray revealed a live explosive device with a remote-detonation mechanism. *Id.* Because Baker remained at large and the device could not be moved safely, the squad attempted to disrupt it in place. *Id.* Despite adherence to protocol, the attempt triggered a detonation that destroyed the rear portion of Petitioner's house and rendered it unsafe. *Id.* A subsequent expert assessment concluded that the house had to be demolished and rebuilt. *Id.*

2. Petitioner, in both her individual capacity and on behalf of A.J., filed suit against Respondents seeking damages for the injuries and property loss caused by the explosion. R. at 4. Invoking 42 U.S.C. § 1983, she asserted claims under violations of the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. *Id.* On her due process claim, Petitioner alleged that Respondents "affirmatively creat[ed] the danger that led to her injuries" by returning Baker to his home rather than arresting him on the out-of-county warrant. *Id.* As to her Takings Clause claim, she alleged that Respondents' "decision to detonate the second device foreseeably destroyed her home," constituting a compensable taking under the Fifth Amendment. *Id.*

The district court granted Respondents' motion for summary judgment on both claims. R. at 4. The court declined to recognize the "state-created danger" theory that other courts of appeals have adopted. *Id.* It also held that Petitioner's Takings Clause claim failed because the Clause "does not apply to destruction of property undertaken in the exercise of the police power." *Id.*

3. The court of appeals affirmed. R. at 1–8. Addressing Petitioner's due process claim, the court noted that it has "never adopted the state-created danger doctrine" because "it is not properly rooted in the Due Process Clause." *Id.* at 5. Citing this Court's decision in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the court reasoned that—"[e]xcept

where the State has restrained an individual's liberty such that she cannot act on her own behalf"—the Due Process Clause "imposes no affirmative duty to protect against private violence." *Id.*

Acknowledging that many other courts of appeals "have recognized" the state-created danger doctrine as "an additional exception to the no-duty rule," the court expressed its view that the doctrine's "doctrinal footing is weak." R. at 6. It explained that the doctrine "rel[ies] entirely on a single sentence in *DeShaney* . . . wrenched out of context," which it deemed "inadequate ground on which to build a doctrine." *Id.* The court further observed that "[e]ven the circuits that recognize the state-created danger doctrine have begun to question its validity." *Id.* Finally, the court cautioned that the doctrine "risks converting virtually every flawed law-enforcement decision into a constitutional tort, thereby federalizing large swaths of state negligence law." *Id.* Concluding that the "proper remedy" for Petitioner's injuries lies "through the democratic process and state remedial statutes," the court held that her due process claim fails. *Id.* at 7.

As to Petitioner's takings claim, the court held that "the Takings Clause does not apply" because the destruction of her property "was a direct interference with physical property pursuant to [Respondents'] police power to protect public safety." R. at 8. The court explained that "[w]hen the government acts to preserve public safety, it exercises its police power, not its power of eminent domain." *Id.* at 7. Citing precedent from other courts of appeals, the court reasoned 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." *Id.* (quoting *Johnson v. Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011)). Because the bomb squad detonated the device "to neutralize what officers reasonably believed to be an immediate threat to life," the Court concluded that the "damage is not a taking for public use" and

compensation was therefore not required. *Id.* at 8 (quoting *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017)).

Judge Hart concurred. R. at 8–9. Citing *United States v. Caltex*, 344 U.S. 149 (1952), he found that the public-necessity doctrine "provides an additional, independent basis for dismissal of the Takings Clause claim." R. at 8. He explained the doctrine—under which "no compensation is owed when property is destroyed in good faith to prevent imminent public disaster"—"fit[s] comfortably within" the facts of this case. *Id.* at 8–9.

Judge Merritt dissented. R. at 9–12. She argued that the majority's "refusal to recognize the state-created danger doctrine" undermines the court's "responsibility to give effect to the Due Process Clause in circumstances where government conduct affirmatively endangers its citizens." *Id.* at 9. Also citing *DeShaney*, she maintained that the decision there "anticipated liability where the state, through its own affirmative acts, creates or heightens a danger that results in harm." *Id.* at 10. In her view, *DeShaney* stood for the proposition that "the Constitution may impose liability where the state plays a part in the creation of the danger." *Id.* at 11. She also rejected the majority's institutional concerns, arguing that the distinctions "between ordinary negligence and conduct which 'shocks the conscience' . . . are not too difficult for the court to analyze." *Id.*

As to Petitioner's takings claim, Judge Merritt argued that the "categorical rule that destruction of property in the exercise of police power" is not a taking cannot be reconciled with this Court's precedents. R. at 11. Citing decisions which "declined to exempt whole categories of government action from Takings Clause scrutiny," she reasoned that this Court's cases foreclose an exemption for law-enforcement activities. *Id.* (collecting cases). Instead, she would have adopted the Fourth Circuit's approach, which asks "whether the harm was the intended or foreseeable result of government action." *Id.* at 12 (citing *Yawn v. Dorchester County*, 1 F.4th 191, 195

(4th Cir. 2021)). Applying that framework, she concluded that the destruction of Petitioner's home "was a foreseeable result of [Respondents'] chosen course" and thus not excluded from Takings Clause Liability. *Id.*

SUMMARY OF ARGUMENT

I. The Due Process Clause of the Fourteenth Amendment limits state power; it does not impose an affirmative duty on the government to shield individuals from private harm. The Clause's text forbids the state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It is intended as a restraint, not a command to act. From the founding era through *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court has reaffirmed that principle: the Due Process Clause is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security." *Id.* at 195. Petitioner's claim—that the Constitution compels the State to protect individuals from private violence—defies the Clause's text, history, and this Court's settled understanding.

A. The claimed right to governmental protection from private actors fails the basic principle of substantive due process: it must be defined with precision and grounded in history and tradition. Petitioner's formulation—an asserted right to protection from third parties—defines liberty at too high a level of generality. This Court has consistently warned that such broad framing allows judges to "dictate rather than discern the society's views." *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

B. The "state-created danger" doctrine on which Petitioner relies is a modern judicial invention. It has no foundation in the text of the Due Process Clause or in this Court's decisions. *DeShaney* rejected a nearly identical claim, holding that a state's failure to prevent private abuse does not violate due process, even when officials were aware of the risk. The state-created danger

exception distorts *DeShaney* by treating its rejection of a "special relationship" duty as an invitation to create a new one. The two sentences of dicta Petitioner invokes were explanatory, not dispositive. This Court has never recognized a due process right to protection from third-party violence, and it should decline to do so now.

Nor does any "special relationship" exist here. The Due Process Clause imposes affirmative duties only when the state so restrains a person's liberty—through incarceration, institutionalization, or similar custody—that she cannot act on her own behalf. Petitioner was never in state custody. Nor did the officer's assurances that the Baker "will be locked up until morning" create a constitutional obligation. Knowledge of danger and expressions of intent to help do not transform a state into a guarantor of safety.

Moreover, recognizing a constitutional duty to protect would collapse the distinction between due process and state tort law. This Court has long rejected efforts to make "the Fourteenth Amendment a font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976). State law already provides remedies for negligence and failures to warn, and many states have chosen—through sovereign-immunity regimes and tort-claims statutes—how to balance accountability with effective governance. Converting those policy judgments into constitutional mandates would disrupt those frameworks and chill officials from acting precisely when decisiveness matters most.

The restraint this Court has shown for more than a century reflects respect for democracy and the judicial role. Recognizing new substantive due process rights places the matter outside the arena of public debate and legislative action. Courts have therefore "always been reluctant to expand the concept of substantive due process." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The state-created danger doctrine abandons that restraint, inviting judges to constitutionalize every alleged governmental misstep. The Constitution does not require that result. The

Court should therefore reaffirm that the Due Process Clause is a shield, not a sword, and does not impose a duty to protect against private wrongs.

II. The Takings Clause protects against the government's appropriation of private property for public use; it does not reach every lawful exercise of governmental power that incidentally affects property. From the Founding onward, courts have drawn a clear line between eminent domain—where the government takes property for its own use or to confer a public benefit—and the police power, through which the state acts to safeguard public health, safety, and order. When officials act pursuant to those traditional police powers, their conduct is not a "taking" within the meaning of the Fifth Amendment and does not require compensation.

A. The distinction between the eminent domain and police powers reflects the Takings Clause's original purpose and enduring limits. The Clause was meant "to secure compensation in the event of otherwise proper interference amounting to a taking," not to constrain all governmental action affecting property rights. *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). The state's police power, by contrast, rests on the inherent obligation of property ownership itself: "that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). Property rights have never been understood to exist free of that limitation. When the government enforces the criminal law, abates nuisances, or averts threats to public safety, it acts within the scope of that preexisting limitation on title. Such actions define, rather than invade, the property interest and therefore do not give rise to a compensable taking.

Text, history, and tradition confirm that the Takings Clause was never understood to compel payment for losses resulting from legitimate exercises of the police power. The Clause protects against compelled sacrifice of property "for public use," U.S. Const. amend. V, not against

governmental actions undertaken to prevent harm or enforce the law. At common law, officers could enter private land to make arrests or conduct lawful searches; such entries did not require compensation because the owner had no right to exclude officers acting within their lawful authority. Likewise, when the government destroyed property out of urgent public necessity—burning buildings to stop a fire's spread or seizing goods to prevent contagion—courts uniformly rejected takings claims. These background principles of necessity and public safety have long limited private ownership and defined the boundaries of the Takings Clause.

B. Requiring compensation for ordinary exercises of the police power would upend those limits and distort the Constitution's design. The Framers draw a clear line between property taken for public use and property damaged in the course of protecting the community. Collapsing that distinction would turn routine law-enforcement actions, building inspections, and emergency responses into potential takings. Such a rule would chill legitimate public-safety efforts, deter swift action in crises, and flood courts with claims for every broken door or seized contraband item. The Constitution does not demand that paralysis.

Nor do principles of fairness or justice support Petitioner's proposed rule. The Takings Clause prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). But when the government acts to prevent or respond to public danger, any resulting burden does not fall unfairly on the affected owner; it reflects the reciprocal obligations inherent in property ownership. Each citizen holds property subject to the same duty not to endanger others. Where the state acts to enforce that duty, any resulting loss is not a public exaction but a natural consequence of that longstanding limitation.

C. In any event, the doctrine of public necessity exempts Respondents' conduct. From the Founding era onwards, courts have recognized that the government may, without paying compensation, destroy or impair private property to avert grave and imminent harm to the community. That principle is not an exception to the Takings Clause but an expression of it: the Clause applies only to property taken for use or advantage by the public, not to property lawfully destroyed to prevent public disaster. Respondents' actions here fall squarely within that historic and constitutional boundary.

In sum, the Fifth Amendment does not transform the government's duty to protect life and safety into a compensable taking whenever property is incidentally affected. The Takings Clause secures payment when the government demands property for its own use; it does not penalize the state for acting to preserve the peace.

ARGUMENT

I. THERE IS NO SUBSTANTIVE DUE PROCESS RIGHT TO GOVERNMENTAL PROTECTION FROM OTHER PRIVATE ACTORS

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has long held that—on top of its procedural guarantees—the Clause provides "protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). "When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest." *Dep't of State v. Munoz*, 602 U.S. 899, 910 (2024). Yet recognizing a right as "fundamental" "carries a serious risk of judicial overreach, so this Court 'exercise[s] the utmost care whenever . . . asked to break new ground in this field.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 720). And Petitioner's

asserted right to governmental protection from private violence provides no basis to depart from that settled restraint.

A. The Right Asserted by Petitioner Is Defined at Too High a Level of Generality

"In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,'" judges "must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239 (2022). Consistent with that caution, whether a claimed liberty qualifies as "fundamental" turns on the two-step inquiry articulated in *Glucksberg*. First, the proponent must provide "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721. Second, they must show that such an interest is among "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (internal quotation marks omitted).

"As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998). This Court's precedents likewise require that "an asserted implied right must be narrowly and precisely expressed." *Poe v. Drummond*, 697 F. Supp. 3d 1238, 1255 (N.D. Okla. 2023), *aff'd*, 149 F.4th 1107 (10th Cir. 2025). Defining rights at too "high [a] level of generality" risks transforming "a broader right to autonomy," for example, into "fundamental rights to illicit drug use, prostitution, and the like." *Dobbs*, 597 U.S. at 257. As this Court has explained, "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views." *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion). Accordingly, courts must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.*

Petitioner's claimed right to government protection from private misconduct "exemplifies how judge-made doctrines can have amorphous bounds." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 320 (2025) (Thomas, J., concurring). Here, Petitioner asserts a "due process right to protection from third parties." *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995). But defining the right at that level of abstraction would effectively mean that "any government activity can give rise to a state-created danger claim." Matthew Pritchard, *Reviving* DeShaney*: State-Created Dangers and Due Process First Principles*, 74 Rutgers U. L. Rev. 161, 175 (2021). Under that theory, even the state's release of an inmate at the end of a lawful sentence could be said to endanger the public. That result cannot be squared with this Court's admonition that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that" interests in life, liberty, and property "do not come to harm through other means." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

Yet the courts of appeals have applied the state-created danger doctrine far beyond its initial limits. The Ninth Circuit, for example, has rejected any distinction "between danger creation and enhancement," holding instead that all state action violates due process when it "plac[es] an individual at risk." *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997). That approach has permitted even claims "based solely on negligence and mistake." *Murguia v. Langdon*, 61 F.4th 1096, 1124 (9th Cir. 2023), *cert. denied sub nom. Tulare v. Murguia*, 144 S. Ct. 553 (2024) (Ikuta, J., dissenting in part). The continual expansion of the doctrine reflects how "[a]textual, judge-created legal rules have a tendency to generate complexity, confusion, and erroneous results." *Ames*, 605 U.S. at 326 (Thomas, J., concurring).

B. The State-Created Danger Doctrine Lacks Support in History, Tradition, or This Court's Precedents

Regardless of how specifically Petitioner articulates her asserted right, this Court "need not decide whether [it] exists," because she "cannot clear the second step of *Glucksberg*'s test: demonstrating that the right . . . is 'deeply rooted in this Nation's history and tradition.'" *Munoz*, 602 U.S. at 911. From the founding, it has been understood that "the Due Process Clause is a limitation only on government action." *Guertin v. Michigan*, 912 F.3d 907, 930 (6th Cir. 2019). That principle traces to the Magna Carta, which "wrung from the king" guarantees "against the oppressions and usurpations of his prerogative." *Hurtado v. California*, 110 U.S. 516, 531 (1884). In doing so, the Magna Carta "pronounced the source of the fundamental rights of English subjects." Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 369–70 (1911). Those protections, however, extended only to "State action . . . which impairs the privileges and immunities of citizens." *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

It is therefore a foundational rule of constitutional law that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment." *Id.* As this Court has explained, the Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. "The Framers were content to leave the extent of governmental obligation" respecting the need to "protect the people . . . from each other" "to the democratic political processes." *Id.* Accordingly, the Court has never understood the Fourteenth Amendment to "alter the basic relations between the States and the national government." *Screws v. United States*, 325 U.S. 91, 109 (1945).

DeShaney does not suggest otherwise. It held that, "[c]onsistent with [due process] principles, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 196–97. The petitioner in

that case—a young boy "beaten and permanently injured by his father"—sued state employees who "received complaints that" he "was being abused by his father . . . but nonetheless did not act" to remove him from his father's custody. *Id.* at 191. Despite the employees' knowledge of the abuse, the Court held that the state owed "no constitutional duty to protect" the child "against his father's violence." *Id.* at 202.

The state-created danger doctrine is the result of decades of extrapolation from two sentences in *DeShaney*. There, the Court acknowledged that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198 (collecting cases). But the Court held that this "special relationship" exception "simply has no applicability," because the harm "occurred not while [the boy] was in the State's custody, but while he was in the custody of his natural father." *Id.* at 201. The Court furthered:

> While the State may have been aware of the dangers that [the boy] 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 [him] 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. From this, the courts of appeals have derived what they now call the state-created danger doctrine, reading those two sentences—which explain why the "special relationship" exception *failed*—as a freestanding constitutional rule. Under that gloss, state employees may incur Section 1983 liability if they "play a part in the creation of" or "take actions which render[] [people] more vulnerable to" private violence. *E.g.*, *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990).

Nor does a "special relationship" exist here. Substantive due process concerns "the State's affirmative act of restraining the individual's freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200. Petitioner's theory rests on the officer's awareness of Baker's violent tendencies (R.

at 2), and his assurance that Baker "will be locked up until at least the morning" (*id.*), which Petitioner says created an affirmative duty for Respondents to warn her when Baker was released (*id.* at 5). But *DeShaney* forecloses that argument: the state's "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him," but from "the limitation which it has imposed on" that person's "freedom to act on his own behalf." 489 U.S. at 200. That duty therefore arises only "when the State takes a person into its custody and holds him there against his will," such as "through incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 199–200. Because Petitioner, unlike those in state custody, was never "wholly dependent on the State," Respondents owed her no "duty to provide certain services and care."[1] *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

This Court should thus put an end to the "legislation by judicial fiat" that is the state-created danger doctrine. *Saint Mary Home, Inc. v. Serv. Emps. Int'l Union, Dist. 1199*, 116 F.3d 41, 47 (2d Cir. 1997). As the Court observed in *DeShaney*, a state which "voluntarily undertak[es] to protect" an individual "against a danger it concededly played no part in creating," may well "acquire[] a duty under state tort law to provide him with adequate protection against that danger." 489 U.S. at 201–02 (citing Restatement (Second) of Torts § 323 (Am. L. Inst. 1965)). But "the Due Process Clause . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202 (collecting cases). States remain free, "through [their] courts and legislatures," to "impose such affirmative duties of care and protection" upon their agents as they wish. *Id.*

And many states have done just that. As this Court has observed, most states, "on their own initiative, have enacted statutes consenting to a wide variety of suits," including tort claims

[1] But even if such a duty existed, this Court has recognized that "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." *Youngberg*, 457 U.S. at 317.

for property damage. *Alden v. Maine*, 527 U.S. 706, 755 (1999). In many of those jurisdictions, legislatures have also provided that state employees "may not be held personally liable in tort," and that "[t]he exclusive remedy for injury or damage" arising from their conduct "is by action against the governmental entity." *E.g.*, Fla. Stat. Ann. § 768.28(9)(a) (West 2025). These provisions reflect the common concern that "personal liability will inhibit public officials in the discharge of their duties." *Johnston v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994).

Recognizing a state-created danger exception would upend those state-law regimes. This Court has long made clear that the Fourteenth Amendment "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). States therefore retain the prerogative to determine whether, and to what extent, they will waive their sovereign immunity. *See Lee-Thomas v. Prince George's Cnty. Pub. Sch.*, 666 F.3d 244, 252 n.8 (4th Cir. 2012). Creating a state-created danger exception would instead turn *DeShaney*'s recognition of a "limited duty of care and protection into a guarantee of shelter from private violence." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 250 (5th Cir. 2003). That result would contradict the bedrock principle that "not 'all common-law duties owed by government actors were…constitutionalized by the Fourteenth Amendment.'" *DeShaney*, 489 U.S. at 202 (quoting *Daniels*, 474 U.S. at 335). The Court should therefore decline to endorse it here.

* * *

This Court has long cautioned that it is not "a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Recognizing a new liberty interest under the Due Process Clause necessarily "place[s] the matter outside the arena of public debate and

legislative action." *Glucksberg*, 521 U.S. at 720. For that reason, the Court has "always been reluctant to expand the concept of substantive due process," as "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). That restraint reflects the settled understanding that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955). This Court should accordingly reject the state-created danger doctrine and its effort to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

II. LAWFUL EXERCISES OF THE GOVERNMENT'S POLICE POWER DO NOT CONSTITUTE FIFTH AMENDMENT TAKINGS

The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Ratified in 1791 as part of the Bill of Rights, its protection operates "as a limitation on the exercise of power by the government," *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833), ensuring it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In 1897—more than a century after ratification—this Court recognized that the Fourteenth Amendment's Due Process Clause "requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state." *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 235 (1897).

Yet the Clause is not designed "to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting

to a taking." *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). The police power, by contrast, reflects the states' inherent authority to secure the public health, safety, and morals. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *see Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."). Accordingly, the exercise of a state's police power "may be invoked without payment of compensation," and Respondents' conduct does not implicate the Takings Clause. Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 36 n.6 (1964).

A. Requiring Just Compensation for Reasonable Exercises of the Police Power Is Inconsistent with the Text and History of the Takings Clause

As this Court has recognized, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021). For example, "government searches that are consistent with the Fourth Amendment and state law" are not takings "[b]ecause a property owner traditionally had no right to exclude an official engaged in a reasonable search." *Id.* at 161. Likewise, the common law recognized "a privilege to enter property to effect an arrest or enforce the criminal law." *Id.* (citing Restatement (Second) of Torts §§ 204–05 (Am. L. Inst. 1965)). Such entries merely reflect a "a pre-existing limitation upon the land owner's title" and therefore do not require just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028–29 (1992).

The principle that "a government may not take more from a taxpayer than she owes" has its roots in the Magna Carta, where King John "swore . . . that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property 'until the debt which is evident shall be fully paid.'" *Tyler v. Hennepin County,* 598 U.S. 631, 639 (2023) (quoting William

Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 377 (1905)). That limit on sovereign exaction carried forward into the common law. *See* 2 William Blackstone, *Commentaries on the Laws of England* 561 (George Chase ed., 3d ed. 1890) (explaining that tax collectors were "bound by an implied contract in law to restore [property] on payment of the debt, duty, and expenses, before the time of sale: or, when sold, to render back the overplus").

At the same time, it has long been understood that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). This Court has likewise explained that "the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987). Thus, under the common law, a state "need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."[2] *Id.* n.22. That rule accords with the ancient maxim *sic utere tuo ut alienum non laedas* (use your own property in such a way that you do not injure others'). *Id.*

Moreover, this Court has made clear that "[i]solated physical invasions" fall short of takings and "are properly assessed as individual torts." *Cedar Point Nursery*, 594 U.S. at 159. Almost all states "provide a remedy for those injured by local government officers and employees" through their respective tort-claims regimes. *E.g.*, *Moore v. Norouzi*, 807 A.2d 632, 639 (Md. 2002). Allowing every instance of property damage by a government actor to be recast as a taking would upend those carefully crafted regimes. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever

[2] This is true even when the dispossessed property owner was innocent. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–85 (1974) (holding that forfeiture of a yacht used to traffic marijuana did not constitute a compensable taking even though the lessor was unaware of the criminal conduct).

merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them."). This Court has previously assessed under tort law property damage caused by law enforcement activities. *See, e.g.*, *Martin v. United States*, 605 U.S. 395 (2025) (analyzing the Federal Tort Claims Act's law-enforcement proviso). The Takings Clause, therefore, "does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to" its legitimate police powers. *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011).

Accordingly, Petitioner cannot satisfy the requirement—applicable to all plaintiffs "alleging any taking theory"—of showing that her "property was taken for public use by lawful action." *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017). The Takings Clause, by its own text, applies only when property is "taken for public use." U.S. Const. amend V. And the Constitution draws a clear distinction "between those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power." *Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019). Never in this Nation's history has "the state's destruction of property . . . in the defense of public safety" warranted—much less required—the payment of just compensation. *Pena v. City of Los Angeles*, No. 24-2422, 2025 WL 3074588, at *9 (9th Cir. Nov. 4, 2025). And "when the historical record does not support the scope of a constitutional claim as alleged, '[t]he absence' of such support is itself 'weighty evidence' counseling against the expansion of constitutional claims." *Id.* (quoting *Culley v. Marshall*, 601 U.S. 377, 392 (2024)).

B. Extending the Takings Clause to Cover Lawful Exercises of the Police Power Would Severely Undermine Legitimate Law Enforcement Interests

Exposing municipalities to Takings Clause liability would significantly hinder law enforcement's ability to perform its duties. As this Court has long recognized, "the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties."

Forrester v. White, 484 U.S. 219, 223 (1988). Courts must therefore avoid "indulg[ing] in unrealistic second-guessing" of police decisions, especially when faced with "swiftly developing situation[s]." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Indeed, "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which" they could have accomplished their objectives. *Id.* at 686–87. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not" give rise to Takings Clause liability. *Id.* at 687 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)).

That is because "for law enforcement officers, a moment's hesitation can mean the difference between life and death." *Kircher v. Pennsylvania State Police Dep't*, No. 4:13-CV-02143, 2016 WL 4379143, at *1 (M.D. Pa. Aug. 17, 2016). History underscores the danger of overdeterrence. In 1666, the Lord Mayor of London refused to raze forty homes during a fire "for fear he should be answerable for a trespass." *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788). The result was catastrophic: "half that great city was burnt." *Id.*; *see also Field v. City of Des Moines*, 39 Iowa 575 (1874) (holding that a municipal officer may raze a building to prevent the spread of fire without owing damages to the property owner).

While it is true that the Takings Clause is rooted in "fundamental principles of fairness," *Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998), there are nevertheless instances where fairness counsels against compensation. As this Court has explained:

> [W]here, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public. . . . Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.

Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 92 (1969) (citations omitted). Because Petitioner was the intended beneficiary of the police conduct here, the public should not be made to bear her losses. The events that gave rise to this case are, of course, tragic. But where tort law can fully and fairly compensate Petitioner, the Constitution need not—and should not—serve as a substitute.

C. Even if the Takings Clause Did Apply, Respondents' Conduct Is Exempt as a Matter of Public Necessity

In any event, Respondents' actions fall squarely within the public-necessity doctrine. As courts have long recognized, "if the government destroys property to address an emergency, then a 'necessity exception' relieves the government of any obligation to compensate the owner of the property that was sacrificed for the public good." *Baker v. City of McKinney, Texas*, 84 F.4th 378, 385 n.3 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 11 (2024) (quoting Brian Angelo Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 393 (2015)); *see also United States v. Caltex*, 344 U.S. 149, 154–55 (1952) ("[T]he common law ha[s] long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."). Because Respondents acted "for the purpose of averting an imminent public disaster," the Constitution imposes no duty to pay compensation. Restatement (Second) of Torts § 196 (Am. L. Inst. 1965).

Whether government conduct constitutes a taking turns on "'traditional property law principles,' plus historical practice and this Court's precedents." *Tyler*, 598 U.S. at 638 (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998)). The Takings Clause—and its state and foreign analogues—was designed "to restrain the arbitrary and oppressive mode of obtaining supplies for the army," as was frequently employed during the Revolutionary War. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 511 (2004) (quoting

1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 305–06 (St. George Tucker ed., 1803)). Yet founding-era courts simultaneously acknowledged that certain property incursions were unavoidable. In *Sparhawk*, for example, the government's loss of 227 barrels of flour to the British did not require compensation because "the rights of necessity form a part of our law." 1 U.S. (1 Dall.) at 362. Consistent with that understanding, this Court later held that no compensation was due when property was destroyed "to prevent the spreading of a fire." *Bowditch v. City of Boston*, 101 U.S. (11 Otto) 16, 18 (1879). Thus, from the Founding onward, American law has recognized a well-established public-necessity exception to the Takings Clause.

This foundational principle runs throughout this Court's takings jurisprudence. In *Caltex*, the Court held that the U.S. Army's wartime destruction of private oil terminals in the Philippines was not a taking. 344 U.S. at 155–56. The Court explained that the "terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war." *Id.* at 155. Because it is impossible to categorically "distinguish compensable losses from noncompensable losses," "[e]ach case must be judged on its own facts." *Id.* at 156. Even so, the "general principles laid down" in the Court's early precedents make clear that in times of emergency, public necessity can override private property interests. *Id.*

For that reason, Petitioner's reliance on *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012), is misplaced. There, the Army Corps of Engineers temporarily deviated from its standard water-control procedures for the Clearwater dam, disrupting Arkansas's tree-growing operations. *Id.* at 28. This Court rejected a categorical exemption from the Takings Clause for "government actions that cause repeated floodings." *Id.* at 31. But the outcome there "rested on settled principles of foreseeability and causation." *Id.* at 34. The Corps made its deviations

knowing they would harm the state's property interests, concluding that the benefits to downstream farmers outweighed those harms. *Id.* at 28. In short, the "public use" for which the Corps took the state's property was the extended harvest periods for those farmers. *Id.*

By contrast, the "same damages" here "would occur had the Government undertaken no work of any kind." *United States v. Sponenbarger*, 308 U.S. 256, 265 (1939). Petitioner lost her property because an explosive was placed on her porch, not because respondent tried to defuse it. R. at 3. As the Court recognized in *Caltex*, wartime losses "must be attributed solely to the fortunes of war, and not to the sovereign." 344 U.S. at 155–56. Had the Army not destroyed the oil terminals, the Japanese would have advanced, and the loss would have been even greater. *Id.* at 153–54. That same principle applies here. Even without respondent's intervention, the explosive would have detonated; it was only a question of time. To impose takings liability under these circumstances would be to hold the government responsible for "damages which it in no way caused." *Sponenbarger*, 308 U.S. at 265; *see also St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1364 (Fed. Cir. 2018) (no taking where plaintiffs failed to establish but-for causation).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

TEAM NO. 16
Counsel of Record
25TH ANNUAL LEROY R. HASSELL, SR.
NATIONAL CONSTITUTIONAL LAW MOOT
COURT COMPETITION

NOVEMBER 2025

Counsel for Respondents