**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, ET AL.**
*Respondents*.

---

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

---

# BRIEF FOR PETITIONER

---

**Team 3**
***Counsel of Record***

## QUESTIONS PRESENTED

1. Are individuals entitled to relief under the Fourteenth Amendment and §1983 when state actors create or exacerbate the dangers posed by third parties leading to a deprivation of the rights secured by the Constitution?

2. Is a blanket exception to the Fifth Amendment which shields police and townships from compensating innocent property owners for destruction of property when actions are taken for public welfare reasons congruent with the text, purpose, and precedent of the Takings Clause?

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

### Cases

**Statutes**



**Other Authorities**



**Constitutional Provisions**

## STATEMENT OF THE CASE

### A. Statement of the Facts

On Friday September 8, 2023, Sarah Jones called 911 in a panic, pleading for help as her intoxicated ex-boyfriend, Mark Baker, made violent threats against her and their ten-year-old son, A.J., inside Jones' home. R. at 2. Upon arrival, Officers Trent and Williams of the Laurenton Police Department ("LPD") witnessed an irate Baker threatening Jones for contacting law enforcement. *Id*. The officers determined that Baker had a warrant out for his arrest for domestic assault in a neighboring county. *Id*. Jones informed the officers that Baker possessed dangerous weapons, including a handgun, and had prior experience with explosives from his military service. *Id*. Jones, fearing for her and her son's safety, asked if she should relocate for the night. *Id*. Trent assured Jones that Baker would be in custody until the morning. *Id*.

In light of Baker's promised confinement, Jones and A.J. returned to their home where they remained for the night. *Id*. Once officers left the scene with Baker in their custody Trent discussed the assurance he made to Jones with Williams. *Id*. Williams reminded Trent that Laurenton City policy might contradict the promise he had made to Jones. *Id*. Pursuant to Laurenton policy, certain warrants, including Baker's warrant for domestic assault, were not to be executed when the county jail was over capacity. *Id*. Williams contacted the county jail and found that the jail was over capacity that night. *Id.* LPD then seized Baker's handgun and brought him back to the home he was renting, without notifying Jones. *Id*.

LPD Officers, despite being told that Baker possessed weapons other than the handgun, made no effort to search his residence, where he had two homemade bombs. *Id*. They seized his firearm and left him at his home with no supervision or surveillance. The next morning, before dawn, Baker took two homemade bombs from his rental home and packaged them, putting one

of them in Amazon branded packaging. *Id*. Baker then brought the explosives to Jones' home, placed one bomb on the front porch and the other on her back porch. *Id.*

Jones, unaware of Baker's release and his unfettered access to his explosives, unwittingly brought the package inside. *Id*. The package exploded as soon as she tried to open it. *Id*. Her left femur was shattered, her arms and face were covered with third-degree burns, and she sustained permanent hearing loss. A.J. was nearby and sustained a fractured arm, lung contusions, and severe psychological trauma from the experience. R. at 3.

A neighbor who heard the explosion called 911, first responders arrived and stabilized Jones and her son and took them to the hospital. *Id*. While securing the scene, LPD officers discovered the second undetonated bomb and alerted the Bomb Squad. *Id*. The device was highly sophisticated and set up to evade disruption which meant that the LPD could be almost certain that following their standard protocol would result in the bomb detonating. *Id*. The LPD following their protocol, deployed a robot to X-ray and attempted to disrupt the bomb. *Id*. Predictably, the bomb detonated on the back porch, obliterating the rear half of the single-story residence, collapsing part of the roof, and rendering the home uninhabitable with damage to the home valued at $385,000, on top of the injuries that Jones and her son sustained. *Id*.

### B. Procedural History

Jones brought two claims, on behalf of herself and her ten-year-old son, A.J., in the United States District Court for the Eastern District of New Virginia under 42 U.S.C. §1983 alleging violations of the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's Takings Clause. R. at 1. The district court found for the defendants on both issues and granted summary judgment in their favor. *Id*.

Jones then appealed to the United States Court of Appeals for the Thirteenth Circuit which affirmed the decision after argument on November 18, 2024. R. at 1-2. In affirming the holding of the lower court, the Thirteenth Circuit refused to adopt the state-created danger doctrine and applied the police-power exemption to the Takings Clause. This Court granted certiorari on September 1, 2025 to determine if (1) Under the Due Process Clause of the Fourteenth Amendment, is a state actor 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; and (2) Whether the Fifth Amendment require just compensation for a taking due to the destruction of property in a valid police power exercise. R. at 13.

## SUMMARY OF ARGUMENT

Legitimizing blanket exceptions to the protections enshrined in our Constitution and thereby enabling those entrusted with its care to shirk accountability and disregard the force of their power is not only unconstitutional, it is unconscionable. Police cannot be absolved of liability from the very Constitutional violations which they cause or exacerbate. The United States Court of Appeals for the Thirteenth Circuit improperly granted summary judgment in favor of the respondent holding that (1) a substantive due process violation is not actionable under state-created danger doctrine and (2) private property destroyed in a valid police-power exercise is not a taking under the Fifth Amendment. This Court now can rectify those mistakes by summarily reversing the Thirteenth Circuit's findings. This Court should formally adopt the state-created danger doctrine which has been embraced by nearly every Federal Court of Appeals and reject categorical exemptions to the Takings Clause.

The state-created danger doctrine does not begin, nor does it end, with the four corners of *DeShaney*. Every Federal Court of Appeals has undertaken a review of the doctrine and its legal

basis, and only two have remained obstinately opposed to accepting it. In settling the circuit split and adopting a clear standard by which to apply the state-created danger doctrine this Court should articulate a framework that encompasses the three universal elements relied upon by the Circuit Courts and clarify their application using the case at bar. The uniform elements of affirmative action, deliberate indifference, and causal connection have provided the guardrails necessary to limit liability to only exceptional and egregious cases of malfeasance. Instead of discarding a decades old doctrine which has been a crucial avenue for vulnerable victims across this country, the Court now has the opportunity to shape the requirements to ensure that §1983 fulfills its purpose, while remaining a narrow remedy.

Given the prevalence and complexities of domestic violence, allowing victims to bring claims under the state-created danger doctrine is essential to deter law enforcement from making survivors more vulnerable to the danger domestic violence poses. The facts in this case exemplify the rare cases in which police altered the status-quo, exposed a victim to greater harm, and disregarded the obvious risks to a callous degree. Unlike in *DeShaney*, here the Police Department affirmatively acted, inducing Jones to remain in her home and creating the conditions necessary for her ex-boyfriend to covertly gain access to concealed explosives while Jones remained unaware of the threat she faced. This is not a case in which the police or other state officials stood idly by; had the police never arrived, Jones would have been fully aware that of the extent and imminence of the threat she faced. Both Jones and her son were left in a state of complete vulnerability, oblivious to the danger and effectively incapable of taking preventative measures to protect themselves. The police had significant time to contemplate each move and yet remained indifferent to the safety of Jones and her child.

Second, the Court should reject a categorical exclusion that is contrary to this Court's repeated directive to avoid such blanket exclusions. The police power exemption is contrary to traditional interpretations, historical development, and the current jurisprudence of the Takings Clause. The character of the taking is dispositive, demonstrated by this Court's prior refusal to recognize a taking in instances of incidental economic diminutions or impairments caused by regulations. Modern cases have consistently viewed the mandate of compensation to be essential in cases of physical encroachment, as these forms of takings slash through the bundle of property rights the Taking Clause was designed to protect. Leaving Jones to shoulder the enormous economic burden caused by the police is antithetical to the notions of fairness and justice that is axiomatic to the Takings Clause jurisprudence. Now Circuits, unable to defend a police power exclusion, have concocted a new exclusion, namely the "objectively necessary" principle to avoid police liability. The Court should reiterate that per se exclusions are disfavored and either employ a fact-based inquiry to determine whether the ultimate destruction was the intentional and foreseeable result of the police's decision to use a disruptive device.

When police have an active role in depriving an individual of the rights secured by the Constitution, there must be a remedy. The lower court's rejection of the state-created danger doctrine and reliance on police powers to deny compensation amounts to absolution at the expense of accountability and justice.

## ARGUMENT

### I. The Fourteenth Amendment Provides Substantive Due Process Rights and §1983 Protects Those Rights by Affording a Remedy to Those Harmed by Private Parties by Holding State Actors Liable for the Acts That Created or Heightened the Danger

The Fourteenth Amendment guarantees the right to be free from deprivations of life, liberty, or property without due process. US Constitution Amendment XIV §1. Section 1983

does not confer additional rights or privileges; rather it serves as a vehicle to redress Constitutional violations by state actors, including substantive due process issues under the Fourteenth Amendment. 42 U.S.C. §1983. While *DeShaney* affirmed that the state does not have a constitutional duty to protect citizens from harm inflicted by third parties, the state-created danger doctrine provides an exception to this general rule. *See Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). The language, purpose, and causation principles embedded in §1983 support recognizing state liability where officials' actions create or heighten the risk of private violence resulting in injury. Building on the framework developed by this Court both in cases before and after *DeShaney*, various federal courts of appeals have adopted this theory of liability. Initially articulated as the "snake-pit" or "special danger" theories of liability, this theory ultimately evolved into the state-created danger doctrine post *DeShaney*.

Nearly every circuit has correctly drawn the same conclusion, but the Thirteenth Circuit squarely rejects the legitimacy of the doctrine by mischaracterizing the strong foundational footing and instead focusing on the differences between circuits, rather than the commonalities. This Court can now fill these gaps by providing clear articulable standards that will deter police misconduct, provide a judicial remedy when deterrence fails, and allow for only the most flagrant instances of misconduct to remain actionable.

### A. The Thirteenth Circuit's Rejection of the Well-Established State-Created Danger Doctrine Stands in Opposition to Binding Legal Principles, the Overwhelming Consensus of Other Circuits, and Public Policy Considerations

#### 1. The Text and Purpose of §1983 Provide a Strong Doctrinal Basis for Holding State Actors Liable for Harm Caused Indirectly

Section 1983 establishes a private cause of action, imposing civil liability on state officials who "subject, or cause to be subjected" any individual within the United States to a deprivation of the rights guaranteed by the Constitution. 42 U.S.C. §1983. Therefore, a

deprivation of life, liberty, or property under the Fourteenth Amendment triggers a substantive due process violation and is actionable under §1983. U.S. Const. amend. XIV, § 1. Though *DeShaney* is commonly cited as the origin for the state-created danger doctrine, the doctrine derives from the text and purpose of statute and from jurisprudence predating that decision.

The genesis of §1983 lies in Congress's response to "voluminous and unquestionable" evidence of the widespread terrorism and violence perpetrated by the Ku Klux Klan in the post-Reconstruction South. *See* Cong. Globe, 42d Cong., 1st Sess., App. at 428. Recognizing these acts as manifestations of a systemic denial of equal protection, Congress enacted §1983 to create a federal remedy for constitutional violations committed by the state or enabled through its complicity or condonation. *See* David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 Rev. Litig. 357, 374-376 (2001). This purpose, which is reflected in the statute's causation language, was not intended to be directed at Klan or its members, rather it imposed liability on state actors for their complicity for deprivations, such as "releas[ing] a prisoner to a vengeful lynch mob." *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 873 (5th Cir. 2012) (en banc) (Higginson, J., concurring in judgment); *see also Monroe v. Pape*, 365 U.S. 167, 175–76 (1961) (detailing history and objectives of §1983). Therefore, the inclusion of causation language reflects Congress's desire to hold state actors liable for private violence facilitated by state actors.

The very language of the statute "subjects or causes to be subjected" supports an indirect causation framework and was endorsed by this Court in *Monell v. Department of Social Services*. 436 U.S. 658 (1978). This Court recognized that the plain text of §1983 and its remedial purpose compels an expansive reading of the statute which encompasses indirect causation, explaining that "Congress did specifically provide that A's tort became B's liability if B "caused" A to

subject another to a tort." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978). Thus, the statutory history, purpose, and language support holding state actors liable, even if the deprivation is ultimately committed by a third party.

### 2. The Development of the State-Created Danger Doctrine Precedes DeShaney and Was Central to the Court's Reasoning Which Has Been Recognized by Nearly All Circuits

Prior to this Court's decision in *DeShaney*, multiple circuits embraced a theory of liability under which the state could be held responsible for private harms when the state exposes or increases the plaintiffs potential harm. Several cases decided by this court between the 1970s-1980s, expanded the reach of the Fourteenth Amendment in cases brought under §1983. *See DeShaney*, 489 U.S. at 197 n.4, 198-199 (citing to previous extensions of the doctrine, including a number of cases operating under special relationship theory). As a result, the First, Seventh, Eighth, Tenth, and Eleventh Circuit recognized a theory of liability outside of a custodial relationship when the State affirmatively acts to expose an individual to harm. *See* Butera v. D.C., 235 F.3d 637, 649 n.1 (D.C. Cir. 2001)(collecting cases before DeShaney recognizing liability under a "heightened danger" theory)

Most notably, Judge Posner, writing for the Seventh Circuit, elucidated on the circumstances in which a State may be found liable. Five years prior to *DeShaney*, Posner explained that "if the state puts a man in a position of danger from private persons and then fails to protect him … it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir. 1982). The Seventh Circuit incorporated this "snake-pit" theory when *DeShaney* first came before it, first by stating a constitutional deprivation cannot arise from "the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees" and finding the elements which would

create liability absent in respect to the facts. *DeShaney,* 812 F.2d at 301, 303 (comparing "the botched rescue" to a case where the state places a victim in a situation of high risk).

After the Supreme Court granted certification of *DeShaney*, the United States, writing as amicus curiae on behalf of the respondent, conceded that "most of the courts of appeals have correctly drawn from the Constitution itself and from this Court's cases" that a substantive due process claim "must at a minimum involve some action of the state that creates the victim's predicament, and not just inaction in the face of a predicament that is not of the state's making." Brief for the United States at 15, *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (No. 87-154). The state's role in creating the danger appears to be a key inquiry the Court found relevant during oral arguments. *See* Transcript of Oral Argument at 13-14, 19, 20-21, 38-39, 41, 57, *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (No. 87-154)

Thus, the language in *DeShaney* referring to the state having no part in the creation of the danger functions as more than mere superfluous filler; it reinforces the "snake pit" theory of liability later recognized as the state-created-danger doctrine. In *DeShaney*, four-year-old Joshua DeShaney endured repeated abuse by his father, ultimately sustaining severe and permanent brain damage. *DeShaney*, 489 U.S. at 193. Joshua's mother sued Winnebago County, the Department of Social Services (DSS), and various DSS employees under 42 U.S.C. § 1983, contending that a special relationship existed, and the State's failure to intervene effectively deprived Joshua of his right to bodily security without due process of law. *Id.* at 193, 195 citing *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977). Although the Court expressed sympathy for Joshua, it ultimately concluded that the defendants bore no constitutional duty to protect him, declining to extend the *special relationship* exception to situations where the State was aware of

a substantial danger and failed to protect an individual despite having previously intervened via protective services. *Id.* at 201.

Consistent with the Seventh Circuit approach, the Court emphasized on three occasions that it was undisputed that the danger posed by Joshua's father existed before and independent of the State's interference. *Id.* at 197, 201, 201-02. This uncontested fact, was later captured by the court's reasoning which stated: "[w]hile 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"' and that the state had "placed [Joshua] in no worse position than that in which he would have been had it not acted at all."' *Id*. at 201 (1989). Therefore, "[t]he oft-cited language of *DeShaney,* 489 U.S. at 201, is thus more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source." *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006).

In the thirty-six years following *DeShaney*, eleven circuits have squarely addressed the legitimacy of the state-created danger doctrine and have embraced the doctrine as a narrow exception to the "no-duty-rule." Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J., 1165, 1173 (2005) (observing that "every circuit, except for the [F]ifth, has embraced the concept of state-created danger"). The Thirteenth Circuit, in categorically rejecting the doctrine, now joins the Fifth as a glaring outlier, standing in stark contrast to every other federal court of appeals in this country. *McClendon vs. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (Parker, J., dissenting) ("The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it.").

While the Thirteenth Circuit wrongly argues the sentence cited in *DeShaney* is "wrenched out of context," leading Constitutional scholar Erwin Chemerinsky contends the state-created danger doctrine goes beyond a mere implication or invitation ushered by *DeShaney*. R. at 6; *See* Erwin Chemerinsky, *The State-Created Danger Doctrine*, Touro L. Rev. 1, 24-25 (2007). Chemerinsky asserts "the reality" is that a considerable majority of circuits have properly interpreted the language in *DeShaney* as creating a basis for the state-created danger. *Id*. Explicit recognition will do little to alter the status quo; however, outright rejection of the doctrine would require repudiating decades of lower-court precedent and denying relief to vulnerable victims.

As of 2023, eight out of eleven circuits have applied the state-created danger doctrine to cases of domestic violence. Max Giuliano, *State-Created Danger: The Fifth Circuit's Refusal to Address the Problem and Its Devastating Effect on Domestic Violence Victims*, 127 Penn St. L. Rev. 929, 941 (2023). Domestic violence remains a widespread and pervasive problem nationwide, that requires law enforcement's sensitivity and accountability. *Okin v. Village of Cornwall-on-Hudson Police Dept.*, 577 F.3d 41, at 432 n.10 (2d Cir. 2009) (citing to numerous studies showing the prevalence and danger of domestic violence). It is estimated that 41% of women and 26% of men have been a victim of intimate partner violence. R.W. Leemis et al., *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*, Centers for Disease Control and Prevention 10-11 (2022).

As the statistics and the facts at hand demonstrate, the actions of law enforcement in responding to domestic violence have enormous consequences, oftentimes life or death. Victims of intimate partner violence who rely on law enforcement intervention call for help despite fears that police involvement may lead to further retaliation. *See Okin*, 577 F.3d at 432 n.10. When viewing the statistics surrounding the effectiveness of laws or polices aimed at reducing the

frequency and fatality of domestic violence, it is clear; policies and responsible practices can be the difference between life, death, and severe injury for many victims. *See generally* Dan Black et al., *Criminal Charges, Risk Assessment, and Violent Recidivism in Cases of Domestic Abuse*, University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2023–11 (2023), https://doi.org/10.2139/ssrn.4336508. The criminal justice apparatus is more than capable of understanding, training, and taking steps to avoid preventable instances of domestic violence. Applying the state-created danger doctrine to cases like the one at bar allows for more accountability for police departments and more recourse for victims.

### B. The Elements of the Doctrine Have Created a Consistent Framework with Firm Guardrails That Limit Application to Only Egregious Cases of Malfeasance

In the absence of Supreme Court guidance, circuits have developed different tests, leading to differences in the scope and availability of this doctrine. Yet, the essential elements remain largely consistent, as these frameworks are grounded in *DeShaney* and the broader statutory and constitutional principles established by this Court's precedent. Courts have "uniformly require[d]" that (1) the defendant affirmatively acted to create or exacerbate a danger; (2) the defendant acted with the requisite degree of culpability; and (3) "a causal connection" exists between the defendant's action and the injury. *See Irish v. Fowler*, 979 F.3d 65, 73–74 (1st Cir. 2020); *see also Phillips v. Cty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008) (remarking that the cases have several elements in common).

As decades of caselaw demonstrates, fears that formal recognition of this doctrine would open the floodgates of litigation or subject law enforcement to liability for every mistaken judgment are largely overstated. Plaintiffs who have brought claims under the doctrine have "rarely survive[d] dismissal, much less summary judgment". Laura Oren, *Some Thoughts on the*

*State-Created Danger Doctrine: DeShaney Is Still Wrong and Castle Rock Is More of the Same*, 16 Temp. Pol. & Civ. Rts. L. Rev. 47, 48; *see also* Theodore Eisenburg, *Four Decades of Federal Civil Rights Litigation*, 12 J. Empirical Legal Stud. 4, 4 (2015) (concluding that §1983 plaintiffs win at trial 30 percent or less compared to higher rates of success in most classes of civil litigation).

This uniform framework has remained faithful to §1983's central purpose—to deter abuses of state power and secure relief for those harmed—yet remains sufficiently tailored to allow law enforcement to perform its duties without paralyzing such action for fear of litigation. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978) (stating the purpose of §1983 is "to deter state actors and provide relief to victims if such deterrence fails"). Therefore, despite some inter-circuit deviation, the elements have served as effective guardrails, limiting liability to only the most egregious cases of police malfeasance. *See Hirsch v. City of N.Y.*, 751 F. App'x 111, 115 (2d Cir. 2018) ("This Circuit's state-created danger jurisprudence creates a high bar for a plaintiff to clear"); *see also Est. of Herv. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019) ("quite narrow and reserved for egregious conduct").

As demonstrated by the low outcomes of success, the common elements used by each circuit have balanced the competing demands of affording judicial recourse to those who have suffered serious constitutional deprivations, while acknowledging the demanding and high-pressure circumstances that officers operate under. This Court, in recognizing the validity of the doctrine, can now bring these elements into a singular [invariable] standard to ensure that competing interests are properly weighed while maintaining the purpose and spirit of §1983.

**1. Affirmative Act**

All Circuits that recognize the state-created danger doctrine, are in firm agreement that the viability of a §1983 claim requires an affirmative act rather than a failure to act even when

"[s]tate actors stood by and did nothing when suspicious circumstances dictated a more active role for them." *Reed v. Gardner*, 986 F.2d 1122, 1125 (1993) (quoting *DeShaney*, 489 U.S. at 203); See *Butera*, 235 F.3d at 650 (2001)(collecting cases among circuits).

Conversely, a failure to act is often what separates a successful claim from an unsuccessful one. *See McQueen v. Bee Cmty. Sch.,* 433 F.3d 460, 465 (6th Cir. 2006) (noting that "on numerous occasions we have rejected claims" because conduct was not an affirmative act). This has been consistent even when intervention was easy and could have prevented harm. *See e.g. Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 918 (7th Cir. 2015) (sexual assault following an officer's failure to intervene, despite seeing three men carrying an intoxicated women); *Weatherspoon v. City of Murfreesboro*, No. 25-5113, 2025 LX 151586, at *6 (6th Cir. June 17, 2025) (leaving a scene of a domestic violence call without investigating or intervening). Thus, a simple "failure to enforce laws, investigate crimes, or provide adequate protection" will preclude liability. *Estate of Reat v. Rodriguez*, 824 F.3d 960, 971 (10th Cir. 2016).

Accordingly, many circuits have focused on *DeShaney*'s language suggesting that liability may arise when the States actions place an individual in a worse position than if it had not acted at all—examining whether the State's conduct exposed the individual to new or heightened dangers, rather than merely returning her to preexisting ones. *See e.g. Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014)( State actors must "create[] the danger or increase[] the plaintiff's vulnerability to the danger through affirmative conduct that altered the status quo."); *Wilson v. Gregory*, 3 F.4th 844, 858 (6th Cir. 2021) (internal citations omitted) ("The key [state-created danger] question . . . is 'not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it.'")

The Fourth Circuit's interpretation of the affirmative act element illustrates that imposing a rigid definition on an inherently imprecise term only breeds further confusion and sacrifices needed practicality with "sterile formalism." *See Deshaney,* 489 U.S. at 212 (Blackmun, J., dissenting). The Fourth Circuit's decision in *Pinder v. Johnson* exemplifies this misguided approach. *Pinder v. Johnson,* 54 F.3d 1169 (4th Cir. 1995). In *Pinder*, Carol Pinder called the police after her former boyfriend, Don Pittman, broke into her home and threatened to kill her and her children. *Id*. at 1172. Pinder informed the responding officer that Pittman was recently released after serving a sentence for attempted arson at her home, and he assured Pinder that since Pittman would be detained overnight, Pittman could return to work. *Id.* With no regard to his earlier promise, the officer charged Pittman with low level misdemeanor offenses – assuring Pittman's release. *Id*. After only an hour in custody, Pittman returned to Pinder's home and set it on fire, killing her three children as they slept inside. *Id.*

The Fourth Circuit, in deciding that the officer was entitled to qualified immunity, also found that no due process violation existed. The court fixated on action, labeling the case as "purely an omission claim." *Id.* at 1176. The Court further muddies the analysis by stating that action and inaction exist on separate ends of spectrum, but yet provided no clarity to determine what point on the spectrum is cognizable. *Id.* at 1175. This mistaken approach represents "one of the harshest interpretations of *DeShaney*" preventing nearly all plaintiffs from recovering in claims of egregious police misconduct. Elizabeth G. Poole, *An Unattainable Standard: Analyzing the Fourth Circuit's Approach to the State-Created Danger Doctrine*, 101 N.C.L. Rev. 871, 878 (2023). Most Circuits, including the Seventh, have utilized more straight-forward analysis, refusing to base liability on the "tenuous metaphysical construct which differentiates sins of omission and commission." *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979).

The comparative danger approach also allows for a simpler analysis. In *Rakes v. Roederer*, the Seventh Circuit issued a three judge per curiam opinion, with Judge Brennan arguing that victims of domestic violence are already in a state of pre-existing danger, given they may be subjected to persistent and violent abuse prior to police intervention. *Rakes v. Roederer,* 117 F.4th 968, 985 (7th Cir. 2024) (Brennan, J., dissenting). However, the majority disagreed finding that by assuring the plaintiff that her abuser would be detained for 24 hours, the state created a "more immediate and acute risk" when it allowed her husband to return home sooner, to find her there alone, and shoot her. *Id*. at 975, 993.

The facts at hand show that the majority of circuits took the correct position and circuits that construed narrower requirements erred by undergoing a molecular analysis that dissects omission from commissions. Moreover, it is crucial to utilize such an approach for survivors of domestic violence. As the facts in Jones' case illustrate, the holding and reasoning of *DeShaney* supports such an interpretation. Removing DCFS involvement in *DeShaney*, leads to the same tragic outcome. Removing LPD from these facts leaves Baker in the position to leave her home, have full knowledge of the threat she faced, and make reasoned and informed decisions to protect her family. While not a physical restraint of freedom the police restrained her decision-making capabilities to a disastrous degree.

Additionally, the comparative-danger approach provides a workable standard. It would be an exhaustive exercise to determine whether the assurance that Jones rightly relied upon was an act rather than a failure to act. This case, like many, involves both omissions and commissions depending on the framing and context in which they appear. Ultimately, the city's policy to release all offenders, including violent offenders, due to overcrowding combined with officers' assurances exposed Jones to a heightened danger and made her a more vulnerable target. These

acts enabled Baker to obtain explosives and return to Jones' home and impaired Jones's ability to appreciate the gravity and imminence of the danger. Much like *Rakes*, the misrepresentation induced Jones to remain in her home and compromised her ability to recognize the packages as bombs. Practically speaking, the consequence of police actions should supersede reliance on the ill-defined boundaries of action and inaction.

As the facts presented here make clear, Jones was not in a position of complete safety; she contacted the police precisely because of Baker's threats and escalating behavior. Restricting the doctrine's applicability in such circumstances would effectively foreclose its use in nearly all domestic-violence cases and would significantly undermine its purpose, given that police intervention often occurs in inherently dangerous situations.

**2. Culpability**

All courts have required a heightened level of culpability in order to heed the Supreme Court's warning against transforming §1983 into "a font of tort law." *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring). However, unlike tort claims, negligence is insufficient to attach liability under §1983 across all circuits. And given this Court's assertion that the "rules of due process are not subject to mechanical application in unfamiliar territory" a flexible, context-specific analysis is necessary. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (noting that deliberate indifference may be sufficient for certain due process violations, but emergency situations require proving an intent to harm. For non-exigent contexts where officials have the ability to make reasoned and unhurried decisions, this court has applied a deliberate indifference standard. *See Farmer v. Brennan,* 511 U.S. 825, 837 (1994) (applying standard to a violation of the Eighth Amendment); *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997) (requiring a showing of deliberate indifference for §1983 municipal liability).

The deliberate-indifference standard, applied to individuals or municipalities, is one of stringency, demanding a showing that the defendant acted with willful disregard of a known or obvious risk of serious harm. *See Board of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). The majority of Circuits have incorporated a showing of "deliberate indifference" or "reckless disregard" within their frameworks. *See e.g. Doe v. City of Bos*., 145 F.4th 142, 151 (1st Cir. 2025); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 432 (2d Cir. 2009); *Robinson v. Township of Redford*, 48 F. App'x 925 (6th Cir. 2002); *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006); *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013)[1]

The fundamental mission of §1983 can only be accomplished when unnecessary harm can be meaningfully prevented. Accordingly, deliberate indifference provides the proper standard to ensure effective deterrence, as it compels state actors who are aware of potential consequences to act with due care. Negligence sets the bar too low, capturing ordinary mistakes where officers lack awareness of the risk, while requiring intent would deny relief to nearly all deserving plaintiffs. Considering the facts in this case, police had several opportunities to contemplate the consequences of their conduct to act sensibly. The officers had knowledge of Baker's violent mental state, expertise in creating explosives, and anger towards Jones. They also were aware Jones would likely remain in her home. Yet, despite making Jones a more vulnerable target and having a sufficient time to deliberate, they failed to correct their mistakes.

[1] Some Circuit have an additional "shock the conscience" inquiry, framing the determination between requisite mental state, while others emphasize the degree to which the actions are arbitrary or egregious. *See Irish*, 979 F.3d at 74 n. 4 (comparing tests). However, as Chemerinsky argues, the standard has only been applied by this Court in emergency situations and should be satisfied by a showing of deliberate indifference. see Chemerinsky, The State-Created Danger Doctrine, supra, at 13.

Incentivizing police to act reasonably can only prevent unnecessary tragedies like those we see in this case. Holding municipalities responsible encourages cities like Laurenton, when confronted with jail overcrowding, to take a more reasoned approach and avoid releasing people accused of violent crimes like domestic violence.

### 3. Proximate Causation

Causation provides a final barrier to prevent attaching liability to every misguided policy, decision, or action that could later lead to harm. This Court has recognized that for liability to attach, the actions of individual actors and policies of municipalities must have a sufficient causal nexus to the harm. The Court in *Martinez* held that a murder occurring five months after a parole board released a violent offender was "too remote a consequence" and officials "were not aware that the decedent, as distinguished from the public at large, faced any danger." *Martinez v. California*, 444 U.S. 277, 285 (1980). Therefore, "to satisfy the proximate cause requirement, the state-created danger must entail a foreseeable type of risk to a foreseeable class of persons." *First Midwest Bank, Guardian v. City of Chicago*, 988 F.3d 978, 988-89 (7th Cir. 2021).

This limitation has been included in the elements required by the First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuit, albeit sometimes under different standards which require foreseeable danger towards a *specific* individual, *see e.g.*, *Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020); *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 512 (8th Cir. 2015); *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491-92 (6th Cir. 2019), that caused an immediate and direct harm. *First Midwest Bank, Guardian v. City of Chicago*, 988 F.3d 978, 988-89 (7th Cir. 2021); *Kneipp by Cusack v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996); *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002).

Given that the decisions of state actors, especially those involving policy, can affect a large class of people and have the potential to create a causal chain leading to harm, this

requirement is especially important. By requiring proximate causation, it shields government decision-makers from unforeseeable or distant harms that may arise. Under §1983, the act must be causally connected to the deprivation. While *DeShaney* excludes mere promises to protect from constituting actionable conduct, promises that induce reliance and cause specific harm are treated differently. Therefore in Jones liability turns on whether she relied on any assurances to her detriment. Mere expressions of aid or empty promises, without detrimental reliance, are insufficient and will fail under the causation standard. Similarly, each decision cannot invite an infinite casual chain leading to liability, it must be remote in time and scope.

The traumatic ordeal that Jones and her son endured is not unique, and, unfortunately, neither is the pattern of police mishandling that compounded it at every turn. These facts illustrate the necessity of the state-created danger doctrine to provide an avenue of relief in these preventable tragedies. The state-created danger has a strong doctrinal basis and established elements which demands recognition and universal availability.

## II. The Fifth Amendment Demands That Just Compensation Be Paid When Police Destroy Private Property

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This Court has held that public use is not limited to eminent domain and can constitute deprivations that encompass actions taken pursuant to public health, safety, and morals. Despite this, several circuits have relied on outdated interpretations of public use to excludes police-power used in the name of public health, safety and morals from the reach of the Takings Clause for physical invasion and appropriation. *See, e.g., Lech v. Jackson*, 791 F. App'x 711, 715–16 (10th Cir. 2019); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011). The Thirteenth Circuit's reliance on a distinction between eminent domain and actions taken pursuant to public health, safety, and morals to construct a

police-power exemption does not comport with this Court's precedent and distorts the traditional interpretation of the Fifth Amendment. A novel necessity privilege similarly runs afoul of historical and modern precedents. This Court should reject these attempts to exclude law enforcement destruction from the rightful compensation mandated by the Fifth Amendment.. As this court warned in *Lucas v. South Carolina Coastal Council*, allowing this "unbridled, uncompensated qualification under the police power" would allow for this exception to be expanded "more and more until at last private property disappeared.'" *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

### A. A "Police-Power" Exception to Physical Destructions is Irreconcilable with Historical and Modern Takings Jurisprudence

#### 1. The Distinction Between Police Power and Eminent Domain Has Only Been Dispositive in the Context of Regulatory Takings

While it is true that the Supreme Court had initially excluded regulations undertaken to promote health, safety, and welfare from the reach of the Fifth Amendment, this antiquated distinction now exists as nothing more than a retired relic of nineteenth century case law. In its early takings jurisprudence, this Court consistently held that valid exercises of police power in the form of regulations were not a taking, unless they result in a direct invasion of property. *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking.").[2]

[2] According to the Supreme Court, takings fall into two categories: (1) those involving permanent deprivations or destruction of physical property, and (2) those involving governmental regulations that restrict an owner's use of property without directly appropriating or destroying it. *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992).

*Mugler*, a principal precedent cited in *Lech* to justify a categorical exclusion for physical takings, illustrates how valid exercises of police-power immunized states from compensation for regulatory takings, but not for physical destruction. *Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019) (citing *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)). *Mugler* involved the closure of a brewery under Kansas's prohibition laws after the legislature deemed the sale of alcohol, "to be injurious to the health, morals, or safety of the community." *Mugler*, 123 U.S. at 668. The court held that this legislative action did not take private property under the Fifth Amendment, reasoning that the law does not interfere with an owner's lawful control or sale of property; it merely declares that using the property for certain prohibited purposes would be detrimental to public health. *Id*. at 669.

The *Mugler* Court contrasted this type of incidental impairment of use to the direct physical destruction of property in *Pumpelly v. Green Bay Co*, 80 U.S. 166 (1871). In *Pumpelly*, the construction of a dam, sanctioned by Wisconsin's legislative authority to improve its navigable waters, resulted in "permanent flooding of private property" described in *Mugler* as the "physical invasion of the real estate of the private owner, and a practical ouster of his possession," and therefore constituted a taking for public use. *Mugler v. Kansas*, 123 U.S. 623, 668 (1887). Accordingly, the distinction between the taking recognized in *Pumpelly* and the non-taking in *Mugler* rests on the degree of interference with property rights, and demonstrates that direct encroachment is a taking, notwithstanding the purpose behind the government action.

Furthermore, a purely regulatory taking is no longer beyond the reach of the Fifth Amendment. In 1922, *Pennsylvania Coal* extended the Takings Clause beyond direct physical invasions, articulating that a regulation may constitute a taking "when it goes too far." *Pa. Coal Co.*, 260 U.S. at 415-16 (1922). Subsequent cases have refined this principle by adopting an ad

hoc, fact-specific inquiry in *Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978), and later establishing per se rules for regulations that result in complete economic deprivation or physical invasions. *See Cedar Point Nursery v. Hassid,* 594 U.S. 139, 147-49 (2021). It defies the bounds of the law or logic to continue to invoke the police-powers theory, which initially grew of the general exceptions for upholding regulations, when regulatory takings themselves are no longer exempt.

### 2. This Exception Does Not Comport with the Court's Historical and Modern Treatment of Physical Takings

Furthermore, both cases were poorly reasoned on account of their failure to properly interpret existing precedent. This Court has consistently recognized that the "public use" standard can be applied beyond the eminent domain context and has applied it to physical takings as well. *Pumpelly Pa. Coal Co*., 260 U.S. at 415-16 (1922). In interpreting "public use" *Pumpelly* rejected a narrow interpretation of the Takings Clause that would have confined compensation to cases of traditional eminent domain. The court argued this restrictive standard would lead to an untenable outcome, contrary to the "laws and practices of our ancestors," by permitting the government to eliminate all economic value of private property, "inflict irreparable and permanent injury to any extent...[and] subject it to total destruction without making any compensation." *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1871). The Supreme Court has "unhesitatingly applied" this principle: in cases where government action, not arising from a regulatory scheme or formal proceeding of eminent domain, results in physical intrusion or destruction of property, compensation must be paid. *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal*., 482 U.S. 304, 317 (1987).

Moreover, consistent with history and tradition, this Court has found that physical invasions and appropriations compel greater Constitutional protection than regulatory takings.

*See Penn. Central*, 438 U.S. at 124. ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program."). Treating physical appropriation as a greater affront to property rights is consistent with the fundamental purpose and governing principle of the Takings Clause, which is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Physical appropriations of property impose a far greater burden on a subset of individuals, infringing on the core possessory rights the Fifth Amendment was designed to protect. In contrast, regulatory takings often take the form of minor diminutions in value or limitations on use that are distributed broadly across the public. *See Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-24 (2002)..

The Court's recent decisions make clear that physical invasions threaten the most sacred form of property rights. The Court has analyzed regulatory takings as existing on a spectrum. By adopting a per se rule for physical takings this Court has signaled that these deprivations require no weighing of competing interests; rather, they are deemed compensable by their very nature. In *Cedar Point*, Chief Justice Roberts, writing for the Majority, makes abundantly clear that physical invasions constitute a per se taking and "[t]he government must pay for what it takes." *Tahoe-Sierra*, 535 U.S. at 322.

The common thread, tying centuries of takings jurisprudence together, is that a taking depends on the character and extent of the government action. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). *Cedar Point* expanded the contours of what constitutes a per se taking to include government intrusion, and, while the decision focused on invasion, governmental destruction has also been found to be a physical per se taking. *A.W. Duckett & Co.*

*v. United States*, 266 U.S. 149, 151 (1924) ("[A] right may be taken by simple destruction for public use.") Ultimately, the determination depends on the character and extent in which state action has interfered with the 'bundle' of property rights including possession, use, disposal, and now exclusion. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435 (1982).

The Police power exception cannot rightly apply when considering the totality of the court's jurisprudence in this area, as well as given the severity of the facts at hand. Here, the police have chopped every strand of the bundle, depriving Jones of the right to use, exclude, possess, and dispose of her property. The Thirteenth Circuit, in using this categorical exception, has now authorized the government to "inflict irreparable and permanent injury" to Jones' private residence thereby "subject[ing] it to total destruction without making any compensation."

### B. The Other Exemptions and Exclusions are Inapplicable to Destruction Caused by Law Enforcement

Recently the categorical police power exclusion has received scrutiny from several circuits, finding it historically, legally, and logically unsound. *Slaybaugh v. Rutherford Cty.*, 114 F.4th 593, 597 (6th Cir. 2024) (quoting *Baker v. City of McKinney*, 84 F.4th 378, 384 (5th Cir. 2023)) (explaining that *Lech, Johnson*, and *AmeriSource* "do not rely on history, tradition, or historical precedent"); *see also Yawn v. Dorchester County*, 1 F.4th 191, 195 (2021) (finding that the absence of a police-power per se exemption "is axiomatic in the Supreme Court's jurisprudence"). The Seventh Circuit, confronted with the overwhelming persuasive authority that demonstrates such a bar to liability is constitutionally unsound, pivoted to a different type of exclusion under the Fourth amendment. *Hadley v. City of S. Bend*, No. 24-2448, 2025 LX 486349, at *9 (7th Cir. Oct. 7, 2025) (acknowledging that the Supreme Court has rejected categorial exclusions and refuted distinctions between eminent domain and police power).

Relying on the dicta in Cedar Point and Lucas that takings must yield to "traditional common law privileges" and "background principles," Courts have circumvented Cedar Point's bright-line rule by applying common law. *Cedar Point*, 594 U.S. at 160-61.Using recent takings jurisprudence without analogous Supreme Court caselaw, the approach has splintered under several alternative frameworks: (1) applying a nebulous "necessity" or "emergency" exception, *Baker v. City of McKinney*, 84 F.4th 378 (5th Cir. 2023); (2) advancing a necessity privilege only in cases in which the destruction of property is inevitable, *Baker v. City of McKinney*, 145 S. Ct. 11, 12-13 (2024) (Sotomayor & Gorsuch, JJ., respecting denial of certiorari), *Baker v. City of McKinney*, 93 F.4th 251, 257 (5th Cir. 2024) (Elrod & Oldham, JJ., dissenting from denial of rehearing en banc); or (3) requiring that the damage to property was the intentional or foreseeable result of the government's actions *Yawn*, F.4th at 195.

The broad necessity privilege articulated in Baker is incompatible with history or the repeated warnings against categorical exclusions by the Supreme Court. *Baker* involved a fugitive who evaded police and barricaded himself in Vicki Baker's home *Baker v. City of McKinney*, 84 F.4th at 379. Police established a perimeter and employed highly destructive measures, including explosives and toxic gas, resulting in a jury awarding Baker $60,000 in damages. *Id.* at 380-81. On appeal, the Fifth Circuit reversed, reasoning that Baker had not cited historical or contemporary authority holding that property damage during an active emergency constitutes a taking, despite the Supreme Court's directive that the government bears the burden of establishing historical exceptions to the plain text of the Bill of Rights. *See id.* at 385; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). The Court then, *sua sponte,* and on an issue of first impression, supplied its own historical account of necessity and emergency cases,

holding that the damage did not constitute a taking. *Baker v. City of McKinney*, 93 F.4th 251, 253 5th Cir. 2024) (Elrod & Oldham, JJ., dissenting).

The Fifth Circuit is misguided for a number of reasons. First, in claiming to decline to apply a broad police power exception, the court directly cites to the Supreme Court's repeated warnings against "blanket exclusionary rules." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 26 (2012). Yet, despite heeding to the Court's guidance cited earlier, it fashions another broad privilege that pays no attention to the "particular circumstances of each case." *Id.* The Court blindly accepts the "chilling-effect" rationale behind the doctrine – that the state will be reluctant to respond with the requisite speed and force the threat demands and "such hesitancy risks catastrophe." *Baker,* 84 F.4th at 386. Yet, this court has given little credence to the "slippery slope" argument, especially when used to justify "blanket exemptions." *See Arkansas Game*, 568 U.S. at 36–37. Absent further contemplation of what constitutes a necessity or emergency, the court's deployment of a necessity privilege is simply another ill-defined per se exclusion that makes no attempt to judge the case "on its own facts." *United States v. Caltex (Philippines), Inc*., 344 U.S. 149, 156 (1952).

The Fifth Circuit admits that its decision "wrongs individuals like Baker" while subsequently acknowledging that it could not "decide that fairness and justice trump historical precedent." *Baker*, 84 F.4th at 38. While the Fifth Circuit was correct that the guiding force in interpretation should be history and precedent, it cherry-picks history and precedent that are distinct from the case at hand. *Baker*, 84 F.4th at 38 (requiring Baker to adduce "historical or contemporary authority that involves *facts closer to those at bar* and where the petitioner succeeded under the Takings Clause."). Instead, the only proper reading of the Takings Clause that aligns with the "Armstrong Principle" is to compensate property owners who now shoulder

the enormous costs of police destruction. Dandee Cabanay, *Baking Up a Taking: Why There is No Categorical Exemption to the Fifth Amendment Takings Clause for the Police Power*, 75 Baylor L. Rev. 778, 806 (2023).

Most of the cases the Fifth Circuit relies upon to justify destruction under the necessity exception are distinguishable in several key respects. *Bowditch Field v. City of Des Moines* involved a large, uncontrolled fire affecting urban cities, while *Sparhawk* and *Caltrex* concerned destruction undertaken in times of war. In contrast, the police standoff in *Baker,* involving a single, contained individual, cannot reasonably be situated with emergencies that involve large-scale threats to life and property posed by "war, riot, pestilence, or other great public calamity." *Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980); *See also United States v. Caltex*, 344 U.S. 149, 154-55 (1952) (acknowledging that at common law, the sovereign when faced with imminent peril is given immunity for actions taken prevent many deaths.)

The court in Baker views necessity through the wrong lens, as determining whether destruction was necessary and thereby excusing the government or individual from trespass or related torts is analytically distinct from whether non-compensation was necessary. *See United States v. Russell*, 80 U.S. 623, 628 (1871) (stating that if an emergency is proven, there cannot be a trespass, and the "government is bound to make full compensation to the owner."). The question of necessity considers whether requiring just compensation would create an overwhelming fiscal or administrative burden on the government or altruistic intervenors during extensive and widespread destruction. *Sparhawk* illustrates the rationale behind the exception, for "[w]hat nation could sustain the enormous load of debt…!" *Respublica v.Sparhawk*, 1 U.S. 357 (1 Dall.) (1788) at 362; *United States v. Pac. R.R.*, 120 U.S. 227, 238, 7 S. Ct. 490, 495 (1887) (discussing President Grant, after vetoing a bill to require compensation of wartime

destruction,"observ[ed] that its payment would invite the presentation of demands for very large sums of money against the government for necessary and unavoidable destruction of property").

The chilling-effect concern cited by the court was a compelling consideration prior to the nineteenth century when individuals who destroyed property to prevent a fire from spreading could be held personally liable at common law for tortious actions. *Hale v. Lawrence*, 21 N.J.L. 714, 729 (1848). (This right to destroy private property did "not appertain to sovereignty, but to individuals" and was "essentially a private and not a public or official right."). Imposing such liability risked deterring decisive action in times of crisis, as individuals acting for the common good would have to weigh their personal liability and if they would be made to shoulder the resulting costs. Today, however, it is municipalities—not individual actors—that face takings claims, which diminishes such concerns. *Baker v. City of McKinney*, 93 F.4th 251, 254 (5th Cir. 2024) (Elrod & Oldham, JJ., dissenting).

Second, assuming *ad arguendo*, the necessity exception applies to smaller, isolated dangers, the Fifth Circuit ignored a fundamental consideration underlying these cases. *Caltex* held that the oil terminal facilities were destroyed "to prevent the enemy from realizing any strategic value from an area which he was soon to capture" and thus "must be attributed solely to the fortunes of war, and not to the sovereign." *Caltex*, 344 U.S. at 155-56. Whereas in Bowditch, the house destroyed to prevent a Great Fire from spreading throughout Boston, was in the path and "in danger from its progress." *Bowditch v. Boston,* 101 U.S. 16, 16 (1879). As noted by Justice Sotomayer, these cases "do not resolve Baker's claim ... because the destruction of her property was necessary, but not inevitable." *Baker v. City of McKinney*, 145 S. Ct. 11, 12-13 (2024) (Sotomayor & Gorsuch, JJ., respecting denial of certiorari).

In *Yawn*, the Fourth Circuit opposed a per se police-power exemptions, and instead invokes the test supplied by this Court in *Ark. Game & Fish*, which focuses instead on intentionality and foreseeability. 568 U.S. at 39; *Yawn v. Dorchester Cnty*., 1 F.4th 191, 195 (4th Cir. 2021). In conducting a foreseeability analysis, the court must look at the County's stated objective and the measures taken to avoid damage. *Yawn*, 1 F.4th at 195. The question is not whether state action would foreseeably result in damage, but rather, whether the injury would occur despite the City's specific efforts to avoid exposing the property to the specific damage. *See id*. at 5.

The inevitability of destruction or foreseeability of harm is an issue of fact that cannot be properly disposed of in summary judgment. While it may have been possible or even probable that the destruction of Jones' home was inevitable, there is a genuine dispute of fact which is a determination is best left to a jury. *See* Fed. R. Civ. P. 56(a).

In the interest of justice, this Court should adopt the Fourth Circuit's *Yawn* test and implement a foreseeability analysis. A foreseeability analysis holds to bar the state's intention and indifference, rather than their actions in isolation. The operational question is if the state took efforts to try and avoid damages, and if those efforts were sufficient given the larger context of the state's action. Adopting this standard would not open the floodgates of takings claims, as some detractors fear, as the test doesn't lend to holding municipalities liable for damage that was merely foreseeable, but instead allows for successful claims where state actors caused foreseeable damage that they did not make specific efforts to avoid or mitigate.

## CONCLUSION

For the forgoing reasons we ask this Court to REVERSE the lower court's decision, adopt the state-created danger test, and reject a blanket exception to the Fifth Amendment.

Respectfully submitted,
Team 3
*Counsel for Petitioner*