Initial Brief on the Merits

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

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QUESTIONS PRESENTED

I. Whether the state-created danger doctrine should be adopted by this Court to provide recovery to individuals when the constitutional right to be free from state-created danger has been violated by the affirmative conduct of state actors that shock the conscience.

II. Whether the Fifth Amendment requires just compensation for destruction of an innocent homeowner's property when the property was foreseeably destroyed under a valid police power exercise.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Sarah Jones ("Petitioner") and Mark Baker had been romantically involved, and shared a ten-year-old son, A.J. R. at 2. Friday evening, Ms. Jones called the police in a panic. *Id*. Baker was intoxicated and threatened both her and A.J. *Id*. When Laurenton Police Officers Trent and Williams ("Defendants") arrived, Baker was livid and continued making threats. *Id*. Ms. Jones expressed fear over her and A.J.'s safety because Baker owned a handgun. *Id*. Additionally, because of his prior military service, he had expertise in the field of explosives. *Id*. She feared retaliation from Baker and reiterated this to the officers. *Id.*

Based on this fear, Ms. Jones asked the officers if she and A.J. should leave their home for the evening. *Id*. Officer Trent assured Ms. Jones that Baker would "[b]e locked up until at least the morning" because of an arrest warrant for a domestic violence incident from a nearby county. *Id*. Relying on Officer Trent's assurance that Baker would be in custody for the night, Ms. Jones and A.J. made the informed decision to stay home. *Id*. The officers took Baker into custody but did not execute the arrest warrant because the jail was at capacity. *Id*. Instead, they took Baker to a rental home where he had been staying. *Id*. Although they retrieved Baker's handgun, the officers took no further action to correct their previous assurances made to Ms. Jones. *Id*.

Hours later, Baker placed two homemade bombs at Ms. Jones's home. *Id*. These bombs were retrieved from the rental home that the officers had dropped him off at just hours earlier. *Id*. One bomb was placed on the front porch, the other at the back. *Id*. The bomb placed on the front porch was intentionally disguised to look like an Amazon package. *Id*. Under the mistaken belief that Baker was in custody, Ms. Jones brought the package inside. *Id*. She opened the package

triggering the bomb. R. at 3. Neighbors called the police after hearing the explosion. *Id.* Ms. Jones and A.J. were taken to the hospital having suffered serious injuries. *Id*. Additionally, the blast caused damage to the front of Ms. Jones's home. *Id*.

When the police arrived at her home, they discovered the second package at the back of the house. *Id*. Baker was still not in custody. *Id*. The Laurenton Police Bomb Squad was called out for assistance. *Id*. The bomb squad used a robot with an x-ray and "energetic tool" that is placed on the package to assess the bomb. *Id*. The use of this tool is not without risk; if the tool cannot disarm the bomb, it will detonate it. *Id*. The bomb was "highly sophisticated," specifically designed to evade the use of such disruption techniques. *Id*. This level of sophistication made a successful disruption of the bomb "non-existent." *Id*. Baker had control of the "remote detonation mechanism," and with Baker still not in custody, the bomb was unstable. *Id*. The bomb squad attempted to disrupt the bomb, but they failed. *Id.* The bomb detonated as predicted. *Id*. The final blast obliterated the rear portion of Ms. Jones's home, "collapsed part of the roof," and left the home uninhabitable. *Id*. The damage was so severe that the house would need to be knocked down and rebuilt from scratch with estimated damages being upwards of $380,000. *Id*.

II. PROCEDURAL HISTORY

Ms. Jones filed a claim under 42 U.S.C. § 1983 against the City of Laurenton and the Laurenton Police Department. R. at 4. Ms. Jones alleged that the City was liable under the Due Process Clause of the Fourteenth Amendment for "[a]ffirmatively creating the danger that led to her injuries" and under the Takings Clause of the Fifth Amendment for not providing her with "just compensation" after her home was decimated. *Id*. The district court granted summary judgment in favor of the City of Laurenton and the Laurenton Police Department on both claims. *Id*. The appellate court affirmed. R. at 8. This appeal followed. *Id*.

SUMMARY OF THE ARGUMENT

This Court should adopt the state-created danger doctrine as a necessary constitutional remedy. This remedy is necessary because it protects the right to be free from state-created danger, which this Court should recognize as a substantive Due Process right under the Fourteenth Amendment. This should be recognized as a fundamental right because it may be carefully described to avoid arbitrary expansions of substantive Due Process and has deep roots within our nation's history and tradition and is implicit to our ordered liberty. Citizen's interests should always be held above the State's when state action rises to the level of a constitutional violation. Sound policy demands that this Court take action. An individual's recourse for a constitutional violation should not vary based on which circuit they reside in. The current state of the law regarding the state-created danger doctrine has this disparaging effect. The case at bar demonstrates that when a carefully described test which defines the standards and culpability required to satisfy it is adopted, Ms. Jones is entitled to recourse. Therefore, this Court should adopt the state-created danger doctrine to protect citizens like Ms. Jones.

Additionally, this Court should find that the Fifth Amendment's Takings Clause does not bar recovery for destruction of property performed under a valid police power exercise. The Fifth Amendment requires the government to pay just compensation when it destroys private property while carrying out official duties. Nothing in the Constitution exempts police actions from that rule. Several lower courts have created a categorical exception, holding that destruction during law enforcement operations is never a taking. That approach cannot be squared with this Court's precedent, which reject blanket exemptions and hold that fairness, not labels, governs when compensation is due. This Court should hold that the Takings Clause protects against all

government actions that intentionally or foreseeably destroy private property, and adopt a clear, fairness-based standard that balances public necessity with constitutional rights.

Therefore, Petitioner respectfully requests this Court to reverse and remand the judgment below and hold that the state-created danger doctrine provides a constitutional safeguard against state-created harm and that the Takings Clause requires just compensation when the government destroys private property in the exercise of its authority.

ARGUMENT

I. STATE ACTORS SHOULD BE HELD LIABLE PURSUANT TO THE STATE-CREATED DANGER DOCTRINE WHEN INJURIES INFLICTED TO PRIVATE PARTIES ARE SO EGREGIOUS AS TO VIOLATE SUBSTANTIVE DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment requires that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Clause further "provides heightened protection" against government actions when dealing with "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The right to personal security, which encompasses the right to be free from state-created harm, requires heightened constitutional protections. *See Rochin v. California*, 342 U.S. 165, 174 (1952); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

This Court is now provided an opportunity to adopt a doctrine which would provide relief from harm caused when this fundamental right is violated. In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), this Court laid the foundation for the legal principle that citizens have a right to be free from harm created or enhanced by state actors. This principle

proved to be massively popular, with near-universal adoption among the circuit courts. *Murguia v. Langdon*, 73 F.4th 1103, 1113 (9th Cir. 2023).[1]

Accordingly, this Court should recognize the state-created danger doctrine because: (A) the right to be free from state-created danger is a Fourteenth Amendment right; (B) adopting the state-created danger doctrine provides recourse for when this right is violated; (C) public policy demands adoption of this doctrine; and (D) application of the state-created danger doctrine to the case at bar protects this constitutional right.

A. The Right to Be Free from State-Created Danger Is Protected Under the Fourteenth Amendment's Due Process Clause.

Grounded within the broader scope of the right to personal security, the right to be free from state-created danger is a constitutional right protected under the Fourteenth Amendment's Due Process Clause. To determine whether an unenumerated right falls under the protection of the Fourteenth Amendment, this Court applies a substantive due process analysis. *Glucksberg,* 521 U.S. at 720-21. This analysis consists of: (1) a "careful description" of the asserted fundamental right; and (2) whether the asserted right is "deeply rooted in this [n]ation's history and tradition," and is "implicit in the concept of ordered liberty." *Id*. The right to be free from state-created danger satisfies both prongs of this analysis.

[1] *See*, *e.g.*, *Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020); *Okin v. Vill. Of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 428, 431 (2d Cir. 2009); *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018); *Callahan v. N.C. Dep't of Pub. Safety*, 18 F.4th 142, 146, 149 n.5 (4th Cir. 2021); *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491-92 (6th Cir. 2019); *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019); *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 512 (8th Cir. 2015); *Sinclair v. City of Seattle*, 61 F.4th 674, 680 (9th Cir.), *cert. denied*, 144 S. Ct. 88, 217 L. Ed. 2d 20 (2023); *Est. of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014); *White v. Lemacks*, 183 F.3d 1253, 1258 (11th Cir. 1999); *Butera v. D.C.,* 235 F.3d 637, 651 (D.C. Cir. 2001).

1. This right to be free from state-created danger should be recognized as fundamental because it may be carefully described to avoid arbitrary expansions of substantive due process.

The *Glucksberg* analysis requires a "careful description" of the asserted constitutional right. 521 U.S. at 720-21. A "careful description" adheres to the doctrine of judicial self-restraint, since determining new substantive due process rights requires this Court to exercise "utmost care." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992) (focusing on how constitutional rights are described and the alleged violations of those rights by the State).

The right to be free from state-created danger conforms to this principle. As demonstrated by the *Okin* court, this right is violated only when: (1) state actors affirmatively create or enhance the danger of violence from private parties; and (2) the state action "shock[s] the contemporary conscience." *Okin v. Vill. Of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 428, 431 (2d Cir. 2009). These qualifications sufficiently narrow the test to only include actions that would rise to the level of a constitutional violation and therefore qualify as a careful description of the right to be free from state-created danger.

2. The right to be free from state-created danger is deeply rooted in the nation's history and tradition and is implicit to the concept of ordered liberty.

The second prong of the *Glucksberg* analysis requires this Court to determine whether the right is deeply rooted within the nation's history and tradition and is implicit to ordered liberty. *Glucksberg*, 521 U.S. at 720-21. This Court utilizes the history and tradition of the nation out of "careful respect for the teachings of history." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). The right to be free from state-created danger can be traced to a multitude of historical works which places it within this nation's legal tradition. David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 Rev. Litig. 357, 374-75 (2001). Additionally, a

right that is implicit to the concept of ordered liberty must weigh the competing interests of the individual and organized society. *Poe v. Ullman,* 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Here, an individual's right to be free from state-created danger and to recover for state-created harm outweighs the government's interest in insulating officers from third-party violence. Because a majority of circuits adopt this principle, *Murguia*, 73 F.4th at 1113, this Court should find it implicit to the concept of ordered liberty.

a. The right to free from state-created danger is deeply rooted in the nation's history and tradition.

In American jurisprudence, the right to be free from state-created danger and to establish State liability for that harm, came well before *DeShaney*. *See Ingraham*, 430 U.S. at 673. In determining whether a right is deeply rooted in this nation's history and tradition, this Court considers fundamental liberties that can be traced to English common-law, historical federal statutes, and principles used in contemporary common law. *See Timbs v. Indiana*, 586 U.S. 146, 150-55 (2019); *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 767-77 (2010).

First, this Court may consider whether a right can be traced to English common-law. *See Ingraham*, 430 U.S. at 674. In *Ingraham,* this Court noted that a citizen's right to personal security was fundamental and within this nation's history and tradition because of its strong roots in common law. *Id*. The *Ingraham* court rested its analysis on the right having origins in the Magna Carta, carried throughout English common-law history, using Sir William Blackstone's Commentaries as evidence. *Id*. at 673 n.41. Drawing from the principles in *Ingraham*, the right to be free from state-created danger has roots within the history and tradition of American jurisprudence. Similar to *Ingraham*, Blackstone's writings demonstrate this principle of state-created danger explaining that stating if, "the Crown has [violated the] private rights" of citizens,

the crown orders "his judges to do justice to the party aggrieved." 3 William Blackstone, *Commentaries* *255 (1768). This analysis is persuasive as the right to be free from state-created danger is predicated on the notion that the state must provide recourse when they create or enhance harm. That recourse is the state-created danger doctrine.

Second, this Court may also consider federal statutes to determine whether a right is deeply rooted in this nation's history and tradition. *McDonald*, 561 U.S. at 767-77. This encompasses whether "a constitutional right [at issue] was established when the Fourteenth Amendment was adopted," as well as evidence that a right "predates the latter part of the 20th century." *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 252 (2022). The right to be free from state-created danger has origins in early federal laws near the time of the Fourteenth Amendment's adoption. Pruessner, *supra*, at 374-75. The right has been traced back to the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, which was enacted in order to safeguard citizens from violence by private parties. *Id.* (finding that local law enforcement was often indifferent to crimes against minorities). Congress built on the KKK Act to enact § 1983, which holds state actors liable to injured parties for constitutional violations that they cause or create. *Id.*; *see also* 42 U.S.C. § 1983. This Court has interpreted this law to include liability where the State is complacent in the face of private party harm. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978). Accordingly, the right to be free from state-created danger has historical roots in federal law.

Third, this Court may also consider the application of a right in contemporary jurisprudence. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Courts have built on the principle that there is a "constitutionally protected liberty interest" against "unjustified intrusions of personal security." *Ingraham*, 430 U.S. at 674-75. Expanding on this liberty interest, the Ninth

Circuit, in *Wood v. Ostrander*, held that the plaintiff should be able to present evidence that her constitutional rights were violated when police officers "affirmatively placed" her in a "position of danger." 851 F.2d 1212, 1216 (9th Cir. 1988), *on reh'g*, 879 F.2d 583 (9th Cir. 1989) (considering the facts that officers arrested the driver of a car and left the passenger in a high crime area, ultimately leading to her rape). Therefore, contemporary decisions also provide evidence that this right is within this nation's history and tradition.

Accordingly, the right to be free from state-created danger is within the nation's history and tradition because it is supported by early common law, federal law, and contemporary application. Therefore, this Court should adopt this fundamental right.

b. The right to be free from state-created danger is implicit to the nation's concept of ordered liberty.

In addition to finding deep roots in our nation's history and tradition, this Court determines whether the right is implicit to our nation's concept of ordered liberty, "such that neither liberty nor justice would exist if it were sacrificed." *Glucksberg*, 521 U.S. at 721. An ordered liberty analysis "sets limits and defines the boundary between competing interests," *Dobbs*, 597 U.S. at 256, and typically weighs individual liberty interests with the "demands of an organized society." *Poe v. Ullman*, 367 U.S. at 542 (J. Harlan dissenting).

The competing interests here are the citizens' fundamental right to be free from state-created danger and to recover from harm, versus the government's interest in keeping law enforcement officers from being held liable for harm caused by third parties. *Compare Murguia v. Langdon*, 61 F.4th at 1114 (holding that a father had a substantive due process claim against police officers that gave twin babies to obviously mentally ill mother, leading to their deaths) *with Murguia v. Langdon*, 73 F.4th 1103, 1107 (9th Cir. 2023) (Bimutay, J., dissenting) (arguing

that the case should be reheard *en banc* because the State had no affirmative obligation to protect citizens from private harm).

For this analysis, the liberty interest of the citizen outweighs the interest of the officers to be free from liability. Precedent suggests finding the State liable to an injury "even if it did not create the situation." *DeShaney* 489 U.S. 189, 207 (J. Brennan, Dissenting) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)). In Justice Brennan's dissent, he argued that ordered liberty calls for "a more active role" for State actors when they know that harm is likely to occur to a private citizen. *Id.* at 203. As affirmed in his dissent, § 1983 was enacted for the exact purpose to protect citizens against harmful acts by state actors. *Id.* at 204. Further, by "monopolizing a particular path of relief," such as calling the police to assist with a dangerous aggressor, the Constitution "may impose upon the State certain positive duties," such as a duty for an officer to fully protect a citizen, rather than turning a blind eye to obvious danger. *Id.* at 207; *see also Murguia*, 61 F.4th at 1114. Therefore, the right to be free from state-created danger is implicit to our nation's ordered liberty.

In sum, to hold for the Petitioner, this Court would affirm centuries of legal doctrine and practice and uphold the considered policy choice of almost every circuit. *Cf. Glucksberg*, 521 U.S. at 723 ("To hold for respondents, the Court would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State"). To do otherwise, would signal to the nation's citizens that "when government action lights the fuse of foreseeable private violence, the courthouse doors will be slammed shut." R. at 11 (Merritt, J. dissenting).

B. The State-Created Danger Doctrine Provides Recourse When the Right to be Free from State-Created Danger is Violated.

This Court should adopt the state-created danger doctrine as the majority of circuits have adopted some form of the doctrine. Christopher M. Eisenhauer, Comment, *Police Action and The State-Created Danger Doctrine: A Proposed Uniform Test*, 120 Penn. St. L. Rev. 893, 898-909 (Winter, 2016) (outlining how eleven out of the twelve circuit courts have adopted the doctrine). Despite their differences, each circuit's test effectuates the same goal: providing a framework to protect an individual's fundamental liberty interest to be free from state-created harm. *Id*. at 919.

Further, the circuit courts use the same overlapping principles in their state-created danger doctrine tests, even though tests vary. Eisenhauer, *supra*, at 898-909. These principles are best divided into four categories: (1) an identifiable plaintiff; (2) State action that creates or enhances the danger that the plaintiff is subjected to; (3) some type of failure on the part of the State; and (4) State conduct goes beyond negligence to shock the conscience. *See e.g., Irish*, 979 F.3d at 75 (requiring a specific, identifiable plaintiff); *Okin*, 557 F.3d at 428, 431 (requiring affirmative conduct on the part of the state actors); *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (requiring a failure on the part of state actors); *Villanueva*, 779 F.3d at 512 (requiring that the conduct shocks the conscience).

The majority opinion of the lower court confuses inconsistency with invalidity. R. at 6. The majority asserts that because the state-created danger doctrine is adopted differently across the circuits that the doctrinal footing is weak and thus, it is not worth adopting. *Id*. However, this is incorrect. This Court has long recognized that "a robust 'consensus of cases of persuasive authority'" is sufficient for the establishment of a doctrine "absent controlling authority." *Ashcroft*, 563 U.S. at 742; *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999). The fact that the

majority of the circuits have adopted the state-created danger doctrine to effectuate the same purpose is the definition of "a robust 'consensus of cases of persuasive authority.'" *Id*.

C. Public Policy Demands Adoption of This Doctrine.

The outlier circuit does not present any compelling policy argument which would outweigh the vast majority of authorities supporting the adoption of the doctrine. In *Fisher*, the Fifth Circuit stated two reasons for refusing to follow suit with the majority of circuits in adopting the state-created danger doctrine. *Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023). First, the circuit court explained, in reference to the *Dobbs* decision, that "[t]he Supreme Court's recent forceful pronouncements signaling unease with implied rights not deeply rooted in our [n]ation's history and tradition" made the circuit hesitate in adopting the doctrine. *Id*. Second, the circuit court used the existence of a circuit split to justify their rejection of the doctrine. *Id*.

In addressing the first concern of the *Fisher* court, the right to be free from state-created danger has been established as a fundamental right because it is deeply rooted within our nation's history and tradition and implicit to our ordered liberty. *See supra*, Part I.A.(2). In addressing the second concern, the court in *Fisher* did not rule out adopting some version of the doctrine, they just did not want to "[b]reak new ground" themselves. *Fisher*, 73 F.4th at 372 (conceding that they would adopt a state-created danger doctrine test that provides recourse when: "[1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] [t]he defendants acted with deliberate indifference to the plight of the plaintiff"). This Court may adopt a test, demonstrated by the court in *Okin*, which does just that, making the only policy concerns raised against this doctrine moot. *See Okin*, 577 F.3d at 428, 431; *see supra*, Part I.A.(1).

It is within this Court's power to unite the circuits. In adopting a uniform standard for the protection of a constitutional right, this Court would be protecting both citizens and state actors. Eisenhauer, *supra*, at 900. A uniform test with defined contours allows for the careful balance between a citizen's right to be free from state-created danger while still allowing law enforcement to do their jobs without the fear that every "[t]ort committed by a state actor [will turn] into a constitutional violation." *DeShaney*, 489 U.S. at 202. This Court should adopt a uniform test which "[e]ncourages justice and recognizes that compassion need not be exiled from the province of judging" reversing the lower court's ruling. *Id*. at 213 (Blackmun, J., dissenting).

D. To Prevent the Expansion of Substantive Due Process This Court Should Adopt a Two Prong Test That As Applied to The Case at Bar Protects the Right to Be Free from State-Created Danger.

To unite the circuits, this Court should adopt the two-part test from the court in *Okin* which, finds a constitutional violation only when: (1) state actors affirmatively create or enhance the danger of violence from private parties; and (2) the state action "shock[s] the contemporary conscience." *Okin*, 577 F.3d at 428, 431. To promote judicial efficiency and to prevent the expansion of Due Process this test must be adopted with explicit guidelines. The way that other circuits approach to defining this standard provide guideposts for how each prong of this test should be met. Application of the test to Ms. Jones's case presents the opportunity to view a full analysis of the doctrine with its defined "contours," allowing this Court to universally adopt it as a route to recovery when the right to be free from state-created danger is violated. *Fisher*, 73 F.4th at 373 (rejecting the state-created danger doctrine because it was not "unanimous in [its] contours or its applications"); *Okin*, 557 F.3d at 428, 431. Now is the opportunity to define how to apply this test.

1. The first prong of the test defines affirmative conduct as inaction on the part of state actors or false assurances of protection.

This Court's analysis of what constitutes affirmative conduct goes back before *DeShaney* was decided. Laura Oren, *Safari Into the Snake Pit: The State Created Danger Doctrine*, 13 Wm & Mary Bill Rts. J. 1165, 1168 (2005). This Court in *DeShaney* recognized the difficulties in determining action and inaction on the part of state actors explaining that the majority failed "to see that inaction can be every bit as abusive of power as action." 489 U.S. at 212 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). Although all of the circuits that adopt the state-created danger doctrine require some type of action on the part of state actors that creates or enhances the plaintiff's danger, the circuits have not adopted the same definition of what constitutes "affirmative conduct." *Irish*, 979 F.3d at 73-74. Thus, when this Court is adopting the proposed uniform test, it is important to properly define what constitutes affirmative conduct.

Inaction on the part of State actors constitutes affirmative conduct for state-created danger doctrine claims under § 1983. *Escamilla v. City of Santa Ana*, 796 F.2d. 266, 268 (9th Cir. 1986). In *Escamilla*, two undercover police officers called for backup after they observed two armed men fighting while surveilling a restaurant. *Id*. at 267. After their first altercation, although shots were fired, no one was injured so the undercover officers took no action in apprehending them. *Id*. However, after a second round of shots were fired, an innocent bystander was killed. *Id*. The circuit court affirmed summary judgment of the § 1983 claim in favor of the undercover officers because they did not "create or exacerbate" the danger the victim faced. *Id*. at 269. The circuit court acknowledged the state-created danger doctrine, and that an omission or inaction could be cause for a § 1983 claim, but explained that there must be more than a "causal relationship" between the inaction and the death. *Id*. at 268. The court emphasized that state

actors are only liable under § 1983 when they fail to protect individuals from danger that they "created or exacerbated." *Id*. at 270.

When a State actor provides "false assurances" of protection to an individual, they have engaged in affirmative conduct under the state-created danger doctrine. *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998).[2] In *Monfils*, murder victim, Thomas Monfils, made an anonymous tip to police regarding a coworker's intention to steal electrical equipment. *Id*. at 513. The thief, a man with a violent history, threatened to get a copy of the phone recordings to identify who turned him in. *Id*. Monfils, in fear for his safety, called the police multiple times to ensure that his anonymity was protected. *Id*. Monfils was assured by various members of the police department that the recording would not be released. *Id*. Despite these assurances, the police released the recording of the call to the thief who identified Monfils' voice. *Id*. Monfils was subsequently murdered and a § 1983 claim was brought on his behalf. *Id*. at 515. The circuit court explained that the assurances made by the police that were then "not follow[ed] through" "created a danger that Monfils would not otherwise have faced." *Id*. Once the tape was released, "Monfils' ability to protect himself was severely limited." *Id*. at 516. *Monfils* made it clear that assurances of safety constitute affirmative conduct for the purposes of a § 1983 state-created danger doctrine claim. *Id*.

Applying this definition of affirmative conduct as being an action or inaction as well as a false assurance sets the boundaries for when a state actor can be held liable under the state-created danger doctrine. Unlike in *Escamilla* where the undercover officers did not create or

[2] *See also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006) (holding that assurances by a state actor that they would patrol the neighborhood leading victims to stay in their home instead of retreating to a safer environment constituted affirmative conduct); *Irish*, 979 F.3d at 71 (holding that false information made by state actors which lulled victims into a false sense of security constituted affirmative conduct under the state-created danger doctrine).

enhance the danger to the victim, Officers Trent and Williams did create an environment where Ms. Jones could be harmed by Baker when they released him and failed to warn her. Additionally, unlike in *Escamilla* where the victim was an innocent bystander who had no previous interaction or contact with the undercover officers, Ms. Jones had called the officers for help and was in direct contact with them. Similar to the facts in *Monfils*, *Kennedy*, and *Irish*, where police officers reassured each victim that they would be free from harm, Ms. Jones was reassured that Baker would be in custody until the morning, which made her feel that she and her son would be safe. Like in *Kennedy* and *Irish*, where the reassurances made by police officers contributed to the victims staying in their homes where their attackers could easily find them, Ms. Jones made her decision to stay in her home based off of the misrepresentation made by Officers Trent and Williams that Baker would remain in police custody. Like in *Monfils* where the release of the tape recording by the police enhanced Monfils' likelihood of being harmed, the officer's release of Baker enhanced Ms. Jones's likelihood of being harmed. Additionally, like in *Monfils*, *Kennedy*, and *Irish*, when the police failed to correct their misrepresentations which lulled each victim into a false sense of security, when Officers Trent and Williams proceeded with Baker's release and failed to correct their misrepresentation, Ms. Jones was lulled into a false sense of security that she then relied on to her detriment. Therefore, this definition protects innocent individuals like Ms. Jones while maintaining the purpose of substantive due process.

2. The second part of the test requires that the state's action shocks the conscience.

The "shocks the conscience" standard was articulated by this Court in *Rochin* almost four decades before the *DeShaney* case wreaked havoc on the circuit courts. 342 U.S. at 172 (holding that forced stomach pumping of an individual who was suspected to have been in possession of narcotics is "[b]ound to offend even hardened sensibilities" and thus shocks the conscience).

This Court has also recognized that "deliberate indifference" can be conduct that shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (distinguishing that a decision to partake in a highspeed pursuit that resulted in death was not an action that shocked the conscience as the officer had to act quickly). In *Lewis*, this Court explained that this is not a "[m]echanical application," thus "[s]ubstantive due process demands an exact analysis of the circumstances before any abuse of power is condemned as conscious shocking." *Id*.

The uniform test that this Court should adopt must be able to account for the balancing act between a State actor's high pressure work environment and the safety of individuals. *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305 (11th Cir. 2003) (explaining that the determination of what conduct shocks the conscience cannot be made "[i]n the glow of hindsight" rather "decisions made by a government actor must be egregious–that is, shock the conscience–at the time the government actor made that decision"); *see also Johnson v. City of Philadelphia*, 975 F.3d 394, 401 (3d Cir. 2020) (explaining that "[t]he exact level of culpability required to shock the conscience...depends on the circumstances of each case, and the threshold for liability varies with the state actor's opportunity to deliberate before taking action").

Negligence is insufficient for a § 1983 claim and thus when defendants act with knowledge of potential dangers, they have acted with deliberate indifference that shocks the conscience. *L.W. v. Grubbs*, 974 F.2d 119, 122-23 (9th Cir. 1992). In this case, L.W. was sexually assaulted and "terrorized" by a male inmate while working in her capacity as a nurse at an Oregon prison. *Id*. at 120. Despite the inmate's file which labeled him as a "[v]iolent sex offender" that had "[f]ailed all treatment programs" provided to him, he was selected to work with L.W. without any additional protection. *Id*. L.W. brought a § 1983 claim against the prison alleging her due process rights were violated. *Id*. In reversing the district court's ruling, the court

of appeals explained that the defendants "[c]reated the danger to which L.W. fell victim" to. *Id*. The circuit court detailed how the defendant's had knowledge of the inmate's violent tendencies, that they knew he would likely harm a female if given the opportunity to do so, and, among other factors, "[m]isrepresent[ed]" the risk L.W. would face working as a nurse. *Id*. at 121. Accordingly, given the knowledge that the defendants possessed and the fact that they proceeded anyway with the assignment, the circuit court found that the defendants acted with "deliberate indifference in creating the danger." *Id*. at 123.

Like in *Grubbs* where the defendants had knowledge of the inmate's violent past but chose to proceed anyway placing L.W. in danger, the officer's knowledge that Baker had weapons, an outstanding arrest warrant for domestic violence, and experience with explosives but still failed to correct their misrepresentation constituted deliberate indifference that shocks the conscience. Unlike in *Johnson* and *Lewis* where state actors were acting in time sensitive situations and thus their actions did not shock the conscience, Officers Trent and Williams were under no such time limitations thus they possessed the requisite mindset, and their actions were deliberately indifferent to Ms. Jones's safety.

This Court should find that this case represents the exact abuses that substantive due process, and the state-created danger doctrine were intended to protect against. R. at 11. These abuses can be seen through the officer's affirmative conduct starting with Baker's arrest through his release and ending with his failure to update Ms. Jones. *Id*. at 2. This is compounded by the officers' deliberate decision not to correct their misrepresentation to Ms. Jones about Baker's whereabouts which was "at the time," egregious rising to the level of conscious shocking. *Waddell*, 329 F.3d at 1305. Therefore, this Court should reverse and remand the lower court's

ruling and adopt the state-created danger doctrine allowing Ms. Jones recourse from the officers' violations of her fundamental right.

II. A CATEGORICAL RULE AGAINST JUST COMPENSATION FOR TAKINGS EXECUTED UNDER THE POLICE POWER IS INCONSISTENT WITH THE FIFTH AMENDMENT AND THREATENS CONSTITUTIONAL PROTECTIONS.

The Takings Clause of the Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. That protection applies with equal force to the States through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234-35 (1897). Yet several circuits have carved out a categorical rule denying compensation when property is destroyed under the police power, reasoning that such destruction is not "for public use." *See Lech v. Jackson*, 791 Fed. Appx. 711, 717 (10th Cir. 2019); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008); *see also United States v. Droganes*, 728 F.3d 580, 591 (6th Cir. 2013). This approach cannot stand. This is because this Court's Takings Clause precedent explicitly rejects blanket exclusions, and recognizes that actions performed under the police powers serve a "public use." *Arkansas Game and Fish Comm'n. v. United States*, 568 U.S. 23, 34, 37 (2012); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). This approach also disregards the Fifth Amendment's purpose, to ensure fairness and prevent individuals from bearing public burdens alone. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Therefore, this Court should reaffirm that the Constitution's guarantee of just compensation turns not on labels like "police power," but on whether the government's actions foreseeably and intentionally inflicted property loss for the public's benefit. *Yawn v. Dorchester Cnty.*, 1 F.4th 191, 195 (4th Cir. 2021).

Accordingly, this Court should reject a categorial rule against compensation for destruction performed under a valid police power action because: (A) this would conflict with a

century of this Court's takings jurisprudence; (B) the courts adopting this rule have misinterpreted precedent; and (C) a foreseeability and intent approach would address concerns while safeguarding constitutional rights.

A. A Categorical Bar on Compensation for Police Power Takings Conflicts with a Century of Takings Jurisprudence.

The Fifth Amendment does not tolerate a categorical exemption for the destruction of property under police power. First, destruction invariably extinguishes the core property rights the Constitution protects and therefore requires compensation regardless of governmental motive. *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 182 (1871); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, even outside the physical context, this Court has consistently rejected categorical rules in favor of case-by-case inquiries grounded in fairness and justice. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978); *Armstrong*, 364 U.S. at 49. The character of the intrusion, including whether it is labeled an exercise of the police power, has never been dispositive, but merely one consideration in determining when justice requires compensation. *Penn. Cent. Transp. Co.*, 438 U.S. at 123.

1. Physical destruction of property is invariably a taking, regardless of government motive.

The physical destruction of private property constitutes a taking, regardless of whether the government acts under its police power or through eminent domain. *See Pumpelly*, 80 U.S. at 182; *Palazzolo,* 533 U.S. at 617. The original understanding of the Takings Clause encompassed only direct physical appropriations, instances where the government explicitly seized or occupied private property, also known as eminent domain. *See Lucas v. S.C. Coastal Council*, 505 U.S.

1003, 1014 (1992); *see also United States v. Pewee Coal Co.*, 341 U.S. 114, 118 (1951). These were considered "as old as the Republic," reflecting the Framers' belief, that enjoyment of property rights was a natural right inseparable from personal liberty. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The Fifth Amendment does not prohibit the government from infringing on those rights; rather, it requires just compensation when those rights are violated. *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 315 (1987).

This Court extended that protection in *Pumpelly*, recognizing that physical takings occur even when the government does not formally seize title. 80 U.S. at 182. There, government-induced flooding that destroyed the value or usefulness of land was deemed a compensable taking. *Id*. The Court reasoned that to deny compensation would "pervert the constitutional provision into a restriction upon the rights of the citizen, instead of the government." *Id*. at 178. *Pumpelly* thus established that any government action that physically invades or destroys property rights constitutes a taking, regardless of motive or method. *Id*. This flows naturally from the principle that when the government inflicts physical destruction, it wholly extinguishes the owner's property rights, an infringement the Constitution has required the public to bear for centuries. *Tahoe-Sierra Pres. Council*, 535 U.S. at 322; *see Armstrong*, 364 U.S. at 49.

Rejecting that rule here would upend a cornerstone of this Court's takings jurisprudence. This Court has consistently reaffirmed that physical appropriations and destructions, whether direct or incidental, are the "clearest sort of taking" because they wholly extinguish ownership rights. *Palazzolo*, 533 U.S. at 617; *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 324. Such takings require compensation without regard to motive or purpose. *Loretto*, 458 U.S. at 426.

Although this Court has yet to addressed destruction under the police power, *Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024) (stating that further development is needed), its treatment of government-induced flooding confirms that physical invasions producing comparable loss of use or destruction of value constitutes a taking. This Court's holdings in *Dickinson* and *Ark. Game & Fish Comm'n* reaffirmed *Pumpelly's* principle that even temporary or recurring flooding which causes physical destruction of property constitutes a taking once the damage stabilizes. *United States v. Dickinson*, 331 U.S. 745 (1947); *Ark. Game & Fish Comm'n*, 568 U.S. at 25. The destruction of property during police power operations cannot be meaningfully distinguished. Whether the government's action releases floodwater or detonates explosives, the result is the same, the owner's possessory and functional interests are obliterated. Because such destruction categorically eliminates property rights the Takings Clause was designed to protect, it must trigger the constitutional command of just compensation regardless of the label attached to the government's action.

2. Besides Physical Appropriations, this Court has long rejected categorical rules in Takings Clause analysis.

While physical takings and total deprivations of ownership have long been treated as categorical, this Court has consistently declined to extend categorical rules outside these narrow contexts. *Tahoe-Sierra Pres. Council*, 535 U.S. at 321 (finding that the text of the Fifth Amendment only provides categorical language for direct physical takings, not regulatory ones); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). Outside of physical appropriations, which necessarily extinguish property rights, determining when other government regulatory actions require compensation presents "a problem of considerable difficulty." *Penn. Cent. Transp. Co.*, 438 U.S. at 123. Accordingly, when the rights at issue arise

outside the physical context, this Court has favored a flexible inquiry grounded in "fairness and justice." *Id*.; *Armstrong*, 364 U.S. at 49. Police power exemptions do not conform to this precedent.

That principle first took shape in *Pennsylvania Coal Co.*, where this Court recognized that even a regulation enacted under the police power may constitute a taking if it "goes too far" in diminishing property rights. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Because such regulatory actions do not lend themselves to a precise "magic formula," *Ark. Game & Fish Comm'n*, 568 U.S. at 32, this Court in *Penn*. *Central* refined the inquiry by adopting a three-factor test: (1) the economic impact on the owner; (2) interference with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn*. *Central*, 438 U.S. at 124. That framework was designed specifically to avoid categorical treatment and the potential injustice that rigid rules might create. *Id*. at 123-24; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (finding the purpose of the *Penn*. *Central* test is to identify actions functionally equivalent to physical takings). Outside the physical context, takings analysis must therefore rely on "ad hoc, factual inquiries" to ensure that property rights remain protected. *Id*. at 124.

Under *Penn. Central*, the character of the governmental intrusion, such as whether an action arises from police power, is only one of three factors in the takings inquiry. 438 U.S. at 124. To elevate that single factor into a categorical rule would go against the principles upheld by this Court. *Id*. The *Lingle* Court explained that any test focusing solely on governmental purpose, such as whether the State acted under its police power, "tells us nothing about the actual burden imposed on property rights" or "when justice might require" compensation. *Lingle*, 544 U.S. at 543; *see also First Eng. Evangelical*, 482 U.S. at 316 (reaffirming that "the entire

doctrine of [regulatory takings] is predicated on the proposition that a taking may occur without a formal proceeding."). Lower courts have recognized this same principle, warning that categorical rules foreclose the balancing that the *Penn*. *Central* test requires. *See*, *e.g.*, *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (warning that "[o]nce a [categorical] rule has been announced, future courts do not have the luxury to consider the public interest"); *Slaybaugh v. Rutherford Cnty., Tennessee*, 114 F.4th 593, 597 (6th Cir. 2024) (observing that "a categorical exception would run afoul of Supreme Court precedent recognizing that the government's exercise of its police powers can, in some circumstances, amount to a taking").

Regardless of whether this Court declines to apply the categorical rule governing physical destruction, because of the *Penn*. *Central* test, this Court should still reject adopting a police power exemption. 438 U.S. at 124. The Fifth Amendment's guarantee of fairness and justice does not yield to the label attached to the government's power.

B. The Lower Courts Misinterpret This Court's Precedent by Adopting a Categorical Rule Against Compensation for Police Power Takings.

Lower courts that have embraced a categorical exemption for police power actions rely on three related rationales, all of which are inconsistent with this Court's decisions. First, they misinterpret "public use" as used within the Takings Clause to be distinct from police powers. *See Midkiff*, 467 U.S. at 232-37; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987). Second, these courts incorrectly rely on decisions such as *Mugler, Bennis, Miller*, and *Lucas* to claim that police power actions are categorically non-compensable.[3] Third, the public

[3] *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017) (relying on *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Bennis v. Michigan*, 516 U.S. 442 (1996)); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011) (relying on *Miller v. Schoene*, 276 U.S. 272 (1928)); *McCutchen v. United States*, 14 F.4th 1355, 1365 (Fed. Cir. 2021) (relying on *Lucas*, 505 U.S. at 1003).

necessity doctrine has been narrowed by this Court's precedents so much that it does not apply to the case at bar. *Lucas,* 505 U.S. at 1029 n.16. These rationales are incorrect.

1. The "public use" requirement is satisfied when government destroys property for the collective benefit.

The lower court's conclusion that police power destruction is not a taking because the property was not turned over for "public use" misreads the Fifth Amendment. These courts argue that destruction of private property during a police operation, firefighting effort, or similar emergency serves no "public use" because the property is not acquired for later use or occupation. *See Lech*, 791 Fed. Appx. at 717; *AmeriSource Corp*, 525 F.3d at 1152; *Droganes*, 728 F.3d at 591. However, this Court has long held that "public use" encompasses any exercise of power undertaken for a legitimate police power. *See Midkiff*, 467 U.S. at 232-37; *Nollan,* 483 U.S. at 834-35.

This Court allows for compensation when property is taken for public use, including police power actions. In *Hawaii Hous. Auth. v. Midkiff*, the Court considered whether Hawaii's Land Reform Act, authorizing the State to seize and redistribute property to reduce inflated land prices, served a "public use." 467 U.S. 229, 232-37 (1984). Relying on *Berman v. Parker*, 348 U.S. 26 (1954), this Court explained that the "public use" requirement is synonymous with the State's police power, encompassing "any purpose within the legitimate scope of government." *Midkiff*, 467 U.S. at 244. Thus, any action taken for the collective benefit, whether to promote economic stability or to preserve public safety, satisfies the "public use" element. This principle was expanded in *Nollan*, where this Court considered whether all valid police power actions, such as creating an easement to open up public beach access, required Fifth Amendment compensation. 483 U.S. at 834-35. This Court held that the Takings Clause applies when an

action was taken under valid police powers, holding that it satisfies the "public use" requirement in being sacrificed for the public benefit. *Id*.

The fact that an action falls within the police power does not remove it from the Takings Clause, it brings it within it. *See Armstrong*, 364 U.S. at 49. The Clause exists precisely to ensure that individuals are not forced to shoulder the costs of public benefit alone. *Id*. Thus, when destruction of property advances a public purpose, the "public use" requirement is satisfied; the only question that remains is how much compensation is owed. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005) ("'Public use' broadly includes any legitimate public purpose.").

2. Lower courts rely on precedents that do not support their assertion.

The four cases most often invoked to justify a "police power" exemption, *Mugler*, *Bennis*, *Miller*, and *Lucas* fall outside the scope of the Takings Clause exemption at issue and cannot sustain this Court's precedent. *See* Emilio R. Longoria, *Lech's Mess with the Tenth Circuit: Why Governmental Entities Are Not Exempt from Paying Just Compensation When They Destroy Property Pursuant to Their Police Powers*, 11 Wake Forest J. L. & Pol'y 297, 307-320 (2021). Each case addresses a distinct context where property was unlawful or where the Takings Clause was not at issue. *Id*. *Mugler* upheld abatement of property used for an illegal purpose; *Bennis* involved criminal forfeiture of a vehicle used in a crime; *Miller* addressed a due process challenge to the destruction of diseased trees; and *Lucas* reaffirmed that compensation is required unless the prohibited use was already unlawful. *See Mugler*, 123 U.S. at 673; *Bennis*, 516 U.S. at 453; *Miller*, 276 U.S. at 248; *Lucas*, 505 U.S. at 1015.

Together, these decisions recognize only narrow exceptions for contraband, public nuisances, or true necessity. Longoria, *supra*, at 307-320. None of these cases support a categorical rule exempting destruction of lawful property for public benefit from the Fifth

Amendment's command of just compensation. Therefore, reliance on these cases is misplaced. *Id*.; *see also Baker v. City of McKinney, Texas*, 84 F.4th 378, 384 (5th Cir. 2023), *cert. denied,* 145 S. Ct. 11 (2024) ("the rule[s] [these cases] adopt [are] inconsistent with our court's precedent"). Courts addressing destruction of lawful property have properly applied the *Penn*. *Central*, framework or traditional physical-takings analysis, rather than these limited context specific holdings that fall outside the Takings Clause altogether. *See Arkansas Game & Fish Comm'n*, 568 U.S. at 31-32 (applying *Penn*. *Central* to temporary government-induced flooding); *Lingle*, 544 U.S. at 536-37 (reaffirming *Penn*. *Central* as the governing framework for evaluating regulatory burdens); *First Eng. Evangelical Lutheran Church*, 482 U.S. at 314-15 (holding that the Takings Clause applies to all exercises of governmental authority, physical or regulatory, that deprive owners of use and enjoyment).

3. The public-necessity doctrine does not create a categorical exemption from the Takings Clause.

The concurrence below incorrectly invoked the "public-necessity" doctrine, finding that compensation is exempted because the police were acting out of public necessity. R. at 8-9. "Public necessity" arose at common law as a defense to tort liability, not as a limitation on the Takings Clause. *See Respublica v. Sparhawk*, 1 U.S. 357, 360 (1788) (recognizing one of the earliest applications of the public-necessity doctrine and limiting it only to tort liability in war). Properly understood, "public necessity" is a factual tort defense applied only in extraordinary circumstances, typically during wartime or natural disaster, where destruction is truly unavoidable and the government acts instantaneously to prevent catastrophic loss. *See United States v. Caltex*, 344 U.S. 149, 154 (1952); *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880). Later cases confirm that necessity is confined to this "inevitable-destruction" context. *See Lucas*, 505 U.S. at 1029 n.16 (recognizing background "principles of nuisance and property law" as narrow

limits on compensation); *Baker*, 145 S. Ct. at 13 (noting that prior cases "may support a necessity exception … when the destruction of property is inevitable," but "do not resolve" cases where destruction is "necessary, but not inevitable"). Because "public necessity" is a narrow, context-specific defense, not a doctrinal exemption, the Takings Clause continues to require compensation whenever the government intentionally destroys private property for public use.

C. This Court Should Adopt a Foreseeability Standard for Takings Claims.

To preserve this Court's Takings Clause precedent while recognizing the State's need to act swiftly in emergencies, this Court should adopt the foreseeability-and-intent framework applied by the Fourth Circuit in *Yawn*. 1 F.4th at 195. That framework aligns constitutional fairness with the practical demands of governance, avoiding the rigidity of categorical rules that would place all police power actions beyond the reach of the Fifth Amendment. *Id*.; *see also Baker v. City of McKinney*, *Texas*, 601 F. Supp. 3d at 143-44 (endorsing *Yawn* and rejecting a categorical police power exemption).

This Court has long recognized that "the degree to which the invasion is intended or is the foreseeable result of authorized governmental action" is central to takings analysis. *Arkansas Game & Fish Comm'n*, 568 U.S. at 39. The circuits have applied that principle to distinguish takings from incidental harms. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955). *Yawn* correctly extended this causation test to police power actions, warning that if private property were "subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared." *Id*. at 195 (quoting *Lucas*, 505 U.S. at 1014). Applying that rule, the Fourth Circuit found no taking because the county had taken precautions to avoid

damage. *Id*. The government had issued widespread notice, employed an experienced pilot, and provided maps to avoid destruction. *Id*. Such steps that made the loss unforeseeable and the resulting damage "plainly intentional." *Id*. at 195-96.

Baker v. City of McKinney illustrates *Yawn*'s reasoning. 601 F. Supp. 3d at 144-45. There, police destroyed a home while pursuing an armed fugitive. The panel held that "[e]ven if the government did not intend to damage [petitioner's] property, it was foreseeable that such damage would result." *Id*. at 144. Although *Baker* was ultimately reversed, the principles of *Yawn* still stand. *See* 145 S. Ct. 11 (2024) (Sotomayor, J., statement respecting denial of certiorari finding that the issue remains unresolved and merits further review). Applying that framework here illustrates why the foreseeability standard best captures the constitutional balance. Like in *Baker* where damage to the property was foreseeable, the destruction of Ms. Jones's home was the foreseeable result of the State's chosen course, detonating an explosive device directly against her house. Unlike in *Yawn*, where they issued notices and took steps to avoid destruction, the State knew as soon as the bomb was assessed that it's level of sophistication made successful disruption "non-existent." R. at 3. Unlike in *Yawn*, where the police attempted to proceed with the utmost precaution, the State employed a method it knew would cause catastrophic damage, rendering the property unusable. That direct and predictable consequence of State action falls squarely within the Takings Clause, which forbids forcing individuals alone to bear burdens that, "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

Therefore, adopting the foreseeability-and-intent test operationalizes *Penn. Central's* preference for ad hoc, factual inquiries while preserving state flexibility to act in genuine emergencies. *Penn. Central*, 438 U.S. at 124; *Yawn*. 1 F.4th at 195. It ensures compensation only

when destruction results from deliberate or foreseeable conduct, maintaining constitutional discipline without chilling emergency response. *Id*. That balance honors both state discretion and the Fifth Amendment's enduring promise of fairness.

CONCLUSION

For all these reasons, this Court should reverse and remand the Thirteenth Circuit's decision to deny Constitutional protection because Ms. Jones has valid claims entitling her to relief.

Respectfully submitted,

s/ Team 7
Counsel for Petitioner