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POLICE POWER PREVAILS: COURT SAYS NO FIFTH AMENDMENT “TAKING” FOR DAMAGE IN LINE OF DUTY SWAT TEAR GAS CASE

***Pena v. City of Los Angeles,
No. 24-2422 (9th Cir. 2025)***

Facts:

In *Pena v. City of Los Angeles*, the plaintiff – a business owner – had an armed fugitive enter his shop. A standoff with law enforcement occurred, leading to LAPD SWAT officers using tear gas to subdue the fugitive. The tear gas caused significant damage to the plaintiff’s property, with damages estimated to have exceeded \$60,000.

Pena sued the City of Los Angeles, claiming that the damage to his property constituted a “taking” under the Fifth Amendment’s Takings Clause. A “taking” under the Fifth Amendment is when the government seizes private property (typically land) for public use, which in turn requires the government to pay the property owner.

Understanding the Takings Clause for Law Enforcement:

The Takings Clause is found in the Fifth Amendment to the U.S. Constitution and states: "nor shall private property be taken for public use, without just compensation." This means that when the government takes someone's private property for public use – such as building a highway or public building – it must pay the owner fair market value.

However, there is an important distinction between a "taking" that requires compensation and the legitimate exercise of police power. When law enforcement takes action to protect public safety – such as breaking down a door during an emergency, using tear gas to apprehend a dangerous suspect, or damaging property while pursuing a fleeing felon – these actions are generally considered exercises of police power, not “takings” requiring compensation. The key difference is that police power actions are taken to prevent harm or enforce the law, not to acquire property for public use.

Both the trial court and the Ninth Circuit Court of Appeals ruled in favor of the City, stating that the destruction of the plaintiff’s property by law enforcement during a reasonable and necessary public safety action was a valid exercise of police power and did not constitute a taking under the Fifth Amendment.

The Court drew a distinction between the government’s police power (used to protect public safety) and its “eminent domain power” (used to acquire property for public use). Damage resulting



from a legitimate exercise of police power, like using force to apprehend a dangerous suspect, does not fall under the Takings Clause.

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Takeaway:

This case is important for law enforcement, as it makes clear that a person does not have a constitutional Takings Claim against the government for damages or destruction of property by law enforcement when acting reasonably in the necessary defense of public safety. Officers can take reasonable actions to protect the public – including actions that may damage private property – without triggering the government's obligation to compensate property owners under the Takings Clause. When law enforcement must damage private property to protect the public or apprehend a dangerous suspect, that destruction, if reasonable under the circumstances, necessary for public safety, and proportional to the threat faced does not require compensation under the Fifth Amendment.

This protection allows officers to make split-second decisions in dangerous situations without worrying about exposing their department to Takings Clause liability.

Stay Safe and Stay Healthy!