No. _____

In The
Supreme Court of the United States

LEO LECH, ET AL.,

Petitioners,

v.

THE CITY OF GREENWOOD VILLAGE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

RACHEL B. MAXAM
LAW OFFICE OF
RACHEL B. MAXAM, PLLC
1543 Champa St., Ste. 400
Denver, CO 80202
(720) 526-2928

ROBERT J. MCNAMARA
JEFFREY H. REDFERN*
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jredfern@ij.org

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Using explosives and a battering ram attached to an armored personnel carrier, the Greenwood Village Police Department intentionally destroyed Petitioners' house. Afterwards, they offered the family $5,000 "to help with temporary living expenses." The family sued, arguing that they were entitled to Just Compensation under the Fifth Amendment for the intentional destruction of their house. The Tenth Circuit, however, held that no compensation was due because the home was destroyed pursuant to the police power rather than the power of eminent domain.

The question presented is whether there is a categorical exception to the Just Compensation Clause when the government takes property while acting pursuant to its police power.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Leo Lech, Alfonsia Lech, and John Lech were plaintiffs in the United States District Court for the District of Colorado and appellants in the Court of Appeals for the Tenth Circuit.

Respondent the City of Greenwood, along with Police Chief John A. Jackson, Commander Dustin Varney, Officer Mic Smith, Officer Jeff Mulqueen, Officer Austin Speer, Officer Jared Arthur, Officer Bryan Stuebinger, Officer Juan Villalva, Officer Andy Wynder, Officer Anthony Costarella, and Officer Rob Hasche were defendants in the United States District Court for the District of Colorado and appellees in the Court of Appeals for the Tenth Circuit.

The Colorado Municipal League and the International Municipal Lawyers Association both participated as amici curiae in the Court of Appeals for the Tenth Circuit.

RELATED PROCEEDINGS

Arapahoe County District Court (Colorado)
Lech v. *Jackson*, No. 2016CV031378
(September 7, 2018)

United States District Court (D. Colo.)
Lech v. *Jackson*, No. 16-195
(January 9, 2018)

United States Court of Appeals (10th Cir.)
Lech v. *Jackson*, No. 18-1051
(October 29, 2019)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and reproduced at App. 1. The opinion of the U.S. District Court for the District of Colorado is unreported and reproduced at App. 20.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2019. Petitioners obtained an extension of time to file a petition for rehearing en banc and timely filed that petition on November 27, 2019. That petition was denied on December 27, 2019. This petition is timely filed on March 11, 2020. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation."

STATEMENT

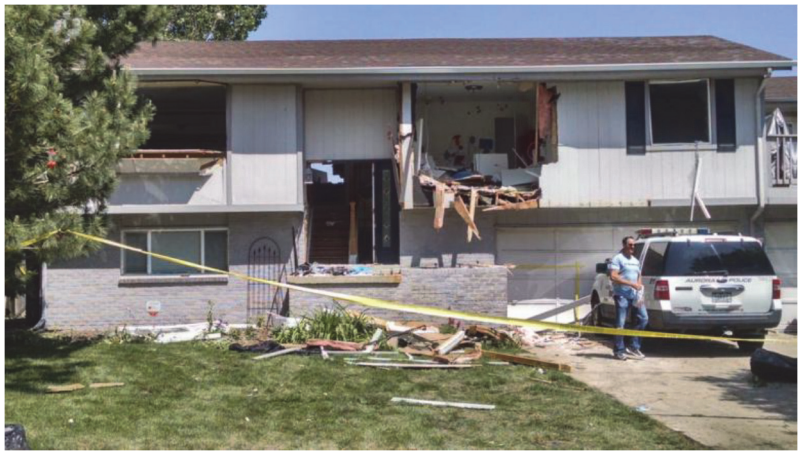
Local government officials intentionally destroyed Petitioners' house, and Petitioners therefore filed a federal suit seeking compensation under the Just Compensation Clause. But the lower court held that no compensation was due at all because the officials who destroyed the home were acting pursuant to the "police power." This Court's intervention is warranted because its precedents squarely foreclose the sort of categorical exemption from the Just Compensation Clause created by the decision below—and because, despite that fact, a growing faction of lower courts has adopted just such an exemption.

1. On June 3, 2015, a Walmart employee in Aurora, Colorado, phoned police to report a suspected shoplifter. App. 21. When police arrived, however, the suspect fled the scene in a vehicle. App. 22. A pursuing officer later found that vehicle abandoned and saw the suspect fleeing on foot near the border of Greenwood Village. At some point thereafter, the suspect broke into the Greenwood Village home owned by Petitioners (a home he selected, as far as the record reveals, apparently at random). *Ibid.* The home was initially

occupied, though the occupants fled promptly, leaving the house occupied solely by the suspected shoplifter by the time the Greenwood Village police arrived. *Ibid*.

But the Greenwood Village police were met with a gunshot—the suspect was armed and willing to shoot. App. 22–23. A standoff ensued, during which the police fired two "40 mm rounds of cold gas munitions" into the house and then breached both the front and back doors using a tank-like vehicle called a BearCat. App. 23–24. When this proved unsuccessful, they deployed more gas munitions (again unsuccessfully) and then decided to use the BearCat to open up holes in the sides of the home. App. 25–26. Specifically, officers were instructed to "take as much of the building as needed without making the roof fall in." App. 26. And the purpose of the destruction of the house's walls is undisputed: The police sought to make the apprehension of the suspect easier, and they destroyed the walls in order to (1) create sightlines into the home, (2) make the suspect feel more exposed within the home, and (3) create gun ports that would allow snipers to fire into the home from a distance. *Ibid*.

At the end of the standoff, the suspect was apprehended, but Petitioners' home was destroyed. The following pictures (included in the appellate record below) depict the home's condition in the immediate aftermath:



See C.A. App. 309. Ultimately, Petitioners were forced to tear the home down and build anew. App. 27.

2. Petitioners sued in state court, alleging in relevant part that Greenwood City and its police had taken their house for the benefit of the public and that this was a taking requiring compensation under the Just Compensation Clause, and the defendants

removed to federal court. App. 27.[1] The district court rejected the Just Compensation Clause claim, finding that (1) there should be an "emergency exception" to the Constitution's general compensation requirement and that (2) the actions of law enforcement here constituted an emergency. App. 44–46.

The Tenth Circuit affirmed, though on different grounds. Rather than relying on an emergency exception, the appellate court squarely held that "when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause." App. 14. And, since the police were engaged in a quintessential exercise of the police power by "entering property to effectuate an arrest," that meant no taking could have occurred here. App. 15 (quotation marks omitted). The court stressed that there are limits to the police power, but that those limits are largely those of the Due Process Clause, not the Just Compensation Clause. App. 18. The fact that the home was destroyed in the course of exercising the police power was dispositive of—and fatal to—any claim under the Just Compensation Clause.

This petition followed.

[1] The Complaint also asserted other violations of federal and state law. *Ibid.*

REASONS FOR GRANTING THE PETITION

Review is warranted here because the decision below announces a categorical exception from the Just Compensation Clause that is directly contrary to years of this Court's precedents. Review is also warranted because the decision below is just the latest in a growing trend of federal courts adopting this sort of categorical exception in direct conflict with the highest courts of several states that apply doctrines more in line with this Court's cases.

A. The decision below conflicts with this Court's longstanding construction of the Just Compensation Clause.

The opinion below holds "that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause." App. 14. This holding conflicts with two principles of law that are well established by this Court's Fifth Amendment decisions.

First, this Court has emphatically rejected any reliance on "categorical" or "automatic exemption[s]" from the Just Compensation Clause. *Arkansas Game and Fish Comm'n* v. *United States*, 568 U.S. 23, 36–38 (2012). To the contrary, this Court's Just Compensation jurisprudence has "recognized * * * that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Id.* at 31. But the decision below defies this rule

by creating exactly the kind of "blanket exclusionary rule[]" that this Court has squarely found to be inappropriate for Just Compensation Clause analysis. *Id.* at 37.

Second, the specific blanket exception adopted below has already been directly rejected by this Court's decisions. In cases that stretch back more than a century, this Court has consistently recognized that otherwise-valid exercises of the police power sometimes require compensation. The opinion below disagrees, arguing that any limits on the police power flow not from the Just Compensation Clause but instead from substantive limitations like the Due Process Clause. App. 18. In other words, the opinion below recognizes two categories of government action: (1) things the government may constitutionally do, which require no compensation, and (2) things the government is constitutionally forbidden from doing, which therefore require compensation. But this Court has repeatedly recognized a third category of government action: Things the government may permissibly do *so long as* it provides just compensation.

In *Pumpelly* v. *Green Bay & Mississippi Canal Co.*, for example, a property owner brought a suit—under the state constitution, which was acknowledged to provide the same protection as the Fifth Amendment—seeking just compensation for flood damage caused by the construction of a state-authorized dam. 80 U.S. 166 (1871). The defendant argued "that there is no *taking* of the land * * * and that the damage is a consequential result of such use of a navigable stream as the

government had a right to for the improvement of its navigation." *Id.* at 177. This Court rejected any such formal distinction:

> It would be a very curious and unsatisfactory result, if * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177–78.

Nor was *Pumpelly* an aberration. In *United States* v. *Russell*, steamboat owners brought Fifth Amendment claims challenging the commandeering of their vessels by various Union army officers during the Civil War. 80 U.S. 623, 627 (1871). This Court expressly held that in the circumstances the military had been justified in commandeering the boats, but noted that "it is equally clear that the taking of such property under such circumstances creates an obligation on the part of

the government to reimburse the owner to the full value of the service." 80 U.S. 623, 628–29 (1871).[2]

The rule of *Russell*, of course, is not that otherwise-valid exercises of government power will *always* give rise to a claim for just compensation; it is simply that (contrary to the opinion below) they *can* give rise to one. *National Board of YMCA* v. *United States*, 395 U.S. 85 (1969), is instructive on this point. In that case, U.S. troops occupied the YMCA's buildings in the course of suppressing a riot, and the YMCA sued for compensation under the Just Compensation Clause for the damage done during the temporary occupation of its property. *Id.* at 86. The Court rejected the claim—but not because riot suppression is an exercise of the police power (of course it is).[3] Instead, the Court said that no compensation was due for two independent reasons. One was that the occupation was meant

---

[2] In 1803, St. George Tucker wrote that the Just Compensation Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army * * * as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305–06 (1803). It seems unlikely that the Framers would have considered the "police power" a valid excuse for dispensing with just compensation, when they specifically intended the Clause to ensure compensation even for actions taken in support of a desperate war for independence on our own soil.

[3] *Cf. Chicago* v. *Sturges*, 222 U.S. 313, 322 (1911) (noting State's police-power obligation to "preserve social order and the property of the citizen against the violence of a riot or mob"). If that much were dispositive, one might reasonably expect the Court to have said so.

to protect the YMCA, and no compensation is required if the person whose property was taken is "the particular intended beneficiary of the government action" at issue. *Id.* at 92. And the other was that the buildings were occupied mid-riot: Even if the troops have not occupied the buildings, they would have remained inaccessible to the YMCA while rioters damaged them. *Id.* at 92–93.

Concurring in the result, Justice Harlan offered a slightly different test and would have held instead that no compensation was due only because in the context of the broader riot the troops should not reasonably have expected greater harm to come to the building because of their occupation. *Id.* at 97–98 (Harlan, J., concurring in result only). Justice Black, joined by Justice Douglas, dissented on factual grounds, arguing that the troops' occupation was not in fact meant to protect the buildings but instead to use them as "a shelter and fortress"—a use that required just compensation. *Id.* at 99 (Black, J., dissenting). No Justice in *YMCA* suggested that the compensation question turned on whether or not suppressing the riot was a valid exercise of the police power because that is not (and never has been) the law.

And if that were the law, this Court's jurisprudence would look wildly different. In *Horne* v. *Department of Agriculture*, for example, this Court held that the government's direct appropriation of a portion of a farmer's raisin crop was a compensable taking. 135 S. Ct. 2419, 2427–28 (2015). The regulation at issue in that case was undeniably an exercise of the police

power. *Cf. id.* at 2428 (conceding that government could prohibit the sale of raisins without effecting a taking). And if officials at the Department of Agriculture had chosen to enforce the requirement directly—if they had simply traveled to the Hornes' farm and taken the raisins under color of law—that, too, would have been an exercise of the police power. Under the holding below, that could not be a compensable taking—even though, under the holdings of this Court, it is one.

In reaching a contrary holding, the panel opinion below ignored these cases and suggested that it wrote without the benefit of binding authority from this Court, saying that this Court "has never expressly invoked this distinction [between the police power and the eminent domain power] in a case alleging a physical taking[.]" App. 10.

But that statement is incorrect. Not only has the Court held for over a century that exercises of the police power can give rise to the taking, but the Court has also addressed this very distinction in the context of a physical taking—and, in addressing it, rejected it. In *Loretto* v. *Teleprompter Manhattan CATV Corporation*, for example, this Court considered a Takings Clause challenge to a New York statute that required landlords to allow TV companies to run cables on the outside of the landlords' properties. 458 U.S. 419, 423–24 (1982). The New York Court of Appeals had determined that this regulation was a valid exercise of the police power, and this Court held that while there was "no reason to question" that determination, it was "a separate question * * * whether an otherwise valid

regulation so frustrates property rights that compensation must be paid." *Id*. at 425.

As cases like *Loretto* and *Russell* illustrate, there are two questions in these situations. On the one hand, the Court asks whether a challenged action is something the government *may do*—whether an exercise of the police power is consistent with the Due Process Clause or other constitutional limitations. See *Lingle* v. *Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005) (noting that the due-process inquiry focuses on whether the government's actions are rational). But it also considers a separate question under the Just Compensation Clause—one that focuses on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights." *Ibid.* It asks, in other words, whether the *effect* of that exercise of the police power on a particular property owner "goes too far" and therefore requires compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). The opinion below holds that there is only one question: Compensation is due if (and only if) an exercise of the police power contravenes the Due Process Clause (or some other legal provision); the Just Compensation Clause has no role to play. App. 18.

This sweeping rule is not only contradicted by the cases cited above; it is unsupported by the cases cited in its favor below. The opinion below, for example, draws support from *Mugler* v. *Kansas*, 123 U.S. 623 (1887), quoting that case for the proposition that when the state is protecting public safety, it " 'is not, and, consistent[] with the existence and safety of organized

society, cannot be, burdened with the condition that the state must compensate [affected property owners] for pecuniary losses they may sustain' in the process." App. 13–14 (quoting *Mugler*, 123 U.S. at 669). But the quotation from *Mugler* is truncated: The Court's actual statement is that the state need not compensate property owners "for pecuniary losses they may sustain, ***by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.***" *Mugler*, 123 U.S. at 669 (emphasis supplied).

In other words, *Mugler* does not speak of a general exception from the Just Compensation Clause whenever the government invokes the police power. Instead, the Court is expressly addressing "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way." *Ibid.* The panel opinion simply omits the relevant words from *Mugler* and thereby transforms an anodyne statement of law (it is not a taking when the government abates a nuisance or forbids certain harmful uses of property) into a sweeping exception from this Court's ordinary doctrines.

This was error. The lower court's doctrinal departure from this Court's longstanding approach warrants a grant of certiorari here for the same reason that certiorari was granted in *Arkansas Game & Fish*. There, like here, the lower court adopted a new categorical rule that a certain sort of government action could not give rise to a claim under the Just Compensation Clause. 568 U.S. at 30–31. There, as here, "[n]o decision

of this Court authorizes a blanket * * * exception to [its] Takings Clause jurisprudence[.]" *Id.* at 34. And here, like there, the Court should grant the petition, "decline to create such an exception in this case," and remand for further proceedings. *Ibid.*

B. Lower courts are deeply divided on how the Just Compensation Clause interacts with the police power.

Although it is impossible to reconcile the decision below with this Court's precedents, the Tenth Circuit is not alone in holding that the police power is a categorical exception to the Just Compensation Clause. At least two other federal courts of appeals and three state courts of last resort have held likewise, albeit with some subtle differences in analysis. By contrast, at least four other state courts of last resort have correctly recognized that there is no such categorical exception and that whether an exercise of the police power requires compensation depends on a wide range of facts and circumstances.[4]

Unfortunately, the most recent federal appellate decisions have uniformly adopted the kind of categorical exception adopted below, which means federal courts are rapidly trending toward a rule under which

---

[4] Petitioners do not mean to suggest that all of these cases on the "correct" side of the split have also analyzed the facts and circumstances of each case correctly—or even in the same way. Rather, those decisions stand together only insofar as they reject a categorical Just Compensation exception.

nearly any intentional destruction of private property by the government will receive no Just Compensation Clause scrutiny at all. On the other side of the split are longstanding state-court rulings making clear that no such blanket exception exists. This second group of cases does not present a uniform mode of analysis. Neither do all of these cases award compensation to property owners—indeed, most deny compensation after engaging in a careful analysis of all the relevant facts. But each engages in the sort of case-by-case analysis commanded by this Court's precedents, and this Court's intervention is warranted to ensure that federal circuits resume that sort of case-by-case doctrinal development as well.

1. Cases that hold that the police power is categorically exempt from the Just Compensation Clause.

Federal Circuit. In *AmeriSource Corp.* v. *United States*, the plaintiff was a pharmaceutical company whose drugs were seized as evidence for use in a criminal case against a third party. 525 F.3d 1149 (Fed. Cir. 2008). The expiration date for the drugs passed, rendering them worthless, and they were never used in the prosecution. The drug company had requested that the government retain only a sample, so the rest could be sold, but the government refused. In denying the company's Just Compensation claim, the Federal Circuit held that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *Id.* at 1153.

The Federal Circuit's decision also endorsed a broad definition of the police power as encompassing "the powers of government inherent in every sovereignty to the extent of its dominions." *Id.* at 1153 (citing *The License Cases*, 46 U.S. 504, 584 (1847)). And the limits of this power, the court explained, "are largely imposed by the Due Process Clause," rather than by the Just Compensation Clause. *Id.* at 1154.

Seventh Circuit. In *Jonson* v. *Manitowoc County*, the plaintiff was a landlord whose rental property was damaged while the police were executing a search warrant. He sued for, *inter alia*, just compensation under the Fifth Amendment. The Seventh Circuit dismissed that claim in just three sentences:

> [T]he Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain. See *AmeriSource Corp.* v. *United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008) (citing *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996)). Here, the actions were taken under the state's police power. The Takings Claim is a non-starter.

635 F.3d 331, 336 (7th Cir. 2011). The Seventh Circuit went on to express sympathy for the property owner, noting that the result was "quite unfair," and suggesting that he attempt to invoke state statutory remedies. *Ibid.*

Washington State. In *Eggleston* v. *Pierce County*, the police physically removed two walls of the plaintiff's

house for use as evidence, rendering the house uninhabitable. 64 P.3d 618, 621 (Wash. 2003). The walls were never actually used as evidence, and it was undisputed that the owner of the house was innocent. *Id.* at 621–22. The Washington Supreme Court held that no compensation was due because the destruction was pursuant to the police power: "[I]t is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public." *Id.* at 623 (emphasis and citation omitted).[5]

Like the Seventh Circuit, the Washington Supreme Court recognized the unjustness of the result and suggested that the plaintiff might pursue other remedies:

> The courts that have found takings have been justifiably outraged by the destruction of real property owned by third parties utterly unconnected with the alleged crime. While we too feel the pull of the justness of the cause * * * [t]he proper apportionment of the burdens and benefits of public life are best addressed to the legislature, absent a violation

[5] Although the court acknowledged in a footnote that the police power can effect a taking when it goes "too far," *id.* at 623 n. 6, the court did not actually consider the impact on the property owner as a relevant factor, focusing solely on whether the government was lawfully pursuing a legitimate objective. See *id.* at 627 ("When law enforcement exceeds its lawful powers, the injured have a right to redress."). And in a subsequent case, the court cited *Eggleston* as establishing a broad rule that the police power never causes a taking as a matter of federal law—a broad rule to which it said *Loretto* was simply a narrow exception. See *Brutsche* v. *City of Kent*, 193 P.3d 110, 121 (Wash. 2008).

> of a right held by an individual seeking redress under the appropriate vehicle.

Id. at 626; see also *id.* at 627 ("We stress we do not examine the applicability of * * * any other cause of action that might be brought.").

One of the two dissenting justices in *Eggleston* correctly pointed out the lack of historical support for a police-power exception to the Just Compensation Clause, arguing that the majority had simply "incant[ed] 'police power' as some sort of mystical excuse to cart away part of a person's house without paying for it." *Id.* at 629 (Sanders, J., dissenting).

California. In a case involving $275,000 worth of damage caused by police while apprehending a fugitive, the California Supreme Court held that "damages resulting from a valid exercise of the state's police power are *damnum absque injuria*." *Customer Co.* v. *City of Sacramento*, 895 P.2d 900, 908 (Cal. 1995). Three justices concurred but criticized the majority's analysis as not "coherent and consistent." *Id.* at 917 (Kennard, J., concurring). Another justice dissented, arguing (based in part on federal authorities) that the state constitution required compensation. *Id.* at 924–27 (Baxter, J., dissenting).

Iowa. In another case involving damage caused by law enforcement while serving a search warrant, the Iowa Supreme Court recognized that the police power can, at least theoretically, effect a taking. *Kelley* v. *Story Cty. Sheriff*, 611 N.W.2d 475, 480 (Iowa 2000). The court's analysis, however, simply asked whether

the law enforcement officers' conduct was reasonable. Concluding that it was, the court held that their action "therefore does not amount to a taking." *Id.* at 482.

This mode of analysis—like Washington's—pays lip service to the idea that the police power can effect a taking, but in practice it (like the Tenth Circuit's opinion below) makes the Just Compensation Clause coterminous with the Due Process Clause. Indeed, the court even cited due process cases to support its holding. *Id.* at 480–81 (citing *Walker* v. *Johnson County*, 209 N.W.2d 137, 139 (Iowa 1973), and *Loftus* v. *Department of Agric.*, 232 N.W. 412, 420 (Iowa 1930)). But, as described above, that approach is exactly what this Court has rejected. See *supra* at 12 (citing *Lingle* v. *Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005)).

Although the damages in *Kelley* amounted to only $1099.60, the dissenting justices accurately foretold that "[t]omorrow, by a police incursion that precipitates escalating damages, the property loss could reach a hundred times Kelley's loss or more." *Id.* at 485 (Snell, J., dissenting). That prediction has been born out in the instant case and in others.

2. Cases recognizing that the police power is not exempt from the Just Compensation Clause.

By contrast, at least four other state courts of last resort have correctly recognized that whether a particular government action is a legitimate exercise of the police power is a distinct question from whether the

action causes a taking, thereby entitling the property owner to just compensation under the Fifth Amendment.

Alaska. In a case involving the intentional destruction of timber to create a firebreak, the Alaska Supreme Court correctly recognized that whether a government action is a legitimate exercise of the police power has no bearing on whether it constitutes a taking for purposes of the Just Compensation Clause. To the contrary, the court held that "[b]ecause the [fires] were set in the exercise of the State's police powers, the damage they caused was for a public use for purposes of the Takings Clause." *Brewer* v. *Alaska*, 341 P.3d 1107, 1112 (Alaska 2014).[6]

Kansas. The Kansas Supreme Court, in holding that a property owner was entitled to compensation for the loss of access to his land caused by a public works project, also explicitly held that an exercise of the police power can cause a taking. See *Garrett* v. *City of Topeka*, 916 P.2d 21, 30 (Kan. 1996) ("Where there is an actual taking of property under the police power, compensation is required."). The court proceeded to thoroughly analyze the facts and circumstances of the particular case to determine the degree of interference with private property rights. *Id.* at 908 ("A case-by-case approach is used in determining whether the facts and circumstances of a case show free and convenient

[6] The court went on to hold that the government could avoid liability if it could show on remand that its actions were justified by the doctrine of necessity, a much narrower exception than the police-power exception at issue in this case. *Id.* at 1118.

access or substantial interference with access or impose a burden to the use of the land.").

New Hampshire. In *Soucy* v. *New Hampshire*, a property owner argued that he was entitled to compensation because the government had ordered him not to repair a fire damaged building so it could be used as evidence in an arson prosecution. 506 A.2d 288, 289 (N.H. 1985). In an opinion by then-Justice Souter, the court held that the "line between a non-compensable exercise of the police power and a compensable taking" depended on "balancing the respective interests of society and property owners." *Id.* at 290–92. In other words, the court did not rely on any categorical exception for the police power. Rather, it asked whether the exercise of the police power went "too far" and effected a taking.

Wisconsin. In a regulatory takings case, the Wisconsin Supreme Court recognized a distinction between the police power and the power of eminent domain, but held the division depends not on whether the government is pursuing a legitimate objective, but rather on the "degree of damage to the property owner." *Just* v. *Marinette Cty.*, 201 N.W.2d 761, 767 (Wis. 1972).[7]

* * *

[7] In another case addressing damage caused by law enforcement offices, a New Jersey intermediate appellate court expressly rejected the argument that the "police power may never be a taking." *Simmons* v. *Loose*, 13 A.3d 366, 389 (N.J. Super. Ct. App. Div. 2011). The court ultimately concluded that there was no taking on the particular facts, including "that the utility of the [property] was [not] substantially reduced" by the damage. *Ibid.*

This split of authority is dangerous, particularly in view of the federal circuits' increasing consensus that the "police power" represents a categorical exception to the Just Compensation Clause. That view is wrong in that it adopts exactly the sort of "magic formula" that this Court has rejected in its Just Compensation cases. *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012). But it is also dangerous in that it encourages unnecessary litigation over the scope of the police power itself.

In *Patty* v. *United States*, for example, the Court of Federal Claims considered a Fifth Amendment claim brought by a property owner whose truck was used by a DEA task force to execute a controlled drug delivery during which the truck was "wrecked" in a hail of gunfire. 136 Fed. Cl. 211, 213 (2018). Faced with a property owner whose property was clearly taken in any meaningful sense of that word, the Court of Federal Claims took the only route doctrinally available to it and held that the DEA operation was outside the scope of the police power *Id.* at 215. To hold otherwise, the court noted, would adopt a view of "the police power [that] would swallow private property whole." *Ibid.* The outcome of *Patty* is correct: It is a taking when the government needs to commandeer a vehicle for law-enforcement purposes. But the case's holding—that the DEA's actions were outside the scope of the police power (and thus, presumably, could have been enjoined)—would have striking consequences if applied more broadly. *Cf. Kagel* v. *Brugger*, 119 N.W.2d 394, 396–97 (Wis. 1963) (collecting cases endorsing historical law-enforcement

power to commandeer vehicles for roadblocks). Decisions like *Patty* are the inevitable consequence of the lower courts' increasing erasure of the category of things that the government may do (but for which it owes compensation), and this Court's intervention is required to ensure that courts return to the Just Compensation analysis required by its precedents.

C. The Question Presented is important.

The Question Presented is of great national significance, for at least two reasons:

1. The "police power," as defined by the Federal Circuit, is extraordinarily broad, covering essentially everything that is not a formal condemnation action. See *AmeriSource Corp.* v. *United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (defining the police power as "the powers of government inherent in every sovereignty to the extent of its dominions"). If the police power is categorically exempt from the Just Compensation Clause, then government has virtually unlimited latitude to destroy private property. The Seventh and Tenth Circuits have uncritically adopted the Federal Circuit's approach, and the doctrine is now sitting around like a loaded gun, ready for mischief.

This "police power" exception could be invoked in essentially any inverse condemnation action, and courts will increasingly be satisfied that they can simply cite these three cases and dismiss the complaints. Indeed, if the decision below is correct, then it is unclear what is left of inverse condemnation. This

idea must be put to rest so that lower courts can resume doing what this Court has instructed them to do—analyze all the relevant facts and circumstances to determine when a government action constitutes a taking.

2. Although the police-power exception has the potential to do mischief in a wide range of situations, this question is also important because the specific facts of this case are becoming increasingly common. While it was once rare for law enforcement to use the kind of destructive tactics employed by the Greenwood Village Police Department, that is no longer the case. Journalists have exhaustively documented the rise of military-inspired, SWAT tactics throughout the United States. See generally, Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (2014). Between 1980 and 2005, the average number of annual SWAT raids in the United States increased from 3,000 to over 50,000. *Id.* at 237, 308. Although many of these raids are for serving routine warrants, even a "knock-and-announce" warrant only requires a SWAT team to wait a few seconds after knocking before breaking down a door, so property damage is becoming the norm. See *United States* v. *Banks*, 540 U.S. 31, 39 (2003).

Even in the active-shooter situations for which SWAT teams were originally created, tactics are more destructive now than they once were. When Los Angeles deployed the first SWAT teams in the country in the 1960s, they were not equipped with the tank-like BearCat used by the Greenwood Village Police

Department to "open up holes" in Leo Lech's house and "take as much of the building as needed without making the roof fall in." App. 26.

This case does not call upon the Court to decide whether these developments in police tactics and equipment are wise or just. But their increasing prevalence means that entirely innocent property owners are increasingly being forced—often, as here, at random—to bear the cost of law enforcement activities. See, e.g., *West* v. *City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), petition for cert. pending, 19-899. These burdens range from a splintered door jamb to an entirely demolished house.

To be sure, the fact that there is "no automatic exemption" from the Just Compensation Clause when law enforcement destroys private property for the public good does not mean that such damage will always be a *per se* taking. See *Arkansas Game & Fish Comm'n* v. *United* States, 568 U.S. 23, 38 (2012). It only means that courts will have to return to their historic practice of "situation-specific factual inquiries." *Id.* at 32. The decision below is part of a growing trend of lower courts' wholesale refusal to engage in those inquiries in cases involving law enforcement, and this Court's intervention is required to return lower courts' focus to the fact-bound analysis required in all Just Compensation cases.

———♦———

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RACHEL B. MAXAM
LAW OFFICE OF
RACHEL B. MAXAM, PLLC
1543 Champa St., Ste. 400
Denver, CO 80202
(720) 526-2928

ROBERT J. MCNAMARA
JEFFREY H. REDFERN*
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jredfern@ij.org

**Counsel of Record*