RECORD NO. 18-1051

In The
United States Court of Appeals
For The Tenth Circuit

LEO LECH; ALFONSIA LECH; JOHN LECH,
Plaintiffs - Appellants,

v.

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; OFFICER ROB HASCHE, of the Greenwood Village Police Department, individually and in their official capacities; THE CITY OF GREENWOOD VILLAGE,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO – DENVER

PETITION FOR REHEARING *EN BANC*

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The panel opinion in this case holds that the government may entirely destroy a person's home without paying compensation, so long as the government is acting pursuant to its police power, rather than the power of eminent domain. That holding conflicts with binding Supreme Court precedent like *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), and *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982), neither of which are addressed by the opinion. Moreover, the Supreme Court cases that the opinion does cite do not support its holding. This Court should grant review to restore conformity with Supreme Court precedent. *See* Fed. R. App. P. 35(b)(1)(A).

FACTUAL BACKGROUND

On June 3, 2015, at a Walmart in Greenwood Village, an employee observed an apparent shoplifter and called the police. The police arrived shortly after and confronted the shoplifter, but he fled the scene. In an effort to evade the police, the shoplifter broke into a house, apparently selected at random, which happened to be owned by the Petitioners in this case, Alfonsina and Leo Lech. The only person home at the time of

the break-in was the son of Petitioner John Lech's girlfriend, who was able to safely exit.

The police quickly arrived on the scene, alerted by the Lechs' burglar alarm, and proceeded to surround the house. The shoplifter opened the garage door, but upon seeing patrol vehicles, closed the garage door and fired one shot through the garage door. Police attempted to negotiate with the shoplifter for a little over 4 hours.

Over the ensuing 19 hours the police laid what can only be described as a siege to the house in an attempt to apprehend the suspect holed up inside. Through the use of explosives, tear gas, flash-bang grenades, 40mm rounds, and battering-ram devices mounted on armored vehicles that tore holes directly into the sides of the house, the home was utterly destroyed:

See Appellant App. 309. Ultimately, police entered the house and took the shoplifter into custody, but the house was declared a total loss and deemed unsafe to occupy by the City of Greenwood Village.

The City offered the Lechs $5,000 to "help with their temporary living situation" as a "gesture of good faith," on the condition that the Lechs waive all claims against the City and its officers. The Lechs refused, and brought this suit alleging that they are entitled to just

compensation under the Fifth Amendment and Colorado Constitution.[1] The district court denied the Lechs compensation, and a panel of this Court affirmed, holding that "actions taken pursuant to the police power do not constitute takings . . . ." *Lech v. Jackson*, No. 18-1051, slip op. at 17 (10th Cir. Oct. 29, 2019).

ARGUMENT

The panel decision is in error and deserves to be reheard en banc. First, the decision is entirely premised on a rule that has been squarely rejected, repeatedly, by the United States Supreme Court. Second, the panel's rule is premised on a serious misreading of other Supreme Court caselaw.

I. The panel decision conflicts with binding precedent from the U.S. Supreme Court.

The panel opinion erroneously holds that the government may intentionally destroy a person's home, without paying any compensation, so long as it acts pursuant to its "police power" rather than the power of eminent domain. Slip op. at 12 ("Accordingly, we . . . hold that when the state acts pursuant to its police power, rather

[1] The Lechs also asserted various tort theories not at issue here.

than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause."). Admittedly, two other circuits have held likewise.[2] But none of those cases addressed the binding Supreme Court precedent that is squarely on point. Indeed, the panel opinion proceeds from the assumption that no on-point precedent exists, stating that "the Supreme Court has never expressly invoked this distinction [between the police power and the eminent domain power] in a case alleging a physical taking . . . ." Slip op. at 9.

But that is incorrect: The Supreme Court has not only *invoked* this distinction, it has *rejected* it. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for example, the Supreme Court squarely rejected the notion that there was a "police power" exception to

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[2] *See Johnson v. Manitowoc Cty.*, 635 F.3d 331, 336 (7th Cir. 2011) ("But the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain."); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) ("Property seized and retained pursuant to the police power is not taken for a "public use" in the context of the Takings Clause. "). The panel also cited an unpublished Third Circuit decision that rejected a takings claim related to evidence seized pursuant to a search warrant. *See Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018). That case addressed a narrow issue and does not stand for the broad proposition that the police power is an exception to the takings clause.

the Takings Clause. *Loretto* concerned a New York statute that required landlords to allow TV companies to run cables on the outside of the landlords' properties. *Id.* at 423–24. The landlords argued that this "physical occupation" constituted a taking. The New York Court of Appeals disagreed, holding that the statute "serve[d] the legitimate public purpose of 'rapid development and maximum penetration by a means of communication which has important educational and community aspects, and thus is within the State's police power." *Id.* at 425 (citation omitted). The U.S. Supreme Court reversed, holding that although there was "no reason to question" the Court of Appeals' determination that the regulation was a valid exercise of the police power, "[i]t is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Id.* The conflict between the Supreme Court's precedent and the panel opinion could hardly be clearer.

Nor is *Loretto* an anomaly. Over and over, the Supreme Court has recognized that exercises of the police power can constitute a taking. In *Arkansas Game and Fish Commission v. United States*, the Federal Circuit had held that there was a blanket exception from the Takings

Clause for damage caused by intermittent flooding that had been intentionally caused by the Army Corps of Engineers. 568 U.S. 23, 30–31 (2012) The Supreme Court unanimously reversed, emphasizing that there is "no magic formula" for "whether a given government interference with property is a taking" and that there are "few invariable rules." *Id.* at 31; *see also id.* at 36–37 (noting the Court's historic refusal to recognize "blanket exemptions from the Fifth Amendments' instruction"). The only categorical rules that the Supreme Court recognized were that certain types of government actions—permanent physical occupation and total destruction of value—*always* constitute a taking. *Id.* at 31–32. But the Court did not identify any government exercises of the police power that are categorically *never* compensable takings. The Supreme Court remanded to the Federal Circuit to consider whether there was a compensable taking on the facts and circumstances of that particular case, without reliance on a categorical exclusion. *Id.* at 40. The panel decision in this case thus runs afoul of *Arkansas Game and Fish* as well.

Indeed, the very existence of regulatory takings is a refutation of the panel opinion's reasoning. Regulation is not the exercise of eminent domain, yet it is well established that "if regulation goes too far" it will be recognized as a taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)[3]; *accord Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992). The panel opinion, for its part, cites regulatory takings in support of its holding, on the apparent assumption that if the government has committed a "regulatory taking" then it has necessarily not used the police power. *See* slip op. at 7–8. But the Supreme Court has always been perfectly clear that whether an action is a valid exercise of the police power is distinct from the question of whether that action requires compensation.[4] Contrary to the panel opinion's

[3] Technically, the Court in *Mahon* held that the regulation at issue was not a valid exercise of the police power, but only because the regulation did not provide for compensation. *Id.* at 415. The Court accepted that the regulation at issue was "passed upon the conviction than an exigency existed that would warrant it." *Id.* at 416.

[4] *See Lucas*, 505 U.S. at 1009 ("Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives."); *Palazzolo v. Rhode Island*, 533 U.S. 606, n.* (2001) (O'Connor, J., concurring) (noting that "whether the enactment or application of a regulation constitutes a valid exercise of the police power . . . [and w]hether the

assumptions, the regulatory-takings cases affirmatively establish that the exercise of the police power sometimes requires compensation under the Takings Clause. The opinion's holding to the contrary is therefore erroneous and worthy of this Court's rehearing.

II. The panel opinion misreads Supreme Court precedent.

Although the conflict between the panel opinion and binding precedent is sufficient reason to grant the petition, the opinion also misreads the primary Supreme Court cases on which it relies.

First, the opinion cites *Bennis v. Michigan*, 516 U.S. 442 (1996), for the proposition that "when state acquires property 'under the exercise of governmental authority *other than the power of eminent domain*,' government is not 'required to compensate an owner[.]'" Slip

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State must compensate a property owner for a diminution in value effected by the State's exercise of its police power" are "two questions"); *Loretto*, 458 U.S. at 425; *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177–78 (1871) ("It would be a very curious and unsatisfactory result . . . 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.").

op. at 9. But the panel reads too much into this quotation and omits crucial language.

Bennis was a case concerning the civil forfeiture of a car, one of whose owners had been arrested for engaging in a sex act with a prostitute in the car. The innocent co-owner of the car objected to losing her interest in the vehicle because of the actions of her husband. But the Supreme Court concluded, on the basis of a few 19th and early 20th Century cases, that due process did not require the state to provide an "innocent owner defense" to civil forfeiture. *Bennis*, 516 U.S. at 446–49. Although Bennis's analysis of the innocent-owner argument is contested,[5] its Takings Clause analysis is quite modest: The Court held that the "government may not be required to compensate an owner for property which it has already ***lawfully acquired*** under the exercise of governmental authority other than the power of eminent domain." *Id.* at 452 (emphasis added).

[5] *Cf. Leonard v. Texas*, 137 S. Ct. 847, 848–50 (Thomas, J., dissenting from denial of certiorari) (registering skepticism that the historical practice of civil forfeiture can support modern forfeiture practices); Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*. 61 Mo. L. Rev. 593 (1996) (arguing that *Bennis*'s discussion of the history of forfeiture practice was erroneous).

The panel opinion omits the words "lawfully acquired" from its discussion of this passage. Slip op. at 9–10. Once those words are restored, it is clear that the Court is saying no more than that the government does not have to pay compensation for a valid forfeiture. That much, though, is obvious: The government does not need to pay compensation for property it lawfully acquires via forfeiture just as it does not need to pay compensation for property it lawfully acquires through a tax lien or escheatment. But that is a far cry from saying that the government never needs to pay compensation when it invades or floods or destroys property. There is simply no reason to read this lone sentence of *Bennis* so broadly when such a reading conflicts directly with holdings stretching from *Loretto* to *Arkansas Game and Fish*.

Similarly, the panel opinion omits important words from its quotation from the Supreme Court's decision in *Mugler v. Kansas*, 123 U.S. 623, 668 (1887). The opinion quotes *Mugler* as holding that "when the state acts to preserve the 'safety of the public,' the state '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 that may sustain' in the

process." Slip op. at 12 (alteration in original). But what *Mugler* actually said was that the state does not have to compensate owners for "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 668–69 (emphasis added). In other words, quoted in full, *Mugler* simply says that the state can prohibit nuisances without incurring an obligation to compensate people who profited by harming their neighbors—in that case by brewing beer. Crucially, the property owner in *Mugler* retained the right to do just about anything with his land except make alcohol. *See also Lucas*, 505 U.S. at 1029 (holding that the government must allow property owners to make economically beneficial use of their land, unless doing so would constitute a common law nuisance).

But once again, the fact that the government can *sometimes* use the police power to take property without owing compensation—as when it prohibits nuisances or forfeits contraband—does not support the panel opinion's holding that the government can *always* use the police power without owing compensation. Because the Supreme Court has squarely held that this broader premise is incorrect, the panel

opinion is in direct conflict with binding Supreme Court precedent and should be reheard by the full Court.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF VIRUS SCAN

I hereby certify that:

1. All required privacy redactions have been made.

2. Paper copies of the Petition for Rehearing *en banc* have been submitted to the court and the ECF submission is an exact copy of the brief.

3. The Petition for Rehearing *en banc* has been scanned for viruses using [Webroot Secure Anywhere, Version v9.0.26.61 updated November 26, 2019], and according to the program is free of viruses.

Dated: November 27, 2019

/s/ Rachel B. Maxam
Counsel for Plaintiffs-Appellants

/s/ Anya Bidwell
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This petition complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this petition contains [*2,443*] words.

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Dated: November 27, 2019

/s/ Rachel B. Maxam
Counsel for Plaintiffs-Appellants

/s/ Anya Bidwell
Counsel for Plaintiffs-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 27th day of November, 2019, I caused this Petition for Rehearing *en banc* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that on this 27th day of November, 2019, I caused the required number of bound copies of the foregoing Petition for Rehearing *en banc* to be filed, via UPS Next Day Air, with the Clerk of this Court.

/s/ Rachel B. Maxam
Counsel for Plaintiffs-Appellants

/s/ Anya Bidwell
Counsel for Plaintiffs-Appellants

FILED
United States Court of Appeals
Tenth Circuit

October 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEO LECH; ALFONSIA LECH; JOHN LECH,

Plaintiffs - Appellants,

v.

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; OFFICER ROB HASCHE, of the Greenwood Village Police Department, individually and in their official capacities; THE CITY OF GREENWOOD VILLAGE,

Defendants - Appellees.

COLORADO MUNICIPAL LEAGUE; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION,

Amici Curiae.

No. 18-1051
(D.C. No. 1:16-CV-01956-PAB-MJW)
(D. Colo.)

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Before **HOLMES**, **McKAY**, and **MORITZ**, Circuit Judges.

Leo, Alfonsia, and John Lech (the Lechs) sued the City of Greenwood Village (the City) and several of its police officers (the officers),[1] alleging violations of the Takings Clause of the Fifth Amendment of the United States Constitution and Article II, Section 15 of the Colorado Constitution. In support of their Takings Clause claims, the Lechs alleged the defendants violated their constitutional rights—first by damaging the Lechs' Colorado home during an attempt to apprehend a criminal suspect and later by refusing to compensate the Lechs for this alleged taking. The district court granted the defendants' motion for summary judgment, concluding in relevant part that (1) when a state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking; (2) because the officers destroyed the Lechs' home while attempting to enforce the state's criminal laws, they acted pursuant to the state's police power; and (3) any damage to the Lechs' home therefore fell outside the ambit of the Takings Clause.

The Lechs appeal, arguing the district court erred in granting the defendants' motion for summary judgment. In support, they first assert the district court erred in "draw[ing] a hard line between" the power of eminent domain and the state's police power. Aplt. Br. 16. Alternatively, they argue that even if such a "line" exists, the

[1] Where appropriate, we refer to the City and the officers collectively as the defendants.

district court erred in ruling that the defendants acted pursuant to the state's police power here. *Id.* For the reasons discussed below, we reject these arguments and affirm the district court's order.[2]

Background

We take the bulk of the following facts from the district court's order granting summary judgment to the defendants. In doing so, we view the evidence in the light most favorable to, and draw all reasonable inferences in favor of, the Lechs.[3] *See Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 882 (10th Cir. 2018).

Leo and Alfonsia Lech purchased the home at 4219 South Alton Street in Greenwood Village, Colorado, for their son, John Lech. At the time of the relevant events, John Lech lived at the home with his girlfriend and her nine-year-old son. On June 3, 2015, officers from the City's police department responded to a burglar alarm at the Lechs' home and learned that Robert Seacat, an armed criminal suspect who was attempting to evade capture by the Aurora Police Department, was inside.

[2] Because we may affirm the district court's order based solely on its conclusion that the defendants' law-enforcement efforts fell within the scope of the police power (and therefore fell outside the scope of the Takings Clause), we need not and do not address whether the Lechs' Takings Clause claims *also* fail under what the district court referred to as the "emergency exception" to the Takings Clause. App. vol. 2, 398.

[3] The defendants filed a supplemental appendix that contains, among other things, documents from the fleeing suspect's related criminal proceedings. Because we see no indication that the defendants submitted these documents to the district court, we decline to consider them. *See John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 506 (10th Cir. 1994) ("This court has held that it cannot, in reviewing a ruling on summary judgment, consider evidence not before the district court.").

Although the nine-year-old son of John Lech's girlfriend was present at the time of the break-in, he was able to exit the home safely.

To prevent Seacat from escaping, the officers positioned their vehicles in the driveway of the Lechs' home. Seacat then fired a bullet from inside the garage and struck an officer's car. At that point, the officers deemed the incident a high-risk, barricade situation.[4] For approximately five hours, negotiators attempted to convince Seacat to surrender. After these efforts to negotiate proved unsuccessful, officers employed increasingly aggressive tactics: they fired several rounds of gas munition into the home, breached the home's doors with a BearCat armored vehicle so they could send in a robot to deliver a "throw phone" to Seacat, and used explosives to create sight lines and points of entry to the home. App. vol. 2, 380. The officers also sent in a tactical team to apprehend Seacat. But Seacat fired at the officers while they were inside, requiring them to leave. When even these more aggressive tactics failed to draw Seacat out, officers used the BearCat to open multiple holes in the home and again deployed a tactical team to apprehend Seacat.

This time, the tactical team was successful: it managed to disarm Seacat and take him into custody. But as a result of this 19-hour standoff, the Lechs' home was rendered uninhabitable. And although the City offered to help with temporary living

[4] According to the police department's manual, a high-risk situation is one that involves "[t]he arrest or apprehension of an armed or potentially armed subject where the likelihood of armed resistance is high." Supp. App. vol. 1, 27. A barricade situation involves a "standoff created by an armed or potentially armed suspect . . . who is refusing to comply with police demands for surrender." *Id.*

expenses when the Lechs demolished and rebuilt their home, it otherwise denied liability for the incident and declined to provide any further compensation.

The Lechs then sued the defendants, alleging, in relevant part, that the defendants violated the Takings Clause of both the United States and Colorado Constitutions by damaging the Lechs' home without providing just compensation. The district court rejected this argument. In doing so, it first distinguished between the state's "eminent[-]domain authority, which permits the taking of private property for public use," and the state's "police power, which allows [it] to regulate private property for the protection of public health, safety, and welfare." *Id.* at 390. The district court then ruled that although a state may "trigger[] the requirement of just compensation" by exercising the former, a state's exercise of the latter does not constitute a taking and is therefore "noncompensable." *Id.* at 390–91.

Next, the district court determined that the state's police power encompasses "the enforcement of" a state's "criminal laws." *Id.* at 397. And because the officers damaged the Lechs' home while attempting to apprehend a criminal suspect, the district court reasoned, their actions fell within the scope of "the state's police powers and not the power of eminent domain." *Id.* at 399. Thus, the district court concluded, any damage the officers caused to the Lechs' home did not constitute a taking for purposes of the Takings Clause. Accordingly, it granted the defendants' motion for summary judgment on the Lechs' Takings Clause claims.[5] The Lechs now

[5] The Lechs also alleged various other claims. But they do not challenge the district court's resolution of those claims on appeal. Accordingly, we discuss the

appeal the district court's order.

Analysis

The parties agree that the Takings Clause of the Fifth Amendment "requires compensation when a taking occurs." *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1174 (10th Cir. 2011); *see also* U.S. Const. amend. V (providing that private property shall not "be taken for public use, without just compensation").[6] But they disagree about whether a taking occurred here. According to the Lechs, the defendants' conduct amounts to a taking because (1) the officers physically intruded upon and ultimately destroyed their home and (2) such a "physical appropriation of property gives rise to a *per se* taking." Aplt. Br. 9. The defendants, on the other hand, argue that no taking occurred because the officers damaged the Lechs' home pursuant to the police power, not the power of eminent domain. The district court agreed with the defendants: it concluded that "the tactical decisions that ultimately destroyed [the Lechs'] home were made pursuant to the state's police powers and not the power of

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Lechs' remaining claims only to the extent they are relevant to our Takings Clause analysis.

[6] The Colorado Constitution contains similar, albeit not identical, language. *See* Colo. Const. art. II, § 15 ("Private property shall not be taken *or damaged*, for public or private use, without just compensation." (emphasis added)). Notably, the Lechs acknowledged in district court that their rights under the state and federal Takings Clauses are "essentially the same." App. vol. 2, 307. The district court agreed, ruling that because the Colorado Supreme Court has interpreted the state Takings Clause consistently with the federal Takings Clause, the Lechs' Takings Clause claims could "be considered together." *Id.* at 389 n.9; *cf. Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 63–64 (Colo. 2001). Because the Lechs do not challenge this aspect of the district court's ruling on appeal, we likewise analyze their state and federal Takings Clause claims collectively.

eminent domain." App. vol. 2, 399. Thus, the district court ruled, the defendants' conduct did not constitute a taking for purposes of the Taking Clause.

In challenging the district court's ruling on appeal, the Lechs advance two general arguments. First, they assert the district court erred in ruling that when the government acts pursuant to its police power, its actions cannot constitute a taking for purposes of the Takings Clause. Second, they argue that even assuming the distinction between the state's police power and its power of eminent domain is dispositive of the taking question, the district court erred in concluding that the officers' conduct here fell within the scope of the state's police power merely because the officers damaged the Lechs' home while "enforcing the law." Aplt. Br. 23. In evaluating these arguments, we review de novo the district court's decision to grant summary judgment to the defendants, applying the same standard as the district court. *Morden v. XL Specialty Ins.*, 903 F.3d 1145, 1151 (10th Cir. 2018). "Summary judgment is appropriate if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1178 (10th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)).

I. Takings, the Police Power, and the Power of Eminent Domain

On appeal, the Lechs first argue the district court erred in drawing a "hard line" between those actions the government performs pursuant to its power of eminent domain and those it performs pursuant to its police power. Aplt. Br. 16. The Lechs do not dispute that the Supreme Court has recognized such a distinction in the context of *regulatory* takings. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 668–69

(1887) (distinguishing between "the state's power of eminent domain"—under which "property may not be taken for public use without compensation"—and state's "police powers"—which are not "burdened with the condition that the state must compensate [affected] individual owners for pecuniary losses they may sustain"). But the Lechs suggest this distinction is not dispositive in the context of *physical* takings. *Compare Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (describing physical takings as "direct government appropriation or physical invasion of private property"), *with id.* at 539 (describing regulatory takings as "regulatory actions that are functionally equivalent" to physical takings). Specifically, the Lechs maintain that *any* "physical appropriation of [private] property" by the government—whether committed pursuant to the power of eminent domain or the police power—"gives rise to a *per se* taking" and thus requires compensation under the Takings Clause. Aplt. Br. 9.

But contrary to the Lechs' position, at least three of our sibling circuits and the Court of Federal Claims have expressly relied upon the distinction between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property. For instance, in *AmeriSource Corp. v. United States*, the Federal Circuit held that no taking occurred where the government physically seized (and ultimately "rendered worthless") the plaintiff's pharmaceuticals "in connection with [a criminal] investigation" because "the government seized the pharmaceuticals in order to enforce criminal laws"—an action the Federal Circuit said fell well "within the bounds of the police power."

525 F.3d 1149, 1150, 1153–54 (Fed. Cir. 2008) (citing *Bennis v. Michigan*, 516 U.S. 442, 443–44, 452–53 (1996)); *see also, e.g.*, *Zitter v. Petruccelli*, 744 F. App'x 90, 93, 96 (3d Cir. 2018) (unpublished) (relying on distinction between power of eminent domain and police power to hold that no taking occurred where officials physically seized plaintiff's oysters and oyster-farming equipment (citing *Bennis*, 516 U.S. at 452)); *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 333–34, 336 (7th Cir. 2011) (relying on distinction between power of eminent domain and police power to hold that no taking occurred where authorities physically damaged plaintiff's home (citing *Bennis*, 516 U.S. at 452)); *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017) (holding that "[w]hen private property is damaged incident to the exercise of the police power, such damage"—even when physical in nature—"is not a taking for the public use, because the property has not been altered or turned over for public benefit" (citing *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92–93 (1969))).

Further, although the Supreme Court has never expressly invoked this distinction in a case alleging a physical taking, it has implicitly indicated the distinction applies in this context. *See, e.g.*, *Bennis*, 516 U.S. at 443–44, 453–54 (rejecting plaintiff's Takings Clause claim where state court ordered vehicle "forfeited as a public nuisance" without requiring state to compensate plaintiff, who shared ownership of vehicle with her husband; reasoning that when state acquires property "under the exercise of governmental authority *other than the power of eminent domain*," government is not "required to compensate an owner for [that]

property" (emphasis added));[7] *Miller v. Schoene*, 276 U.S. 272, 277, 279–80 (1928) (rejecting constitutional challenge to statute that allowed state to condemn and destroy "cedar trees infected by cedar rust," even though statute did not require state to compensate owners for any trees it destroyed; characterizing statute as valid "exercise of the police power").[8]

And we have likewise implicitly treated the distinction between the police power and the power of eminent domain as dispositive of the taking question, even when the interference at issue is physical, rather than regulatory, in nature. For instance, in *Lawmaster v. Ward*, we held that the plaintiff failed to establish a Takings Clause violation where federal agents physically damaged his property—by, for example, tearing out door jambs and removing pieces of interior trim from his

[7] In *Bennis*, the Court did not expressly characterize the forfeiture action as a use of the state's police power. But the Court has previously described forfeitures in this manner. *See, e.g.*, *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926) ("[A] state in the exercise of its police [power] may forfeit property . . . ."). Further, in *Bennis*, the Court noted that the state's actions were motivated by its desire to "deter illegal activity that contributes to neighborhood deterioration and unsafe streets." 516 U.S. at 453. And these are classic markers of the state's police power. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several [s]tates have exercised their police powers to protect the health and safety of their citizens."). Finally, other courts have interpreted *Bennis* as a police-power case. *See, e.g.*, *Rhaburn v. United States*, 390 F. App'x 987, 988 (Fed. Cir. 2010) (unpublished) ("In *Bennis* . . . [t]he Court ruled that no taking had occurred, relying on the nature of the government power exercised to take the property, *i.e.*, the police power.").

[8] The nature of the plaintiffs' constitutional claim in *Miller* is not entirely clear from the Court's language. But the Court has repeatedly cited *Miller* as part of its Takings Clause jurisprudence. *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (characterizing *Miller* as "holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the [s]tate had ordered destroyed").

home—while executing a search warrant. 125 F.3d 1341, 1344–46, 1351 (10th Cir. 1997). In doing so, we reasoned that the plaintiff "fail[ed] to allege any facts showing how his property was taken for public use." *Id.* at 1351. And although we did not expressly note as much in *Lawmaster*, we have previously equated the state's power to "take[] property for public use" with the state's power of eminent domain, as opposed to its police power. *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971) ("Police power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged[,] or destroyed.").[9] Thus, by holding that the plaintiff in *Lawmaster* could not show a Fifth Amendment violation because he failed to show "how his property was taken for public use," we implicitly held his Takings Clause claim failed because he could not show the government acted pursuant to its power of eminent domain, rather than pursuant to its police power. 125 F.3d at 1351; *see also McKenna v. Portman*, 538 F. App'x 221, 223–24 (3d Cir. 2013) (unpublished) (relying in part on *Lawmaster* to hold that because defendants exercised state's police power—rather than power of eminent domain—when they seized plaintiffs' property pursuant to search warrant and subsequently damaged it, defendants "did not engage in a 'taking' under the Fifth Amendment").

[9] Notably, although the defendants discuss *Lamm* in their response brief, the Lechs do not address it in their reply brief.

Nevertheless, despite these persuasive authorities, the Lechs urge us to disregard the distinction between the police power and the power of eminent domain in resolving this appeal. In support, they point out that "the Takings Clause 'was designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Aplt. Br. 13 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). And they argue that upholding the district court's summary-judgment ruling would do just that: it would force the Lechs to bear alone the cost of actions the defendants undertook in an effort to "apprehend[] a criminal suspect"—actions that were clearly "for the benefit of the public" as a whole. *Id.* at 13, 33.

We do not disagree that the defendants' actions benefited the public. But as the Court explained in *Mugler*, when the state acts to preserve the "safety of the public," the state "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. 123 U.S. at 669. Thus, "[a]s unfair as it may seem," the Takings Clause simply "does not entitle all aggrieved owners to recompense." *AmeriSource Corp.*, 525 F.3d at 1152, 1154.

Accordingly, we reject the Lechs' first broad challenge to the district court's ruling and hold 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. And we further hold that this distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private

property. But that does not end the matter. We must next determine whether, as the district court ruled, the defendants acted pursuant to the state's police power here.

II. Law Enforcement and the Police Power

"[T]he police power encompasses 'the authority to provide for the public health, safety, and morals.'" *Dodger's Bar & Grill, Inc. v. Johnson Cty. Bd. of Cty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)). The "contours of [the police power] are difficult to discern." *AmeriSource Corp.*, 525 F.3d at 1153. But as discussed above, we have described the police power in contrast to the power of eminent domain: "the former controls the use of property by the owner for the public good," while the latter "takes property for public use." *Lamm*, 449 F.2d 1203.

The parties have not pointed us to any Tenth Circuit authority that affirmatively resolves whether the defendants' conduct here damaged the Lechs' home for the public good or for public use. But the Court of Federal Claims has applied this distinction to facts that are nearly identical to those at issue here. *See Bachmann*, 134 Fed. Cl. 694. In *Bachmann*, the United States Marshals Service "used gunfire, smoke bombs, tear gas, a battering ram, and a robot to gain entry" to the plaintiffs' rental property, which—unbeknownst to the plaintiffs—had become a hideout for a fleeing fugitive. *Id.* at 695. The plaintiffs then sued the Marshals Service, alleging the damage to their property constituted a taking under the Fifth Amendment. *Id.* The Marshals Service moved to dismiss, arguing that because it acted under the police power, any damage it caused to the

plaintiffs' property in the process "could not amount to a compensable Fifth Amendment taking." *Id.*

Relying in large part on the Federal Circuit's decision in *AmeriSource*, the Court of Federal Claims agreed with the Marshals Service and granted the motion to dismiss. *Id.* at 695–97 (citing *AmeriSource*, 525 F.3d at 1153–55). Critically, in doing so, it rejected the plaintiffs' argument that "when law enforcement officials damage private property in the process of enforcing criminal law, they . . . take private property for public use." *Id.* at 695. Instead, the court reasoned, the Marshals Service damaged plaintiffs' property while "us[ing] perhaps the most traditional function of the police power: entering property to effectuate an arrest or a seizure." *Id.* at 697. Thus, the court concluded, the plaintiffs did not suffer "a taking of their property for public use," and their Fifth Amendment claim failed as a result. *Id.* at 698.

Notably, in reaching this conclusion, the Court of Federal Claims addressed the potential distinction between (1) cases in which "law enforcement officials seize and retain [personal] property as the suspected instrumentality or evidence of a crime" and (2) cases in which government officials inflict damage to real property that is "incidental to the exercise of the police power." *Id.* at 696–98. And the Lechs attempt to invoke the same distinction here: they argue that although the police power encompasses the seizure of personal property that is "caught up in criminal activity" or is "evidence of a crime," it does not encompass "the destruction of an entire home in furtherance of apprehending an uncooperative suspect." Aplt. Br. 21–22. But like the Court of Federal Claims, we see no "principled reason" to draw such a distinction. *Bachmann*,

134 Fed. Cl. at 698. Indeed, just like the house at issue in *Bachmann*, the Lechs' home "had become instrumental to criminal activity"—it was serving as a hideout for a fugitive. *Id.* at 697. Thus, just as in *Bachmann*, "the damage caused in the course of arresting a fugitive on plaintiffs' property was not a taking for public use, but rather it was an exercise of the police power." *Id.*

The Lechs resist this approach, insisting that if we define the police power broadly enough to encompass conduct like the type at issue here and in *Bachmann*, it will amount to a "federally unprecedented expansion" of that power. Aplt. Br. 26. In support, the Lechs first insist that the police power encompasses only the state's "power to *establish* laws"—as opposed to the power to "enforce[]" those laws. Aplt. Br. 28. Yet the Lechs expressly concede elsewhere in their brief that the police power encompasses the power "to make *and enforce* laws." Aplt. Br. 30 (emphasis added). And caselaw supports this concession. *See, e.g.*, *AmeriSource Corp.*, 525 F.3d at 1153 ("The government's seizure of property *to enforce criminal laws* is a traditional exercise of the police power that does not constitute a 'public use.'" (emphasis added) (citation omitted)). Thus, we reject the Lechs' effort to limit the police power to actions that establish law, rather than merely enforce it.

We likewise reject the Lechs' assertion that the police power does not encompass the state's ability to seize property from an *innocent* owner. This argument is not without support. *See, e.g.*, *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 41–42 (Minn. 1991) (holding that where "innocent third party's property [was] damaged by the police in the course of apprehending a suspect," such damage was inflicted "for a public use").

Nevertheless, despite "the considerable appeal of this position as a matter of policy," we join the Federal Circuit in rejecting this argument as a matter of law. *AmeriSource Corp*., 525 F.3d at 1154–55 ("[S]o long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment. The innocence of the property owner does not factor into the determination." (citation omitted) (citing *Bennis*, 516 U.S. at 453)).

Finally, contrary to the Lechs' position, we see no indication that defining the police power broadly enough to encompass the defendants' actions in this case will signal to police they may "act with impunity to destroy property" or deprive them of "reason to limit the destruction" they cause simply "because they will not bear the burden of the cost and will be absolved of any responsibility" for their actions. Aplt. Br. 31. This argument overlooks *other* limits placed on the police power. Indeed, even the Lechs concede that the police power is subject to the requirements of the Due Process Clause. *See Lambert v. California*, 355 U.S. 225, 228 (1957); *AmeriSource*, 525 F.3d at 1154 ("As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause."); *Lowther v. United States*, 480 F.2d 1031, 1033–34 (10th Cir. 1973) (holding that where government "destroyed appellee's property without having any authority in law to do it," its actions were "contrary to the [D]ue [P]rocess [C]lause of the Fifth Amendment"). And as the defendants point out, police officers who willfully or wantonly destroy property may also be subject to tort liability. *See, e.g.*, Colo. Rev. Stat. § 24-10-118(2)(a).

Conclusion

Because (1) the defendants' law-enforcement actions fell within the scope of the police power and (2) actions taken pursuant to the police power do not constitute takings, the defendants are entitled to summary judgment on the Lechs' Takings Clause claims. We therefore affirm the district court's ruling.

Entered for the Court

Nancy L. Moritz
Circuit Judge