No. 23-5765

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOLLIE SLAYBAUGH and MICHAEL SLAYBAUGH,

Plaintiffs-Appellants,

v.

RUTHERFORD COUNTY, TENNESSEE, RUTHERFORD SHERIFF'S DEPARTMENT, and TOWN OF SYMRNA, TENNESSEE,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee, No. 3:23-cv-00057

APPELLANTS' BRIEF

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On January 24, 2022, law enforcement officials blew up the Plaintiffs' home. The Plaintiffs were innocent of any wrongdoing and were not suspected of any. This appeal seeks to determine whether innocent homeowners are entitled to just compensation when the government destroys property while performing "police powers."

Framed differently: If a SWAT team destroys your home while trying to apprehend a criminal suspect, who pays for the damage? You, the unlucky and innocent homeowner? Or the public? The Fifth Amendment provides a straightforward answer: The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Law enforcement is a public good. Through our taxes, we pay for the training, equipment, and salaries of police officers. We pay to incarcerate criminals. We pay for a court system and public defenders. When the police destroy private property in the course of enforcing the criminal laws, that is simply another cost of law enforcement. Forcing random, innocent individuals to shoulder that cost alone would be as

fair as conducting a lottery to determine who has to pay the police chief's salary each year. Yet that is precisely what the district court below did by creating a "police power" exception to the Fifth Amendment's Just Compensation clause—an exception that is contrary to the plain text of the Constitution, our nation's history and tradition, and Supreme Court precedent.

CORPORATE DISCLOSURE STATEMENT

Appellants Mollie and Michael Slaybaugh are natural persons and no publicly owned corporations have a financial interest in the outcome of this case.

STATEMENT SUPPORTING ORAL ARGUMENT

The district court held that the government's "police power" is exempt from the Just Compensation Clause of the Fifth Amendment. That is wrong, but there is an inter- and intra-circuit split on that question. The Third, Seventh, Tenth, and Federal Circuits have adopted the district court's rule. *See AmeriSource Corp. v. United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008); *Johnson v. Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011); *Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018); *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019). The

Fourth and Fifth Circuits (as well as the Supreme Court) have rejected it. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *Baker v. City of McKinney*, 84 F.4th 378, 385 (5th Cir. 2023); *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021). And this Court, in unpublished opinions, has vacillated. *Compare Ostipow v. Federspiel*, 824 F. App'x 336, 341 (6th Cir. 2020) (granting qualified immunity because it was not "clearly established" that the police power was subject to the Just Compensation Clause), *with Bojicic v. DeWine*, No. 21-4123, 2022 WL 3585636, at *8 (6th Cir. Aug. 22, 2022) (rejecting a categorical "police power" exception to the Takings Clause). Oral argument would assist this Court in resolving this dispute.

JURISDICTION

The district court had federal question jurisdiction over this case because the Plaintiffs asserted a right to Just Compensation under the Fifth Amendment to the United States Constitution. 28 U.S.C. § 1331; 42 U.S.C. § 1983. The district court dismissed the Plaintiffs' complaint in its entirety, with prejudice, on August 24, 2023. The Plaintiffs filed a timely notice of appeal on August 25, 2023. This court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether actions taken pursuant to the "police power" are categorically exempt from the Just Compensation Clause of the Fifth Amendment.
2. Whether actions taken pursuant to the "police power" are categorically exempt from the Just Compensation Clause of the Tennessee Constitution.

BACKGROUND

Mollie and Michael Slaybaugh are residents of Rutherford County, Tennessee, and they own a house at 1100 Odom Ct, Smyrna, TN. On January 23, 2022, the Slaybaughs' adult son, James Jackson Conn, asked Mollie if he could come to visit for a few days, and she agreed. He arrived at the house that day. After a short conversation, Mrs. Slaybaugh left the house to do some errands. Mr. Slaybaugh was not at home at the time.

Later that evening, just before she had intended to go to bed, Mrs. Slaybaugh noticed two police cars parked outside, near her neighbor's house. Concerned for her neighbor, she went outside to check if everything was okay. When she opened her front door, however, she

was met by a police officer with his weapon drawn. Another officer pointed a flashlight at her and told her to step out of the house. She did as she was instructed. Mrs. Slaybaugh then noticed that dozens of police cars were parked outside. Another officer, using a loudspeaker, instructed Mrs. Slaybaugh's son to exit the property with his hands in the air.

Mrs. Slaybaugh had no idea what was going on or why the police were there. She spoke to the officers and asked if she could reenter her home to see if she could persuade her son to come out. The police told her that her son was wanted for questioning regarding a homicide and that she could not reenter her home. Mrs. Slaybaugh's son did not exit the house, and the police eventually left. They told Mrs. Slaybaugh that she could not reenter her home, so she went to spend the night at her daughter's home nearby.

Mrs. Slaybaugh returned to the house the next morning and saw that members of the Rutherford County Sheriff's Department and the Smyrna Police Department had returned and had set up a perimeter around her home. She again asked the police if she could enter her

home to try to convince her son to come out, but again, the police would not allow it.

Eventually, the police decided to assault the house. They broke down the door and fired dozens of tear gas cannisters at the house, smashing through windows and drywall, and saturating the house with noxious chemicals. The damage totaled over $70,000.

The Slaybaughs' insurance carrier denied coverage, citing a common provision in homeowners' policies that purports to exclude damage caused by civil authorities. The Slaybaughs assumed that the County of Rutherford and City of Smyrna would compensate them for the damage. After all, they were indisputably innocent of any wrongdoing, and the government intentionally destroyed their property in order to apprehend a criminal suspect. Yet when they requested just compensation, both the County and the City refused.

The Slaybaughs filed this federal lawsuit on January 20, 2023, naming as defendants: Rutherford County, Tennessee, the Rutherford County Sheriff's Department, and the Town of Smyrna, Tennessee (collectively "the government"). The Slaybaughs asserted that the destruction of their property was a taking for public use within the

meaning of both the U.S. and Tennessee Constitutions and that the government defendants had unlawfully denied them just compensation.

On August 24, 2023, the district court dismissed the complaint in its entirety. The court held that the Sheriff's Department was not a proper party to the lawsuit and was redundant of Rutherford County itself (which was a proper party). The court also held that the Slaybaughs had sufficiently alleged that the denial of compensation was the result of an official policy or custom, thereby satisfying the requirements of *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

On the merits, the district court held that the Slaybaughs had failed to state a Just Compensation claim because, the court concluded, exercises of the government's "police power" are exempt from the Fifth Amendment. The Court also dismissed the Tennessee constitutional claim on the ground that the Tennessee Just Compensation Clause is coterminous with its federal counterpart. This appeal followed.

SUMMARY OF ARGUMENT

The Supreme Court has squarely held that when the government intentionally destroys private property, it is a taking within the meaning of the Fifth Amendment. The Slaybaughs have adequately pleaded that the government defendants, through the actions of their police officers, intentionally destroyed the Slaybaughs' property for the public purpose of apprehending a criminal suspect. The police acted lawfully, but "fairness and justice" require that the cost of their actions be borne by society as a whole, not by two unlucky individuals like the Slaybaughs.

The district court erred in finding that an exception to the Just Compensation Clause applies here. The Supreme Court has held that, when the plain text of a provision of the Bill of Rights applies, the government bears the burden of proving that any exception to that text is consistent with our nation's history and tradition. The government, and the district court for that matter, failed to do so: There is no precedent or tradition supporting either a "law enforcement" or "police power" exception to the Just Compensation Clause. Indeed, the latter is explicitly foreclosed by over a century of precedent, which the court

below did not address. Nor is "necessity" (a defense that the government has never raised and which the Plaintiffs' allegations do not support) an exception to the Just Compensation Clause, notwithstanding a recent Fifth Circuit decision to the contrary. History shows that "necessity" was understood as an affirmative defense against individual liability, not a governmental immunity.

Fundamentally, all of these illusory "exceptions" to the Just Compensation Clause suffer from the same flaw: They are premised on the notion that the government should be relieved of its constitutional burden to pay for what it takes when it is acting for a really good reason. But the Supreme Court has consistently held that whether Just Compensation is due turns on the fairness of burdening an individual property owner—not on whether the government is acting for a good reason. The district court's dismissal of the Slaybaughs' federal claim must be reversed.

Finally, the district court erred in dismissing the Slaybaughs' claim for just compensation under the Tennessee Constitution. The courts of Tennessee have not addressed whether Tennessee's Just Compensation Clause precludes relief under the facts pleaded here. In

concluding otherwise, the court below misreads precedent and makes historical errors. At the very least, this question should be certified to the Tennessee Supreme Court.

STANDARD OF REVIEW

When a district court grants a motion to dismiss, this Court reviews that decision *de novo*, accepting the plaintiffs' allegations as true and drawing all reasonable inferences in the plaintiffs' favor. *See Pleasant View Baptist Church v. Beshear*, 78 F.4th 286, 294–95 (6th Cir. 2023).

ARGUMENT

I. Under the Just Compensation Clause, intentional destruction of property is no different from appropriation.

The Supreme Court has consistently held that when the government intentionally destroys private property for public purposes, it is a taking, just as if the government formally condemned an interest in the property. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (11 Wall.) 166, 181 (1872) ("[W]here real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."). In *Pumpelly*, the government erected a dam that flooded the plaintiff's property. *Id.* at 167. The

government, like the defendants in this case, "argue[d] that the damages of which the plaintiff complain[ed] [were] such as the State had a right to inflict . . . without making any compensation for them." *Id.* at 176. The Supreme Court disagreed:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, 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.

Id. at 177–78. This holding could hardly be clearer. Destroying property is the same as taking possession of it, and any argument that hinges on supposed differences between destruction and appropriation is a non-starter.

Pumpelly is not an aberration or a moribund precedent. The Supreme Court has continued to cite it with approval and has repeatedly affirmed that destruction of property is akin to physical appropriation and, therefore, implicates the Just Compensation Clause.

See, e.g., *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012) (citing *Pumpelly*); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713 (2010) ("[W]hen the government uses its own property in such a way that it destroys private property, it has taken that property") (citing *Pumpelly*); *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316–17 (1987) (citing *Pumpelly*); *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) ("[T]he Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment."); *United States v. Causby*, 328 U.S. 256 (1946) (finding that low-level overhead flights caused property damage warranting compensation); *United States v. Cress*, 243 U.S. 316 (1917). These sorts of physical appropriations constitute the "clearest sort of taking." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). As such, courts "assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery*, 141 S. Ct. 2063, 2071 (2021) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002)).

Neither the government nor the district court had any answer to *Pumpelly*. The district court simply ignored it, notwithstanding that it was the centerpiece of the Slaybaughs' brief below. And the government's argument was that *Pumpelly* was "not a police powers case," because it involved "an eminent domain analysis." ECF 15 at 9[1]. But *Pumpelly* was not an eminent domain case; the government did not bring any proceedings to claim an interest in the property at issue. It was an inverse condemnation case brought by a property owner who asserted that the uncompensated destruction of his property by the government was a taking, exactly like the present case. Nor can *Pumpelly* be distinguished as a special case about flooding. The Supreme Court has explicitly refused "to adopt a 'flooding-is-different' rule," holding instead that "[t]here is [] no solid grounding in precedent for setting flooding apart from **all** other government intrusions on property." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012) (emphasis added).[2] *Pumpelly* is good law, and it establishes a

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[1] ECF citations are all to the file-stamped footer's Page ID #.

[2] Notwithstanding the clarity of the Supreme Court's holding on this point, the Fifth Circuit, in a case similar to this one, recently distinguished *Pumpelly* as merely "a flooding case," and insisted that it

universal rule that property damage or destruction is the same as appropriation.[3]

II. Mr. and Mrs. Slaybaugh have sufficiently alleged that their property was taken without just compensation.

Of course, even though the Just Compensation Clause treats destruction the same as appropriation, that does not mean that *all* property destruction will constitute a taking. The plaintiff must sufficiently allege that the government (1) intentionally or foreseeably

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would not apply the rule in other contexts. *See Baker v. City of McKinney*, 84 F.4th 378, 384–85 (5th Cir. 2023). This Court should not similarly thumb its nose at the Supreme Court.

[3] The County's brief below distinguished *Pumpelly* by arguing that the destruction of the Slaybaugh's house was a mere "consequential injury." ECF 22 at 12. Unsurprisingly, the County does not bother to define the term "consequential," since no legal definition of that term would exclude the fair market value of property that the defendant literally destroyed. As every law student knows, consequential damages are "[s]uch damage as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." *Wills Elec. Co. v. Mirsaidi*, No. M2000-02477-COA-R3CV, 2001 WL 1589119, at *4 (Tenn. Ct. App. Dec. 13, 2001) (quoting *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)). The Slaybaughs are not arguing, for instance, that they are entitled for compensation because the destruction of their house interfered with a planned business meeting. They are arguing that the destruction of their house was a direct result of *the defendants' destroying their house*.

(2) caused property damage (3) for the public use. Here, however, that standard is easily met.

Causation. To trigger its obligation to pay, the government must have actually caused the property damage or destruction. Often (as it is in this case), this will be obvious—such as when low-level aircraft render a chicken farm inoperable. *Causby*, 328 U.S. at 266. In other cases, the causal chain might be inadequate, *see Armstrong*, 364 U.S. at 48 (listing cases), or the property's destruction might have been inevitable, *see, e.g.*, *YMCA v. United States*, 395 U.S. 85, 97 (1969) (Harlan, J., concurring) ("[I]f the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied[.]").[4]

Flooding cases demonstrate the causal connection required for finding that a compensable taking has occurred. In one case where a newly constructed governmental canal flooded and damaged the claimant's property, the Court denied a Just Compensation claim in

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[4] Another way of looking at "inevitable destruction" cases is that the fair market value of property that is about to be destroyed is essentially zero.

part because "the property was subject to seasonal flooding prior to the construction of the canal, and the landowner failed to show a causal connection between the canal and the increased flooding, which may well have been occasioned by changes in weather patterns." *Ark. Game & Fish Comm'n*, 568 U.S. at 34 (citing *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924)). By contrast, when the government causes flood damage by constructing a dam that raises water above its natural level, owners are due compensation for the taking. *United States v. Cress*, 243 U.S. 316, 328 (1917); *see also Ark. Game & Fish Comm'n*, 568 U.S. at 36 (refusing "to adopt a 'flooding-is-different' rule").

There is no dispute that the government's officers caused catastrophic damage to Mr. and Mrs. Slaybaugh's home when they assaulted it. Nor is there any suggestion that Mr. Conn himself would have damaged or destroyed their home. *Cf. YMCA*, 395 U.S. at 92 ("The YMCA building was on fire from Molotov cocktails being thrown from [third-party rioters]." (internal quotation marks omitted)).

Intentional or Foreseeable. "Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Ark. Game & Fish*

Comm'n, 568 U.S. at 39 (citing *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921)). Again, it is obvious in this case that the government's officers intended, or at the very least could have foreseen, the damage they caused to the Slaybaughs' property.

A recent Fourth Circuit case provides an illustrative contrast. In *Yawn v. Dorchester County*, the government conducted an aerial mosquito-spraying operation that allegedly killed the claimant beekeepers' bees. 1 F.4th 191, 192 (4th Cir. 2021). Although the court agreed that that the spraying operation was an exercise of the police power that *could* lead to a compensable taking, it denied the claim because "the death of [plaintiffs'] bees was neither intentional nor foreseeable." *Id*. at 194–95. In particular, the government had taken significant and "specific measures to avoid the unfortunate death of the bees"—measures that had been successful in the past. *Id*. at 195. *See also id*. at 193, 196 (noting that, prior to spraying, "the County issued a press release . . . to numerous media outlets, including local television stations, newspapers, radio stations, and social media platforms," and it provided the pilot with a map of all known "beehives so that he could turn off the sprayer when flying over those locations"). There was no

reason, under such circumstances, to expect that this time the spraying operation would lead to the death of any bees, so the court held that there was no compensation due.

In this case, it was eminently foreseeable that the assault on Mr. and Mrs. Slaybaugh's home would cause significant property damage. The police broke down the door and fired dozens of teargas cannisters through the windows and walls of the house, saturating the property and all its contents. While causing damage may not have been their objective, they acted with the certain knowledge that they were going to destroy the house and its contents. Their ultimate objective—the capture of a criminal suspect–was a legitimate goal, to be sure, but it was for the *public's* benefit, and the costs thereof, "in all fairness and justice, should be borne by the public as a whole." *Ark. Game & Fish Comm'n*, 568 U.S. at 31 (citation omitted).

Public Use. Finally, a compensable taking must have been for the "public use." Generally speaking, the question is whether the destructive act was lawful. *See Ark. Game & Fish Comm'n*, 568 U.S. at 39 ("invasion [must be] the foreseeable result of authorized government action"). There is no dispute in this case that the government's officers

acted lawfully when they assaulted Mr. and Mrs. Slaybaugh's home. (Whether their actions were *necessary* is a different question.) *See Steele v. City of Houston*, 603 S.W.2d 786, 791–92 (Tex. 1980) ("public use" requirement satisfied when "the City ordered the destruction of the property because of real or supposed public emergency to apprehend armed and dangerous men who had taken refuge in the house").[5]

III. The government bears the burden of establishing any exception to the Just Compensation Clause, and it cannot do so here.

Because the Slaybaughs adequately pleaded a *prima facie* claim for Just Compensation, the burden shifts to the government to demonstrate an applicable exception to the Fifth Amendment's categorical command. After all, the Just Compensation Clause says that "private property [shall not] be taken for public use, without just compensation." It does not say: "unless the government is using its

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[5] If the destruction were illegal, then the Slaybaughs would have a different claim. *See Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200 n.26 (5th Cir. Unit A May 1981) ("[T]he landowner whose property is . . . 'taken' albeit not for 'public use' will nevertheless have a damage cause of action under § 1983 since such a 'taking' would constitute the deprivation of property without due process of law under the Fourteenth Amendment.").

'police power.'" *Cf. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (The Fifth Amendment "does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'"). As the Supreme Court recently held:

> When [a Bill of Rights provision's] plain text covers an individual's conduct, the Constitution presumptively protects that conduct. **The government** must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition . . . . **Only then may a court conclude** that the individual's conduct falls outside the [provision's] unqualified command.

N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (emphases added) (citation omitted); *accord*. *id*. at 2156 ("[W]e conclude that **respondents have not met their burden** to identify an American tradition justifying the State's proper-cause requirement." (emphasis added)); *see also id*. at 2130 ("This Second Amendment standard accords with how we protect other constitutional rights."). In other words, the tie goes to the text, and courts may not invent atextual exceptions to the Just Compensation Clause on the basis of ambiguous history. *See Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 830 (6th Cir. 2023) ("Without obvious textual support, Nashville perhaps could justify its proposed distinction if it grounded

the distinction in some background takings principle. But Nashville identifies nothing in the 'historical record' that would allow us to [accept its proposed rule].").

In the following sections, the Slaybaughs will demonstrate that the district court erred in finding that any exception to the Just Compensation Clause applies in this case. First, cases concerning a law-enforcement right of *entry* onto private property say nothing about the right to *damage* or *destroy* private property without compensation. Second, notwithstanding the decisions of some lower courts, the Supreme Court has consistently held, for over a century, that the police power is not exempt from the Just Compensation Clause. Finally, although the issue was not raised below, the Slaybaughs will address a recent Fifth Circuit decision that erred in finding a "necessity" exception to Just Compensation.

Although each of these "exceptions" suffers from different doctrinal and historical flaws, at bottom they share the same totally incorrect premise—that the government should not be forced to compensate people for taking their property if the government did it for a *really good* reason—such as to enforce the criminal laws, to protect

health and safety, or because of an emergency. This reasoning is simply incompatible with the Fifth Amendment. A Just Compensation claim "presupposes" that the government is acting for a good reason, and the Supreme Court has consistently held that the right to compensation does *not* hinge on the importance of the government's objectives, but rather on the "severity of the burden that government imposes upon private property rights." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

The entire point of the Just Compensation Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Whether the government is acting for an important reason is "logically prior to and distinct" with whether it is fair to force certain individuals to bear the cost of that action. *Lingle*, 544 U.S. at 543. As explained in the following sections, the government cannot meet its burden here.

A. The Slaybaughs' claim concerns the intentional destruction of their home—not the mere entry upon it.

To justify its holding, the district court noted that public officials, acting consistently with the Fourth Amendment, may "enter property to effect an arrest or enforce the criminal law" without compensating the owner. ECF 37 at 16 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021)). Nobody disputes that this principle is grounded in our nation's history, but this case is not about mere entry onto property; it is about the intentional *destruction* of private property. And as discussed above, destruction has been treated as a taking since the nineteenth century. The Slaybaughs are not arguing that the government would have owed them compensation for an isolated entrance upon their property, whether it be to capture a suspect or to "park[] on [their] vacant land to eat lunch" one day. *Cedar Point*, 141 S. Ct. at 2078 (citation omitted). *Cedar Point*'s discussion of when non-destructive incursions onto property constitute a taking is therefore totally inapt. *See ibid.* (addressing the dissent's concern for "a host of state and federal government activities involving **entry** onto private property" (emphasis added)).

In fact, *Cedar Point* reaffirms that foreseeable property damage or destruction resulting from governmental action is the same as a physical appropriation of property. *Id.* at 2073 ("Because the damages suffered by the Causbys 'were the product of a direct invasion of [their] domain,' we held that 'a servitude has been imposed upon the land.'" (citation omitted)). That is true even when the governmental invasion itself was temporary. *Id.* at 2074. When governmental agents merely *enter* property on an isolated occasion, there is no taking because there is no appropriation of property—but when they *do* appropriate property, as the government's agents have done here, government is not exempted from compensating owners solely because it completed its appropriation over a definite period. *See id.* at 2072.

In short, nothing in either the text of the Fifth Amendment or this Nation's historical tradition establishes that the government can destroy private property without compensating the owners, so long as the government is enforcing the criminal laws.

B. Property destruction pursuant to the police power is not exempt from the Just Compensation Clause.

The district court ultimately held that Mr. and Mrs. Slaybaugh's claim fails "because the Fifth Amendment does not create a right to

recovery for property damage resulting from the exercise of the police power." ECF 37 at 9. Not only is this contrary to the text of the Fifth Amendment and unsupported by history, it has also been explicitly and repeatedly rejected by the Supreme Court for over 100 years.

The district court's holding "would essentially nullify [the Supreme Court's] affirmation of limits to the noncompensable exercise of the police power. [The Court's] cases provide no support for this[.]" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992). If "the uses of 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 1014 (punctuation omitted) (quoting *Pa. Coal Co.*, 260 U.S. at 415). Thus, a given governmental act might be "within the State's police power . . . . **It is a separate question, however**, whether an otherwise valid [exercise of the police power] so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (emphasis added).

Of course, "the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, [but] the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987). To illustrate that very principle, the *First English* Court cited *Pumpelly*, which, as described in the section above, involved destruction of property. *Id.* at 316–17.

To be sure, exercises of the police power do not *necessarily* require that compensation be paid. For example, the government need not compensate owners when it, pursuant to its police power, prohibits "noxious use of [] property [that would] inflict injury upon the community," *Mugler v. Kansas*, 123 U.S. 623, 669 (1887), or when it acquires property through a forfeiture proceeding, *Bennis v. Michigan*, 516 U.S. 442, 452 (1996); *cf. Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015) (stating that, absent forfeiture proceedings or the like, "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home"). Nor must the government give compensation for property damage caused while

defending the claimant's property from destruction or appropriation, in an action that only "incidentally [] benefit[s] the public." *YMCA v. United States*, 395 U.S. 85, 92 (1969). But just because government is not "liable under the Just Compensation Clause to property owners **every time** policemen" damage property, *ibid* (emphasis added), it does not follow that it is *never* liable for destruction pursuant to the police power.

If the police power were categorically exempt from the Just Compensation Clause, that would surely be relevant in a case involving damage inflicted during a firefight with rioters, but not a single member of the Court even mentioned it. *See YMCA v. United States*, 395 U.S. 85 (1969). In *YMCA*, U.S. troops occupied a YMCA building in the Panama Canal zone during a riot, defending it from attackers who wielded Molotov cocktails and firearms. *Id.* at 87. The property owner brought a Just Compensation claim for the damage caused to the building. A majority of the Supreme Court held that the owner could not recover because the army's purpose in occupying the building was to protect the property from the rioters (with only "incidental[]" benefit to the public), so the owner was the "particular intended beneficiary" of

the government action. *Id.* at 92. Justice Harlan, concurring, said the result would have been different if there were any evidence that the government activity caused more damage than it prevented. *Id.* at 94–95. The dissenting justices simply disagreed about the record; they thought that the army had taken the building for their own benefit, to use as a base, and not to protect it. *Id.* at 99. Every member of the Court seemed to agree that if the army had *not* been acting primarily to protect the property, there would have been a valid Just Compensation claim.

It is of no consequence that the governmental agents who ordered and carried out the destruction happened to be wearing a badge. As the Supreme Court has recently explained, "[t]he essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—**by whatever means**[.]" *Cedar Point Nursery*, 141 S. Ct. at 2072 (emphasis added).

C. The district court followed non-binding circuit decisions that ignored or misread Supreme Court precedent.

The district court ignored the foregoing mountain of binding precedent and, instead, followed non-binding decisions from other circuits, many of which are unreported and do not discuss or even cite any of the relevant Supreme Court precedents. Primarily, the district court relied on *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019). *See* ECF 37 at 21 ("The court finds the analysis in *Lech* to be persuasive[.]"). *Lech*, being unpublished, is "not precedential" even in its home circuit. 10th Cir. R. 32.1(A). More importantly, neither it nor any other categorical exemption for exercises of the police power can be reconciled with binding precedent from the Supreme Court.

First, *Lech* rested on a key misreading of Supreme Court precedent. At bottom, it relied on the Supreme Court's observation 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 they may sustain' in the process." *Lech*, 791 F. App'x at 717 (quoting *Mugler*, 123 U.S. at 669). That quotation, however, is critically truncated: To continue the quoted

Supreme Court passage, "the state [need not] compensate [] individual 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 added).[6]

Thus, the Supreme Court case on which the Tenth Circuit panel purported to rely does not speak of a general exception to the Just Compensation Clause whenever the government exercises its police power. Instead, the Court expressly addressed "[t]he exercise of the police power by the destruction of property **which is itself a public nuisance.**" *Ibid* (emphasis added). By omitting such patently relevant language from *Mugler*, the Tenth Circuit panel erroneously transformed a completely anodyne statement of law (it is not a taking when the government forbids property owners from causing a nuisance) into a sweeping exception from Supreme Court doctrine—a categorical exception that, as described above, is not only unsupported by

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[6] The district court, quoting the *Lech* panel, similarly abridged the same Supreme Court precedent. ECF 37 at 19.

intervening Supreme Court precedent but expressly forbidden by it. *See Lucas*, 505 U.S. at 1026.

Second, *Lech* relied on a Federal Circuit case that also critically misread Supreme Court precedent. In *AmeriSource*, the Federal Circuit took the Supreme Court (in *Bennis v. Michigan*) as "suggest[ing] that so 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." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008); *see also Bennis v. Michigan*, 516 U.S. 442 (1996). But precedent from both before and after *Bennis* (and after *AmeriSource*) demonstrates that that observation cannot be correct. *See Horne*, 576 U.S. at 361 (finding the government's direct appropriation of a farmer's raisin crop to be "a clear physical taking"); *Loretto*, 458 U.S. at 425–26 (finding an otherwise valid exercise of "the State's police power" to be a Taking requiring compensation). And other circuits already recognize that the Federal Circuit's broad statement is not correct. *See, e.g.*, *John Corp. v. City of Houston*, 214 F.3d 573, 578–79 (5th Cir. 2000) ("[S]imply because the City did not formally use its powers of eminent domain to destroy

Appellants' property does not mean that its actions could not amount to a taking requiring just compensation."). Again, "the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without [] formal proceedings." *First Eng.*, 482 U.S. at 316.

In fact, the Federal Circuit severely misread *Bennis*. In that case, the Supreme Court considered whether compensation was owed for property that had been "transferred by virtue of [a forfeiture] proceeding from petitioner to the State." 516 U.S. at 452. Holding against the claimant, the Court stated that "[t]he 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." *Ibid.* (emphasis added). That statement stands for nothing more than the notion that, other than in eminent domain, no compensation is due when government acquires title to property by virtue of a lawful, formal proceeding (such as forfeiture).

Indeed, *Bennis* relied not on principles of Just Compensation but, instead, on forfeiture—specifically, the uncompensated seizure of property utilized as part of a criminal enterprise. *See Van Oster v.*

Kansas, 272 U.S. 465, 469 (1926) (seizure of "vehicle[] used in unlawful transportation of liquor"); *Dobbins's Distillery v. United States*, 96 U.S. 395, 397 (1878) (seizure of "a distillery" and the items necessary to run it, which was illegal at the time); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 13 (1827) (seizure of pirates' vessel). In those cases, the government need not compensate owners prior to seizing their property because the property was considered dangerous and constituted criminal evidence, and their loss to the owner furthered punitive and remedial goals. *The Palmyra*, 25 U.S. at 15. Similar considerations would apply, for instance, if the government acquired property via a tax foreclosure—or if, say, Mr. Conn had barricaded himself inside his own house and later sought compensation for the assault to apprehend him.

Third, *Lech* erroneously assumed that actions taken pursuant to the police power are not for the "public use," as contemplated by the Fifth Amendment. *See Lech*, 791 F. App'x at 716–17. That cannot be reconciled with Supreme Court precedent stating, unequivocally, that even if a governmental act is "within the State's police power . . . **[i]t is a separate question** . . . whether an otherwise valid [exercise of the

police power] so frustrates property rights that compensation must be paid." *Loretto*, 458 U.S. at 425 (emphasis added).

The *Lech* court—just like every panel that has recognized a "police power" exception to the Just Compensation Clause[7]—failed to address *Loretto*, *Lucas*, *Pennsylvania Coal*, or any of the many cases in which the Supreme Court has squarely rejected such an exception. Likewise, the district court failed to acknowledge such binding precedent—or precedent from circuits that have actually heeded the Supreme Court. *See, Baker v. City of McKinney*, 84 F.4th 378, 385 (5th Cir. 2023); *Bojicic v. DeWine*, No. 21-4123, 2022 WL 3585636, at *8 (6th Cir. Aug. 22, 2022); *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021) ("That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme

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[7] The Seventh Circuit relied *solely* on the Federal Circuit's erroneous reading of *Bennis* to find that "actions . . . taken under the state's police power" are exempt from the Just Compensation Clause. *Johnson v. Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011). The Third Circuit (in an unpublished opinion) followed *Johnson*, again misinterpreting *Bennis*—without citing any of the Supreme Court's relevant Takings precedent. *Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018).

Court's jurisprudence."). This Court should not make that same mistake.

D. The Fifth Circuit is wrong: There is no "necessity" defense to just compensation claims.

Just a few weeks ago, a Fifth Circuit panel issued an opinion holding that "necessity" is a defense to Just Compensation claims, and that the defense precludes recovery when a SWAT team destroys property to apprehend a fugitive. *See Baker*, 84 F.4th at 385. In the present case, neither the government nor the district court below said anything about "necessity," so any such claim should be deemed waived for present purposes. Because we anticipate that the Defendants will rely on *Baker* in their opposition brief, however, we will address it here.

Baker was a case with similar facts to the present case, also litigated by the undersigned counsel: A fugitive had barricaded himself inside the home of an innocent third party, and a SWAT team eventually caused approximately $60,000 worth of damage when it stormed the house to apprehend him. *Id.* at 380. The district court held that this was a compensable taking under the Fifth Amendment and that the police power is not exempt from the Just Compensation Clause. *Id.* at 381–82. On appeal, the City renewed its "police power"

arguments, and the Fifth Circuit panel categorically rejected them. *Id.* at 383 ("The City invites our court to adopt a broad rule: because Baker's property was damaged or destroyed pursuant to 'the exercise of the City's police powers,' there has been no compensable taking under the Fifth Amendment. We decline.").

Then things got weird. Having rejected every argument that the appellant offered, the panel took it upon itself to conduct its own historical research, from which it concluded that "necessity" is a historically grounded defense to just compensation claims and that the defense applied on the facts of the case. *Id.* at 388.[8] Because the *Baker* panel did not have the benefit of any adversarial briefing about necessity or the early history of the Just Compensation Clause, it made major errors. The arguments below are *not* arguments that the Fifth Circuit rejected; they are arguments that the Fifth Circuit never considered. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) ("In our adversarial system of adjudication, we

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[8] This egregious violation of the party-presentation principle prompted us to file a rehearing petition, and the court immediately requested a response from the City (which has been filed). The petition remains pending as of filing, and the mandate has been stayed.

follow the principle of party presentation. Courts are thus entitled to decide a case based on the historical record compiled by the parties." (cleaned up)).

First, the *Baker* panel erroneously placed the burden on plaintiffs to *disprove* a historical exception to a specifically enumerated right. As explained above, this was contrary to the Supreme Court's decision in *Bruen*, which puts the burden on the government to establish exceptions to the plain text of the Bill of Rights. Second, it conflated a private defense against individual liability with a defense against governmental liability. In the process, it missed an incredible volume of material that directly undermined its conclusions. Third, even if the panel were correct to recognize a public necessity defense to the Just Compensation Clause, it would at most be *a defense*, which the government would bear the burden of affirmatively pleading and proving.

1. Public necessity is a defense against individual tort liability, not an exception to the Just Compensation Clause.

The *Baker* panel's fundamental error was confusing a private defense against individual liability with an exception to the Fifth Amendment's Just Compensation Clause. To be sure, necessity has a

long common-law history as a defense against the tort of trespass. *See* Restatement (Second) of Torts § 197 (private necessity); *id.* at § 196 (public necessity) ("One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."). But the strong weight of authority rejects it as a governmental immunity from a duty to pay compensation. That makes sense—the necessity defense to trespass asks whether an interference with property rights is lawful to begin with, not whether compensation is due from the public for an otherwise-lawful taking. *See, e.g., Dayton v. City of Asheville*, 115 S.E. 827, 829 (N.C. 1923) ("Public necessity may justify the taking, but cannot justify the taking without compensation."); *Platt v. City of Waterbury*, 45 A. 154, 162 (Conn. 1900) ("But, however great the necessity may be, it can have no effect on the right to compensation for property taken.").[9]

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[9] The distinction is underscored by the fact that, in cases of private necessity, the defendant is still liable for actual damages, though he cannot be held liable for punitive or nominal damages because the action itself was lawful. *See* Rest. 2d Torts § 197.

Cases from the nineteenth century confirm this understanding of the necessity defense. Indeed, one of the very cases that the *Baker* panel cited to support a necessity exception to Just Compensation actually says precisely the opposite. In 1837, a New York appellate court *affirmed* a decision holding that a plaintiff whose property was destroyed to stop a fire was entitled to governmental compensation. The court below had succinctly explained the distinction between public necessity (an individual defense) and Just Compensation (a public duty):

> **[T]he individual concerned in the taking or destroying of the property is not personally liable**. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defence of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; **and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle** (*Const. U. S. Art.* 5, of the Amendments).

City of New York v. Lord, 17 Wend. 285, 291 (N.Y. Sup. Ct.), *aff'd*, 18 Wend. 126 (N.Y. 1837). (emphases added).

Similar decisions abound. The Supreme Court of Georgia—also in a fire-destruction case—squarely held that public necessity is not an exception to Just Compensation:

> [I]n a case of **actual necessity**, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other **great public calamity**, the private property of an individual may be *lawfully* taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases, **while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss.**

Bishop v. Mayor & City Council of Macon, 7 Ga. 200, 202 (1849) (emphases added). So too in New Jersey. *Hale v. Lawrence*, 21 N.J.L. 714, 728–29 (1848). And in South Carolina. *See Jarvis v. Pinckney*, 21 S.C.L. (3 Hill) 123, 140 (1836) ("[A]s the danger to human life was great, it might be destroyed upon the principle that private property may be taken for the public use[, but] . . . it can only be done upon just compensation. Both the Federal and State constitutions agree[.]).

Even the U.S. Supreme Court, albeit in dicta, has twice explained that public necessity is not an exception to the Just Compensation Clause. *See United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871)

("[P]rivate rights, under such **extreme and imperious circumstances**, must give way for the time to the public good, but **the government must make full restitution for the sacrifice**." (emphases added)); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) ("Unquestionably . . . the government is bound to make full compensation to the owner; but the officer is not a trespasser."); *see also Grant v. United States*, 1 Ct. Cl. 41, 47 (1863) ("taking of private property for use or destruction, when the public exigency demands it, . . . is an exercise of the right of eminent domain").

The evidence is not limited to court decisions. Many founding era declarations of rights even explicitly clarified that necessity is *not* an exception to the principle of just compensation. The Northwest Ordinance of 1787 provided that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." The Massachusetts Constitution of 1780 spoke of compensated takings "whenever the public exigencies require" it. And the Vermont Constitution of 1777 speaks of compensated takings "when necessity requires it." These documents and others emphasize that

"public necessity," rather than an exemption to the Just Compensation Clause, is the quintessential justification for committing a compensable taking: If it's that important for the public to take your property, the idea goes, all the more reason for the public to pay for it.

Indeed, the Just Compensation Clause seems to have been squarely aimed at these kinds of emergencies. This is unsurprising, since the founders experienced perhaps the greatest "public necessity" one can imagine—a war for independence on home soil. St. George Tucker, the earliest commentator on the U.S. Constitution, wrote that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 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). John Jay had complained about such seizures in 1778. See John Jay, *A Freeholder, A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 The Founders' Constitution 312.

Vattel similarly explained that during wartime, when the military intentionally destroys private property, "[s]uch damages are to be made good to the individual, who should bear only his quota of the loss." Emer de Vattel, The Law of Nations, bk. III, ch. 15, § 232, at 617 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758)). Vattel was quite familiar to the Framers. In fact, George Washington famously borrowed a copy of *The Law of Nations* from the New York public library in 1789 and never returned it. (The library waived his late fees in 2010.) *See George Washington's Library Book Returned 221 Years Late*, Reuters (May 20, 2010), https://www.reuters.com/article/us-book-library-washington-idCATRE64J1ZV20100520.

We can trace the rule back even further. In 1606, Lord Coke wrote that, when "necessary [for] defence of the realm," the King's agents had the right to invade private property to dig for saltpeter (used to make gunpowder), just as they could "make bulwarks and trenches upon another's land." Nevertheless, "after the danger is over," the "King's servants must make the places as commodious to the owner as they were before" so that "the owner shall not have prejudice in his

inheritance." *The Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 1295 (K.B. 1606).

In the maritime context, the rule goes back even further—to Hammurabi. The "law of general average" has long held that when individuals are forced to sacrifice their property for the common good—for instance, by throwing cargo overboard during a storm—those who benefited from the sacrifice are required to share in the loss. *See, e.g.*, *Columbian Ins. Co. of Alexandria v. Ashby*, 38 U.S. (13 Pet.) 331, 336 (1839).

Going forward to more recent times, we still find no support for the Fifth Circuit's rule. As noted above, the most recent case in which a "necessity" exception to the Just Compensation Clause would have been relevant was *YMCA v. United States*, concerning a riot in the Panama Canal zone where U.S. troops occupied a building and fought off the rioters, and the building was subject to damage. *See YMCA v. United States*, 395 U.S. 85 (1969). Not a single member of the Court even mentioned the doctrine of necessity. All four opinions appeared to agree that, if the government *had not* been acting to protect the property at issue, it would have been liable for any damage its actions caused

More recent Supreme Court decisions are also irreconcilable with *Baker*. Under the Fifth Circuit's strange test, if the police destroy two houses to catch two fugitives, only one of whom was extremely dangerous, then only one property owner would be entitled to compensation. It wouldn't matter that the two property owners suffered the exact same loss. But as the Supreme Court has explained, "[i]t would make little sense to say that the second owner has suffered a taking while the first has not." *Lingle*, 544 U.S. at 543. The touchstone of Just Compensation is the burden on property rights, not the importance of the governmental objective. *Id.*

2. *Even if "public necessity" were a defense, the government would bear the burden of proving it.*

Even if the *Baker* panel were correct to find a "necessity" exception to the Just Compensation Clause, at most it would be an affirmative defense, which the government must plead and prove. As the Federal Circuit held, a "necessity defense is just what it says it is: a defense." *TrinCo Inv. Co v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013); *Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980) (same). Of course, the government here has pleaded and proven nothing–this case was dismissed under Rule 12—so even if this Court

were inclined to find that necessity is a defense to Just Compensation claims, the government would have to wait until summary judgment to press that argument.

It is not possible to conclude, as a matter of law, that apprehending a fugitive is automatically sufficient to establish a necessity defense. The Texas Supreme Court's decision in *Steele v. City of Houston* is directly on point with materially identical facts. There, the police destroyed an innocent person's house in order "to apprehend armed and dangerous [fugitives] who had taken refuge" inside. 603 S.W.2d at 792. Yet the court held that alone was insufficient to establish any necessity defense to Just Compensation. *Ibid.* It remanded and noted that at trial the City could "defend its actions by proof of a great public necessity," but "[m]ere convenience will not suffice." *Ibid.* So if there were such a thing as a "public necessity" exception to the Just Compensation Clause, it clearly would require more than a dangerous man barricaded inside a building.

The facts in this case (as pleaded in the complaint) make for an even weaker necessity defense than the facts in *Steele*. In this case, the police initially came to the Slaybaughs' house on January 23, 2022.

After Mrs. Slaybaugh exited the house, the police used a loudspeaker to request that her son surrender. She requested permission to enter the house, to convince him to come out, but the police would not permit it. After a few hours, the police gave up and left the house. ECF 1 at 3. They returned the next morning and set up roadblocks and a perimeter. Mrs. Slaybaugh again requested permission to enter the house to speak with her son, and the police again refused. Finally, the police stormed the house and caused at least $70,000 in damage.

If it were truly "necessary" to destroy the Slaybaughs' home, why did the police leave and return another day? Why not simply wait until the fugitive gave up and turned himself in? Why not turn off the utilities? Why not call his cell phone? Was he an imminent danger to anyone? Why not allow Mrs. Slaybaugh to speak to him? These are not rhetorical questions—they are kinds of questions that a factfinder must answer to assess a necessity defense (if such a defense did exist against

providing Just Compensation), and they are not suitable for resolution on a motion to dismiss—particularly when no defendant has raised it. [10]

None of this is meant to suggest that what the police did was *unlawful*. And, to be sure, blowing up a home by firing dozens of teargas cannisters into it was likely more convenient than waiting around for hours and hours in the cold. But as the *Steele* court held, "[m]ere convenience will not suffice" to establish public necessity. 603 S.W.2d at 792.

IV. The district court misread Tennessee precedent.

In a single paragraph, the district court dismissed the Slaybaughs' claim invoking the Tennessee Constitution—because, in its view, the Just Compensation component of the "Tennessee Constitution . . . offer[s] protections co-extensive with those of the Takings Clause in the Fifth Amendment." ECF 37 at 25 (citing *Phillips v. Montgomery County*, 442 S.W.3d 233, 244 (Tenn. 2014)). Here, too, the district court erred.

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[10] Another reason not to recognize an ahistorical "necessity" exception to the Just Compensation Clause is that it would require extensive litigation regarding police judgment and tactics.

The case on which the district court relied actually supports the Slaybaughs' position. In *Phillips*, the Tennessee Court asked whether "the Tennessee Constitution encompasses [protection against] regulatory takings" in addition to physical appropriations and nuisances. *Phillips*, 442 S.W.3d at 242. The court answered that it does, citing "the lack of any historical basis indicating that [the Tennessee Constitution] should be viewed as less protective of private property rights than the federal Takings Clause." *Id*. at 244. Put another way, protection under the Tennessee Constitution is *at least* coextensive with federal Takings precedent. *Phillips* therefore allows claims like the Slaybaughs to succeed, even if they wouldn't under federal precedent.[11] Tennessee caselaw may also be read as supporting takings claims under

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[11] To the extent *Phillips* notes, as an aside, that some state constitutions "requir[e] compensation for regulatory takings in more circumstances than would be required by federal precedents," *Phillips*, 442 S.W.3d at 240 n.10, that aside is totally irrelevant here. State "damagings" clauses were adopted primarily to constitutionalize the tort of nuisance and to provide compensation in circumstances where government action devalued land without directly invading it. *See* Maureen E. Brady, *The Damagings Clauses*, 104 Va. L. Rev. 341, 342, 377–78 (2018) (noting that federal precedents already provided for compensation for physical damage at the time that the "damagings clauses" were adopted).

the circumstances pleaded here. *See, e.g., Branham v. Metro. Gov't of Nashville-Davidson Cnty.,* No. M2015-00455-COA-R3-CV, 2016 WL 4566095, at *6 (Tenn. Ct. App. Aug. 30, 2016) (a taking occurs when "the government engage[s] in some purposeful or intentional act *that results in damage* to the plaintiff's property.") (emphasis added) (citing *Edwards v. Hallsdale-Powell Util. Dist.*, 115 S.W.3d 461, 466 (Tenn. 2003) ("In each of the cases in which this Court has found that a taking has occurred, the governmental defendant performed a purposeful or intentional act for the public good that resulted in damage to a plaintiff's property or property rights.")). One reason for the district court's error is that it did not have the benefit of complete merits briefing—as the district court acknowledged, the defendants below instead contested whether "plaintiffs may [] bring a claim directly under the Tennessee Constitution."[12] ECF 37 at. 25. *Cf. United States v.*

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[12] This issue is inconsequential because, regardless, Tennessee provides a statutory cause of action for inverse condemnation—which was precisely how the plaintiff in *Phillips* sought to access the court. *Phillips*, 442 S.W.3d at 236 (citing Tenn. Code Ann. § 29-16-123). And even otherwise, Tennessee courts have long held that the Tennessee Constitution itself provides a "right of compensation[, which] existed long before the statutory scheme of condemnation came into being; therefore

Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (noting the importance of "party presentation" in "our adversarial system of adjudication").

This Court, however, need not determine the merits of the Plaintiffs' Tennessee constitutional claim directly. Should this Court reverse upon finding that the Slaybaughs have plausibly stated a claim for relief under the federal Constitution, then it would follow that the Tennessee Constitution also provides no less than the same relief. *See State v. Randolph*, 74 S.W.3d 330, 334–35 (Tenn. 2002) ("Tennessee's Constitution . . . may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees," though it "may impose higher standards and stronger protections than those set by the federal constitution."). Otherwise, given a lack of "controlling precedent" in the Tennessee courts, and given Tennessee courts' entitlement to participate in the development of an unsettled area of constitutional law that has fractured federal courts, *cf.* Paul M. Bator, *The State Courts and*

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such right cannot be said to be created by any such statutes." *Duck River Elec. Membership Corp. v. City of Manchester*, 529 S.W.2d 202, 207 (Tenn. 1975) (quotation marks omitted).

Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 637 (1981) (arguing that state courts "should continue to play a substantial role in the elaboration of federal constitutional principles"), this Court should certify to the Tennessee Supreme Court the question of how the Tennessee Constitution views compensation for intentional or foreseeable destruction of property pursuant to the police power. *See* Tenn. Sup. Ct. R. 23, § 1.

CONCLUSION

The district court's decision dismissing the complaint should be reversed, and this case should be remanded for further proceedings.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7) because it contains 9,913 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

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/s/ Jeffrey Redfern

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I hereby certify that on this 17th day of November 2023, a copy of Appellant's Brief was sent via CM/ECF to all counsel of record.

/s/ Jeffrey Redfern

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31	Reply to Response to Motion to Dismiss by Town of Smyrna, Tennessee	227-232
32	Reply to Response to Motion to Dismiss by Rutherford County and Rutherford County Sheriff's Department	233-238
33	Notice of Supplemental Authority for 24 Response in Opposition to Motion to Dismiss (14, 21)	239-242
33-1	Exhibit 1- *Knight v. Metropolitan Government of Nashville & Davidson County*	243-260
36	Defendants' Joint Response to Supplemental Authority	273-278

37	Memorandum of Court Granting the Motion to Dismiss (14, 21)	279-303
38	Order Granting Motion to Dismiss (14, 21)	304
39	Notice of Appeal	305-306