No. _____

In The
Supreme Court of the United States

MOLLIE AND MICHAEL SLAYBAUGH,

Petitioners,

v.

RUTHERFORD COUNTY, TENNESSEE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A few weeks ago, this Court denied certiorari in *Baker* v. *City of McKinney*, 23-1363, a case about whether the Fifth Amendment's Takings Clause requires compensation when a SWAT team destroys an innocent person's property while pursuing a fugitive. The Fifth Circuit had held that there is an implicit exception to the Takings Clause when the government's actions were "objectively necessary."

In a statement respecting the denial of certiorari, Justice Sotomayor, joined by Justice Gorsuch, wrote that "[w]hether any such exception exists (and how the Takings Clause applies when the government destroys property pursuant to its police power) is an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention." *Baker*, No. 23-1363, 2024 WL 4874818, at *2 (U.S. Nov. 25, 2024).

The facts of the present case are materially identical to *Baker*, but the Sixth Circuit panel below denied compensation on different grounds: Because the Slaybaughs had no legal right to exclude the police, the panel reasoned, the destruction of their house was not actually a deprivation of their property rights. In support of this conclusion, the panel relied on dicta from *Cedar Point Nursery* v. *Hassid*, where this Court noted that lawful searches do not "appropriate" an owner's traditional right to exclude others from his or her property.

The question presented is: "Does a common law privilege to *access* property categorically absolve the government's duty of just compensation for property it physically *destroys*?"

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Mollie Slaybaugh and Michael Slaybaugh.

Respondents (defendants-appellees below) are Rutherford County, Tennessee, Rutherford County Sheriff's Department, and the Town of Smyrna, Tennessee.

RELATED PROCEEDINGS

Slaybaugh v. *Rutherford County, Tennessee*, 23-5765 (6th Cir.), judgment entered on September 3, 2024.

Slaybaugh v. *Rutherford County, Tennessee*, 3:23-cv-00057 (M.D. Tenn.), judgment entered on August 24, 2023.

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Mollie and Michael Slaybaugh petition for a writ of certiorari to review the judgment of the Sixth Circuit below.

OPINIONS BELOW

The opinion of the court of appeals, App. A, is reported at 114 F.4th 593. The district court's opinion granting the motion to dismiss, App. D, is reported at 688 F.Supp.3d 692.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2024. Timely filed motions for rehearing were denied on October 16, 2024. This petition was timely filed on January 14, 2025. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

STATEMENT

This case is the latest example of a growing, nationwide trend. Police officers, while lawfully pursuing fugitives, cause massive property damage. The government often refuses to pick up the tab, forcing random, unlucky individuals to bear the cost of public law enforcement activity. Petitioners Mollie and Michael Slaybaugh are two such unlucky individuals.

The Slaybaughs own a home in the town of Smyrna, Tennessee. On January 23, 2022, their adult son called Mollie and asked if he could come to visit for a few days, and she agreed. He arrived at the house later that same day. After a short conversation, Mollie left the house to do some errands. Michael was not home at the time.

Later that evening, just as she was about to go to bed, Mollie noticed two police cars parked outside, near her neighbor's house. Concerned for her neighbor, she went outside to see if everything was okay. When she opened the door, however, she was met by a police officer with a weapon drawn. Another officer pointed a flashlight at her and told her to step out of the house. She did as instructed and then noticed that dozens of police cars were parked outside. She then heard another officer, using a megaphone, tell her son to come out of the house.

Mollie asked if she could reenter the house to persuade her son to come out. The police said he was wanted for questioning regarding a homicide, and that she could not reenter. Her son did not leave the house, and eventually the police left, though they told Mollie she could not reenter the house. She spent the night at her daughter's house.

The next morning, Mollie returned to her house and saw that the police had also returned and set up a perimeter. She again asked if she could speak to her son, and the police said no. Eventually, the police assaulted the house. They broke down the door and launched dozens of tear gas cannisters at the house, smashing through windows and drywall, and

saturating the house with noxious chemicals. While they successfully effected the arrest, the damage totaled over $70,000.

Both the Town of Smyrna and Rutherford County refused to compensate the Slaybaughs for the damage (the police and sheriff's department were both involved in the assault), so the Slaybaughs filed suit in federal district court, alleging that their property had been taken without compensation, in violation of the Fifth Amendment. The Slaybaughs also brought related state law claims.

The district court dismissed the complaint on the ground that the damage was caused pursuant to the government's "police power," which the court said is categorically outside of the scope of the Fifth Amendment. App. 60a (following *Lech v. Jackson*, 791 F. App'x 711 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020)).

The Slaybaughs appealed, and the Sixth Circuit affirmed on different grounds. The panel held that the "police power" is not categorically exempt from the Just Compensation Clause, splitting with the Third, Seventh, Tenth, and Federal Circuits. App. 8a. See Petition for Writ of Certiorari, *Baker* v. *City of McKinney*, No. 23-1363, 2024 WL 3293358, at *7–13 (U.S. June 28, 2024) (explaining circuit split in this area). The panel also declined to follow the reasoning of the Fifth Circuit's recent decision in *Baker v. City of McKinney*—a materially identical case where the court held that the Takings Clause does not apply if the government is acting pursuant to "public necessity." See App. 22a. The reason is because, as the

Sixth Circuit panel noted, the Fifth Circuit's conclusion is in tension with the historical record. App. 21a.

The panel instead held that the destruction of the Slaybaughs' home did not deprive them of any property interest at all. "If the Slaybaughs had no right to exclude law enforcement's privileged actions in the first place, police cannot be said to have 'taken' any of their legally cognizable property interests. Thus, if the officers' actions were covered by th[e common law "search-and-arrest"] privilege, the Slaybaughs cannot recover for any damage to their home resulting from officers' lawful conduct." App. 11a.

The panel cited just one case for the proposition that common-law trespass defenses also defeat takings claims: This Court's recent decision in *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 152, 160–61 (2021), where a majority of this Court noted in dicta that property owners' right to exclude is not "appropriated" when government agents conduct lawful searches. App. 10a.

The panel below discussed at some length the history of the common law "search and arrest" privilege before concluding that the officers' conduct was privileged. App. 12a–19a. (The Slaybaughs did not and do not dispute that the officers themselves are protected from individual liability by the privilege; the question was whether a private tort immunity can be imputed to the government for purposes of takings claims—which far from requiring an element of fault or illegality, presume the opposite.)

The Slaybaughs petitioned for rehearing en banc, emphasizing that nothing in *Cedar Point* can be read to apply to government authorized intrusions that literally destroy private property. Rehearing was denied on October 16, 2024. App. B. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

As Justices Sotomayor and Gorsuch recognized a few weeks ago, whether there is a "public necessity" exception to the Takings Clause "is an important and complex question that would benefit from further percolation." *Baker*, 2024 WL 4874818, at *2. The decision below acknowledges that *Baker* may have been incorrect, but it gets to the same result via a different route: If property owners have no right to stop the police from destroying their property ex ante, then that destruction does not actually deprive them of any property rights protected by the Fifth Amendment.

The panel's holding hinges entirely on a few lines of dicta from this Court's decision in *Cedar Point*, which invalidated a grant of access to property while acknowledging that governmental officers have certain common-law privileges to enter property on occasion. However, a privilege to enter property does not categorically absolve government of its duty to pay for property it physically destroys pursuant to an invasion—as all nine justices in *Cedar Point* acknowledged, and as courts across the country (including this one) have acknowledged for centuries.

The issue remains pressing, for all the reasons noted in the *Baker* petition and the supporting amicus

briefs. Although this case does present a potential vehicle to decide the broader question in *Baker*, this Court should consider a narrow summary reversal so that the Sixth Circuit can squarely address *Baker*'s reasoning.

I. *Cedar Point*—a case about the right to exclude—cannot reasonably be read to apply to government-authorized property destruction.

Over thirty years ago, this Court held that a takings claim is not defeated merely because the government has asserted a weighty public interest involved. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992). At the same time, the Court explained in dicta that the Takings Clause is not implicated by government regulations that merely "duplicate the result that could have been achieved in the courts…under the State's law of private nuisance." *Id.* at 1029. In other words, certain limitations on the use of private property "inhere in the title itself," and a regulation does not effect a taking when it simply makes "explicit" restrictions that were previously implicit. *Id.* at 1029–30. That observation is unremarkable: It is obviously not a taking merely to prohibit a common-law nuisance. See *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887) (government need not "compensate such 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").

Although *Lucas*'s holding was a significant victory for property owners, its dicta discussing a

"background principles" exception to the Takings Cause has taken on a life of its own. It is "an exception that has become a categorical governmental defense to takings claims" and "has swallowed the categorical per se takings rule Lucas established." Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 Fla. L. Rev. 1165, 1165 (2020),

https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1452&context=flr. The problem is that *Lucas* did not foresee the infinite creativity that government lawyers and lower courts would deploy in identifying novel "background principles." See*, e.g.*, *Esplanade Properties, LLC* v. *City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (upholding the denial of a shoreline development permit under the "public trust doctrine"); *Stevens* v. *City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (determining that the public possessed a "customary" right to access private beaches in Oregon), *cert. denied*, 510 U.S. 1207 (1994).

Now, the very same phenomenon is occurring with lower courts' treatment of dicta from *Cedar Point*. *Cedar Point* involved specifically the right to exclude, a right secured by the Takings Clause. 594 U.S. at 149 ("The right to exclude is 'one of the most treasured' rights of property ownership."). This Court held that California violated farmers' right to exclude, by requiring that they "allow union organizers onto their property for up to three hours per day, 120 days per year." *Id*. at 143. At the same time, this Court clarified in dicta that its holding would not prevent officers from entering property pursuant to a common-law privilege (including necessity and the search-and-

arrest privilege), as those isolated entries do not deprive owners of any right to exclude. *Id.* at 160.

The Sixth Circuit seized on *Cedar Point*'s dicta to deny the Slaybaughs compensation—reasoning that, because they had no right to exclude law enforcement, the destruction of their home therefore does not represent a loss of property. App. 9a–10a. That, however, is a misreading of *Cedar Point*. Moreover, *Cedar Point* aside, the Sixth Circuit cannot be correct: The search-and-arrest privilege merely means that the destruction of the Slaybaughs' home was lawful, *i.e.*, that the officers were not trespassers. It does not mean that the government is categorically exempt from paying for the damage.

As noted above, *Cedar Point* concerned a grant of access involving no physical property damage. Although this Court was sharply divided on that question, all nine justices agreed that physical damage is akin to physical appropriation (and therefore a *per se* taking)—separately from any right to exclude government from the property. *See United States* v. *Causby*, 328 U.S. 256 (1946) (damage to chicken farm from overhead governmental aircraft constituted a taking, notwithstanding that government has the privilege to fly over property); cf. *Cedar Point*, 594 U.S. at 153 (citing *Causby* approvingly); *id.* at 172 (Breyer, J., dissenting) (acknowledging that *Causby* establishes a *per se* takings approach for "economic damage" suffered pursuant to a physical invasion). See also *Pumpelly* v. *Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871) (recognizing that the Fifth Amendment requires government to pay just compensation for otherwise-lawful destruction). Thus, *Cedar Point*'s dicta

cannot support the Sixth Circuit's baffling conclusion that people have not been deprived of any property when government agents literally destroy their homes.

Even if the *Cedar Point* dicta were unclear, however, the Sixth Circuit's holding is at odds with centuries of takings precedent. As this Court has explained, the fact that government is privileged to take property—*i.e.*, that the taking itself was lawful—does not absolve government of its duty of just compensation. In any case, the act that gave rise to the taking might be "otherwise valid"; nevertheless, "[i]t is a separate question" whether just compensation is due. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Here, the search-and-arrest privilege establishes only that the destructive act itself was lawful. The search-and-arrest privilege, like the necessity privilege, is an individual defense against tort liability; it does not absolve the government of takings liability. See*, e.g., Mitchell* v. *Harmony*, 54 U.S. 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*"); *Bishop v. Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849) ("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."); *City of New York* v. *Lord*, 17 Wend. 285, 291 (N.Y.

Sup. Ct.) ([T]he individual concerned in the taking or destroying of the property is not personally liable…and yet…the sufferers would be entitled to compensation from the national government within the constitutional principle"), *affirmed*, 18 Wend. 126 (N.Y. 1837).

History shows that the necessity privilege is not a defense to takings liability, and the panel below conceded as much. App. 21a ("We acknowledge that some historical evidence suggests that, in certain circumstances, persons could be compensated for the taking of property out of necessity."). Yet the panel did not explain why the rule should be any different for the "search-and-arrest" privilege—and, indeed, there is no principled basis for distinguishing between the two privileges. Even the *Cedar Point* dicta treated the search-and-arrest and necessity privileges interchangeably, 594 U.S. at 160, which is all the more reason not to read that dicta as applying to physical property damage.

In any event, the lack of historical precedent exploring the search-and-arrest privilege in the context of the Just Compensation Clause is unsurprising. Until quite recently, property damage caused incident to a search or arrest was likely to be uncommon and de minimis. In the rare situation where someone refused to open a door to an agent with a warrant, it is doubtful that a splintered door jamb would lead to litigation. See, *e.g., Sandford* v. *Nichols*, 13 Mass. 286, 289-90 (1816) ("[No] violence or injury was done but what was necessary to obtain possession of the goods, [so] it is probable that very small damages will be recovered upon another trial; the parties will, therefore,

judge, whether it is worth their while to proceed further.").

Requiring compensation for lawfully caused physical damage is also consistent with how other common law privileges against trespass function. For example, in the famous case of *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 459 (1910), a ship captain moored his boat on a private dock during a severe storm. He likely saved his ship by doing so, but as a result the dock was damaged. The captain's actions were justified under the doctrine of private necessity, but the Minnesota Supreme Court held that the owners of the ship should still compensate the owners of the dock for the actual damages sustained:

> Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Id. at 460. If the ship had caused no damage, its owners would have owed nothing because the storm provided them with a defense against trespass—nominative or punitive damages would not have been available. But having caused damage for their own benefit, the lawfulness of their actions does not excuse them from making the dock owner whole. *See* Rest. 2d Torts § 195 (private necessity).

At bottom, the Sixth Circuit's categorical exception to the Takings Clause cannot be reconciled with the very purpose of the Clause, which "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). Whether a house is destroyed by police officers apprehending a suspect or by firefighters combating a nearby blaze, these are public burdens that present precisely the same property loss on innocent, unlucky individuals: a demolished house. "It would make little sense to say that the second owner has suffered a taking while the first has not." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

II. This Court should consider summary reversal.

This case presents another possible opportunity to consider the serious questions raised in the Baker petition and flagged by Justice Sotomayor's statement regarding denial. Petitioner is mindful, however, that the statement expressed a desire for more percolation in the lower courts prior to a full consideration of the question presented, and that the court was aware of the decision below.

One way to get more percolation on these issues would be to issue a narrow summary reversal in this case. By granting the petition and explaining that *Cedar Point*'s dicta concerns only the right to exclude–not physical damage–this Court could give the Sixth Circuit another opportunity to squarely confront the "important and complex question" raised by the *Baker*

petition. This Court has, in the past, granted summary reversals in similar situations where the courts of appeals have simply misunderstood the import of this Court's decisions. See, *e.g., Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) ("Although we find its disposition to have been in error, we fully appreciate that…it was caused in large part by imprecision in our prior cases."); *Williams* v. *Johnson*, 573 U.S. 773 (2014). Additionally, this Court has issued decisions in Takings Clause cases that reject one specific rationale for denying compensation, while leaving the door open on remand for the other arguments. See *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38–40 (2012) ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.* * * [P]reserved issues remain open for consideration on remand.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: January 14, 2025

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