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*

(Filed Oct. 29, 2019)

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;

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

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

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 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.*

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[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

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. 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

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held that it cannot, in reviewing a ruling on summary judgment, consider evidence not before the district court.").

[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.*

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 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 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

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

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 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

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[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.

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]

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[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").

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 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

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

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").

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 16-cv-01956-PAB-MJW

LEO LECH,
ALFONSIA LECH, and
JOHN LECH,

Plaintiffs,

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,
and
THE CITY OF GREENWOOD VILLAGE,

Defendants.

ORDER

(Filed Jan. 8, 2018)

This matter is before the Court on Defendants' Motion and Brief in Support of Summary Judgment [Docket No. 47] and Plaintiffs' Motion for Partial Summary Judgment on the Takings Clause and Due Process Issues [Docket No. 48]. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

I. BACKGROUND

The following facts are undisputed unless noted otherwise. In 2013, plaintiffs Leo and Alfonsina Lech purchased the property at 4219 South Alton Street in Greenwood Village, Colorado, both as an investment and as a place for their son, plaintiff John Lech, to live. Docket No. 47 at 2, ¶ 1; Docket No. 54 at 1, ¶ 1. The home was a bi-level home that backed directly to Interstate 225. Docket No. 47 at 2, ¶¶ 2-3. At the time of the events giving rise to this lawsuit, John Lech lived at the property with his girlfriend, Anna Mumzhiyan, and her son. *Id.*, ¶ 4.

The events at issue in this case occurred on June 3-4, 2015. Docket No. 47 at 1; Docket No. 48 at 1. In the afternoon of June 3, 2015, an officer with the Aurora Police Department was dispatched to a local Walmart to assist in a shoplifting investigation. Docket No. 47

at 5-6, ¶ 17.[1] However, after the officer confronted the shoplifting suspect and attempted to escort him back to the store's loss prevention office, the suspect fled the scene in a vehicle at high speed. *Id.*; Docket No. 47-9 at 2.[2] The officer found the vehicle abandoned, Docket No. 47 at 6, ¶ 18, and later observed the suspect cross the northbound lanes of Interstate 225 on foot. *Id.* A civilian informed the officer that she saw the suspect with a black semi-automatic pistol. *Id.*

The Greenwood Village Police Department ("GVPD") was notified through dispatch that the Aurora Police Department was pursuing an armed suspect – later identified as Robert Jonathan Seacat – on foot near the northern border of Greenwood Village. *Id.*, ¶ 19. At approximately 1:54 p.m., GVPD responded to a burglar alarm at plaintiffs' residence. *Id.*, ¶ 20. GVPD learned that a nine-year-old boy – Anna Mumzhiyan's son, D.Z. – was present in the home when Seacat entered, though he was able to leave the residence unharmed. *Id.*; Docket No. 4 at 3, ¶ 10. Officers positioned their vehicles in the driveway to block any attempt by Seacat to drive a vehicle out of the garage. Docket No. 47 at 6-7, ¶ 21. As one officer was getting out of his car, a bullet fired from inside the garage

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[1] Aurora is a municipality located near Greenwood Village.

[2] Defendants state that, in fleeing the scene, the suspect attempted to run the officer over with his vehicle. Docket No. 47 at 5-6, ¶ 17. Plaintiffs assert that this is a legal conclusion that has yet to be proven in court. Docket No. 54 at 2, ¶ 17.

went through the garage door and struck the police car's hood. *Id.*[3]

From the outset, GVPD deemed the incident a "high-risk, barricade suspect situation." Docket No. 47 at 7, ¶ 22. Under the GVPD manual, a "barricade situation" is defined as a "standoff created by an armed or potentially armed suspect in any location . . . who is refusing to comply with police demands for surrender." *Id.* at 4, ¶ 11. The manual defines a high-risk situation as "[t]he arrest or apprehension of an armed or potentially armed subject where the likelihood of armed resistence is high." *Id.*

Shortly after shots were fired through the garage door, Commander Dustin Varney of the GVPD arrived on scene and assumed the role of incident commander. *Id.* at 7, ¶ 23. As incident commander, Commander Varney was directly in charge of deploying resources and managing events during the incident. *Id.* Commander Varney secured the scene, set up tactical command posts, and activated GVPD's Emergency Response and Crisis Negotiation Teams. *Id.*, ¶ 24. He also shut off the gas and water to the home, restricted overhead airspace, and sent a reverse 911 call out to residents in the neighborhood informing them of safety protocols. *Id.*

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[3] Although plaintiffs do not deny that a bullet struck the car's hood, they contend that defendants' statement that Mr. Seacat "fired at the officers" constitutes speculation about Mr. Seacat's state of mind. Docket No. 54 at 3, ¶ 21.

For approximately four and a half hours, GVPD negotiators tried to get Seacat to surrender. *Id.* at 8, ¶ 30; Docket No. 54 at 4, ¶ 31; Docket No. 47-10 at 1. GVPD negotiated with Seacat via his cellphone and, at Seacat's request, brought Seacat's sister to the scene. Docket No. 47 at 8, ¶¶ 29-30. GVPD also played messages from Seacat's family members over a loudspeaker. *Id.* Despite these efforts, Seacat did not surrender. *Id.*

At approximately 7:11 p.m., when there had been no sightings of Seacat for several hours, Commander Varney authorized the firing of two 40 mm rounds of cold gas munitions through a window for the purpose of getting Seacat out of the residence. *Id.*, ¶ 31. This tactic did not elicit a response. *Id.*

About the same time, Commander Varney authorized officers to shut off Seacat's cell phone and to deliver a "throw" phone and a robot into the home. *Id.*, ¶ 32; Docket No. 47-10 at 1-2. GVPD believed at this point that Seacat was barricaded on the top floor of the residence. Docket No. 47 at 9, ¶ 33. To enable delivery of a robot and the throw phone, officers breached the front and rear doors of the residence using a BearCat armored vehicle. *Id.* at 9, ¶¶ 34-35; Docket No. 47-10 at 2. Over three hours later, at approximately 10:40 p.m., a tactical team for GVPD entered the residence to apprehend Seacat. Docket No. 47 at 9-10, ¶ 36. As the officers attempted to reach the second floor, Seacat fired

at them several times. *Id.*[4] The officers were ordered to leave the home. *Id.*

Commander Varney authorized the deployment of additional gas munitions at various times throughout the incident in an attempt to get Seacat out of the home. *Id.*, ¶ 37. These efforts were unsuccessful. *Id.*

In the early morning hours of June 4, 2015, a throw phone was delivered to the second floor of the home where officers believed Seacat was hiding. *Id.*, ¶ 38. Despite calls to the phone and officers' announcements via loudspeaker, Seacat did not pick up the phone. *Id.* Seacat's personal cell phone was turned back on at approximately 4:05 a.m., but negotiators were also unable to reach Seacat on his cell phone. *Id.*

At approximately 5:14 a.m., Commander Varney authorized the use of another EOD charge on the east side of the home for the purpose of locating Seacat and limiting his movements inside the home. *Id.*, ¶ 39. Officers also continued their negotiation efforts and deployed additional gas munitions in an effort to induce Seacat to exit the residence. *Id.* at 11, ¶ 40. These efforts failed. *Id.*

Due to law enforcement's inability to communicate with Seacat or force him out of the residence with the gas munitions, Commander Varney authorized the use

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[4] Plaintiffs object to this statement to the extent it attributes a particular state of mind or intent to Seacat. Docket No. 54 at 4, ¶ 36. However, there appears to be no dispute that Seacat discharged his weapon in the direction of the police officers and in response to their presence.

of the BearCat to open up holes in the back of the home. *Id.*, ¶ 41. Commander Varney instructed the officers to "take as much of the building as needed without making the roof fall in." Docket No. 47-4 at 20, 50:12-21; Docket No. 47-16 at 6; Docket No. 54-3 at 2, 103:4-13 (Varney deposition). Chief John Jackson, the Chief of Police for GVPD at the time of the incident, testified that he and Commander Varney discussed this instruction and, specifically, the need to use destructive tactics "for a purpose rather than simply taking apart the house." *Id.* at 20-21, 50:25-51:10; Docket No. 53 at 6, ¶ 2 (admitting that Chief Jackson was the Chief of Police at the time of the incident). It is undisputed that the purpose of opening up holes in the side of the home was threefold: (1) to create sightlines into the home for the purpose of enabling officers to locate Seacat; (2) to make Seacat feel more exposed; and (3) to create gun ports so snipers could shoot into the residence from a distance. Docket No. 47 at 11, ¶¶ 41-42.[5]

After officers had punctured holes in the side of the home, Commander Varney sent a tactical team into the residence. *Id.*, ¶ 43. The tactical team succeeded in disarming Seacat and taking him into custody, thereby ending the incident after approximately nineteen hours. *Id.*

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[5] In their motion to strike, plaintiffs object to defendants' assertion that the BearCat was used to "negate [Seacat's] ability to ambush officers" on the ground that it is not supported by the record. *See* Docket No. 80 at 10. The Court need not decide this issue, however, because it is immaterial to the Court's resolution of the parties' summary judgment motions.

As a result of the police actions used during the standoff, plaintiffs' home was rendered uninhabitable. Docket No. 48 at 3, ¶ 11. Plaintiffs ultimately demolished the home and built a new one in its place. Docket No. 47 at 14, ¶¶ 60-61. Greenwood Village offered plaintiffs $5,000 to help with temporary living expenses, but it denied any liability for the incident and declined to provide further compensation. Docket No. 48 at 3, ¶ 13; Docket No. 53 at 7, ¶ 10.

Plaintiffs filed this lawsuit in the District Court for Arapahoe County, Colorado on June 3, 2016. Docket No. 1-3 at 1. Plaintiffs' complaint asserts the following claims against Greenwood Village and members of the Greenwood Village Police Department in their individual and official capacities: (1) taking without just compensation in violation of the U.S. and Colorado constitutions; (2) denial of plaintiffs' due process rights under the U.S. and Colorado constitutions: (3) trespass; (4) negligence; (5) negligent infliction of emotional distress; and (6) intentional infliction of emotional distress. *See* Docket No. 4. Defendants removed the case to federal court on August 1, 2016. Docket No. 1. On July 10, 2017, defendants moved for summary judgment on all claims, Docket No. 47, and plaintiffs moved for partial summary judgment on their takings and due process claims. Docket No. 48.

II. LEGAL STANDARD

Summary judgment is warranted under Federal Rule of Civil Procedure 56 when the "movant shows

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-50 (1986). A disputed fact is "material" if under the relevant substantive law it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc*., 259 F.3d 1226, 1231-32 (10th Cir. 2001). Only disputes over material facts can create a genuine issue for trial and preclude summary judgment. *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). An issue is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (internal quotation marks omitted) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works of Colo., Inc. v. City & Cty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994). The nonmoving party may not rest solely on the allegations in the pleadings, but instead must designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotation

marks omitted). "To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Bausman*, 252 F.3d at 1115. When considering a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Id.*

III. ANALYSIS

Defendants move for summary judgment on all claims. Plaintiffs move for summary judgment on their takings and due process claims.

A. Ripeness of Federal Takings and Due Process Claims

Defendants argue that plaintiffs' claims under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments are not ripe for review because plaintiffs have failed to exhaust state procedures for obtaining just compensation. Docket No. 47 at 16-18.

Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), if a state provides adequate procedures for obtaining just compensation, a property owner must utilize those procedures before bringing a claim under the Takings Clause of the Fifth Amendment. *Id.*

at 194-95.[6] As the Tenth Circuit has recognized, "the State of Colorado has provided a procedure for obtaining compensation for inverse condemnation." *SK Finance SA v. La Plata Cty., Bd. of Cty. Commis*, 126 F.3d 1272, 1276 (10th Cir. 1997) (citing Colo. Rev. Stat. § 38-1-101 *et seq.*).[7] The failure to utilize that procedure

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[6] Plaintiffs argue that *Williamson County* is inapposite because it involved a regulatory taking. *See* Docket No. 54 at 8. In contrast to an "actual" taking, or a "direct government appropriation or physical invasion of private property," a regulatory taking occurs when "government regulation of private property . . . [is] so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Although this is an important distinction, the Supreme Court's determination that a plaintiff must exhaust state compensation procedures before bringing a federal takings claim is predicated on the language of the Takings Clause itself, which encompasses both physical and regulatory takings. *See Williamson Cty.*, 473 U.S. at 194 (noting that "[t]he Fifth Amendment does not proscribe the taking of property," but only "taking without just compensation"); *Lingle*, 544 U.S. at 537 (explaining that both physical and regulatory takings are compensable under the Fifth Amendment). To the extent plaintiffs assert that the Supreme Court's ripeness holding was based on the developer's failure in *Williamson County* to obtain a final decision regarding the effect of a zoning ordinance, the Court notes that *Williamson County* set forth two separate ripeness requirements: (1) "that the government entity charged with implementing the [challenged] regulations has reached a final decision regarding the application of the regulations to the property at issue"; and (2) that the plaintiff has "sought just compensation through the available state procedures and been denied relief." *Schanzenbach v. Town of LaBarge*, 706 F.3d 1277, 1281-82 (10th Cir. 2013); *see also Williamson Cty.*, 473 U.S. at 186-95. Although both requirements served as the basis for the Supreme Court's holding in *Williamson County*, only the second is at issue in this case.

[7] Colo. Rev. Stat. § 38-1-101 prohibits takings without just compensation and provides that, "[i]n all cases in which

thus renders a federal takings claim unripe for review. *See id.* (federal takings claim unripe because plaintiff had not availed itself of Colorado's statutory procedure for obtaining just compensation).

The requirement that a property owner exhaust state compensation procedures before seeking redress under federal law has also been applied to due process claims that assert "the same loss upon which the . . . takings claim is based." *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of Cty. Commis of El Paso Cty.*, 972 F.2d 309, 311 (10th Cir. 1992). In such circumstances, courts in this circuit have "required the plaintiff to utilize the remedies applicable to the takings claim." *Id.*; *see also Miller v. Campbell Cty.*, 945 F.2d 348, 352 (10th Cir. 1991) (explaining that, when "factual situation [] falls squarely within" Takings Clause, "[i]t is appropriate . . . to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause"). Accordingly, the failure to bring an inverse condemnation action in state court renders the due process claim "likewise not ripe because it is in essence based on the same deprivation." *Rocky Mountain Materials & Asphalt, Inc.*, 972 F.2d at 311.

Since its decision in *Williamson County*, however, the Supreme Court has clarified that the state compensation requirement is based on prudential rather than

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compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders . . . or by a jury when required by the owner of the property. . . ."

jurisdictional concerns. *See Horne v. Dep't of Agric.*, 569 U.S. 513, 525-26 (2013). Moreover, *Williamson County* "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 346 (2005). Relying on these two propositions, courts have held that a defendant waives the *Williamson County* state compensation requirement by removing a case to federal court when the plaintiff's original state court action asserted both state and federal claims for inverse condemnation. *See*, *e.g.*, *Lilly Investments v. City of Rochester*, 674 F. App'x 523, 530-31 (6th Cir. Jan. 5, 2017) (unpublished); *Sherman v. Town of Chester*, 752 F.3d 554, 563-64 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544-47 (4th Cir. 2013); *Race v. Bd. of Cty. Commis of the Cty. of Lake, Colo.*, No. 15-cv-1761-WJM-KLM, 2016 WL 1182791, at *3-4 (D. Colo. Mar. 28, 2016); *River N. Props., LLC v. City & Cty. of Denver*, No. 13-cv-01410-CMA-CBS, 2014 WL 1247813, at *2-9 (D. Colo. Mar. 26, 2014); *Merrill v. Summit Cty.*, 2009 WL 530569, at *3 (D. Utah Mar. 2, 2009). As the Fourth Circuit has explained, application of the waiver doctrine in these circumstances prevents a state or political subdivision from "manipulat[ing] litigation to deny a plaintiff a forum for his claim." *Sansotta*, 724 F.3d at 545.[8]

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[8] At least one court has expressed skepticism about this justification, noting that dismissal on ripeness grounds is not an

The Court finds this reasoning persuasive. Plaintiffs in this case did exactly what they were permitted to do by filing both their state and federal takings claims in state court. *See San Remo Hotel*, 545 U.S. at 346. Because state courts – like federal courts – adhere to the *Williamson County* requirement and adjudicate a plaintiff's state inverse condemnation claims before reaching the merits of any companion federal claims, dismissal of the federal claims following removal would "put[ ] the case in effectively the same position" as if the case had remained in state court. *Race*, 2016 WL 1182791, at *3; *see also Claassen v. City & Cty. of Denver*, 30 P.3d 710, 715 (Colo. App. 2000) (stating that, under *Williamson County*, "the Fifth Amendment claims cannot be ripe for judicial review until the companion inverse condemnation claims are resolved"). The Court agrees that the only thing to be achieved by such a maneuver is delay. *See id.* Accordingly, the Court joins other courts in this district in holding that defendants waived the *Williamson County* compensation requirement by removing this case to federal court. Plaintiffs' claims are therefore ripe for review.

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adjudication on the merits and thus does not preclude a plaintiff from bringing his federal claims at a later date. *See Race*, 2016 WL 1182791, at *2. Nevertheless, that court recognized that a rule waiving the *Williamson County* compensation requirement when a defendant removes a case to federal court "discourage[s] a procedural maneuver that adds nothing to the dispute but delay." *Id.* at *3.

B. State and Federal Takings Claims

Defendants argue that plaintiffs' takings claims under the U.S. and Colorado constitutions fail as a matter of law because defendants were authorized, pursuant to their police powers, to damage plaintiffs' property without triggering the requirement of just compensation. Docket No. 47 at 23-26.[9]

The Takings Clause of the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, Article II, § 15 of the Colorado Constitution provides that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." Colo. const.

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[9] Defendants claim that because Article II, § 15 of the Colorado Constitution affords broader protections than the federal Takings Clause, plaintiffs' inability to survive summary judgment on the state claim requires dismissal of the federal claim. Docket No. 47 at 17. The Court agrees that the two claims can be considered together. First, aside from the "damages" clause of Article II, §15 of the Colorado Constitution, which "only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land," the Colorado Supreme Court has interpreted that section "as consistent with the federal [takings] clause." *Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Commis*, 38 P.3d 59, 63-64 (Colo. 2001). Second, neither the Colorado courts applying the Colorado Constitution nor the courts in this circuit applying the federal constitution have addressed the precise issue presented in this case – whether damage to property caused by law enforcement's efforts to apprehend a suspect barricaded inside an innocent third party's home constitutes a taking without just compensation.

art. II, § 15. These provisions are "designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Lingle*, 544 U.S. at 537 (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987)). At the core of the compensation requirement is the principle that government should not be permitted to "forc[e] 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); *Bd. of Cty. Commis of Saguache Cty. v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984).

However, the prohibition against uncompensated governmental interference with private property has certain limitations. The Takings Clause is concerned with the government's power of eminent domain. Where the government acquires private property by virtue of some other authority, just compensation is not required. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996). Consistent with this limitation, cases applying both state and federal takings clauses have historically distinguished between eminent domain authority, which permits the taking of private property for public use, and the police power, which allows states to regulate private property for the protection of public health, safety, and welfare. *See*, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (distinguishing between eminent domain and police powers and stating, in regard to the latter, that "[a] prohibition simply upon the

use of property for purposes that are declared . . . to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); *City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 766-67 (Colo. 1992) (noting that "[p]olice 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 just compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged, or destroyed"). While exercise of the eminent domain power triggers the requirement of just compensation, exercise of the police power is noncompensable. *See State Dep't of Highways, Div. of Highways v. Davis*, 626 P.2d 661, 667 (Colo. 1981) (noting that a restriction imposed under the police power is a loss without an injury). "Like the state, municipalities have broad police powers. . . ." *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 325 P.3d 1032, 1038 (Colo. 2014).

Defendants in this case argue that they were acting pursuant to their police powers when they damaged plaintiffs' home. Docket No. 47 at 25. Specifically, they contend that Seacat posed a serious and ongoing threat and that the actions defendants took in apprehending him were necessary to protect the "safety, morals, health and general welfare of the public." *Id.* Plaintiffs respond that there is no "public safety" or emergency exception to the U.S. or Colorado constitutions. Docket No. 48 at 7; Docket No. 54 at 6, 10. In

addition, they assert that the distinction between a taking requiring just compensation and the exercise of a state's police powers is not a matter of settled law. Docket No. 54 at 12.

Courts in this circuit applying either Colorado law or federal law have not considered whether damage sustained to an innocent third party's home as a result of police efforts to apprehend a suspect gives rise to a compensable taking under the Colorado or U.S. constitutions.[10] However, a majority of courts that have considered whether the just compensation requirement applies to property damage caused by police officers in the performance of their duties have concluded that it does not. In an analogous case, the California Supreme Court held that property damage caused by law enforcement's efforts to apprehend a suspect barricaded inside a store did not give rise to an inverse condemnation action under the California Constitution. *Customer Co. v. City of Sacramento*, 895 P.2d 900, 904-05 (Cal. 1995).[11] The court reasoned that the just compensation requirement had never "been applied to require a public entity to compensate a property owner for property damage resulting from the efforts of law

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[10] The Court notes that the parties' factual disputes, to the extent they exist, have no bearing on this question. Plaintiffs contend that the destruction of their property constituted a taking regardless of whether defendants' actions were reasonable under the circumstances. *See* Docket No. 48 at 5.

[11] Article I, Section 19(a) of the California Constitution provides that "[p]rivate property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner."

enforcement officers to enforce the criminal laws." *Id.* at 906. Instead, claims for property damage caused by public employees in the performance of their duties had generally been understood as arising in tort. *Id.* at 909.

The California Supreme Court also relied on the so-called "emergency exception" – "a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause" – to support its conclusion that the property damage alleged in the case was noncompensable under California's takings clause. *Id.* at 909. The emergency exception has historically been applied to deny compensation where property is destroyed to avert a public emergency, such as a fire, *see*, *e.g.*, *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879), or the advance of enemy troops, *see*, *e.g.*, *United States v. Caltex, Inc.*, 344 U.S. 149 (1952). The court concluded that the case fell within the scope of this exception, given that "law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property." *Customer Co.*, 895 P.2d at 910-11.

Cases decided before and after *Customer Co.* have similarly concluded that property damage caused by law enforcement officials in the performance of their duties does not give rise to a claim for just compensation. *See*, *e.g.*, *Johnson v. Manitowoc* Cty., 635 F.3d 331, 336 (7th Cir. 2011) (holding that property damage

resulting from officers' execution of search warrant did not give rise to claim for just compensation because officers were acting pursuant to police powers); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (holding that seizure and retention of innocent third party's property for use in criminal prosecution did not give rise to claim for just compensation, even where government action rendered property useless, because "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause"); *Jones v. Phila. Police Dep't*, 57 F. App'x 939, 941-43 (3d Cir. 2003) (unpublished) (holding, under multi-factor balancing test, that property damage resulting from police officers' execution of search warrant did not entitle property owner to compensation under the Fifth Amendment); *Lawmaster v. Ward*, 125 F.3d 1341, 1351 (10th Cir. 1997) (holding that plaintiff failed to allege any facts showing how property was taken for public use under the Fifth Amendment where property was damaged during officers' execution of search warrant); *Eggleston v. Pierce Cty.*, 64 P.3d 618, 623, 627 (Wash. 2003) (distinguishing between police power and power of eminent domain and holding that plaintiff was not entitled to just compensation after police rendered home uninhabitable by removing load-bearing wall for use as evidence during execution of search warrant); *Kelley v. Story Cty. Sheriff,* 611 N.W.2d 475, 482 (Iowa 2000) (concluding that property damage caused by officers during execution of search warrant "was a reasonable exercise of police power and therefore does not amount to a taking of plaintiff's property within the

meaning" of the Iowa constitution); *McCoy v. Sanders*, 148 S.E.2d 902 (Ga. App. 1966) (holding that property owner was not entitled to just compensation because officers were acting pursuant to state's police powers when they drained fish pond in order to locate body of murder victim).

At least two courts have reached the opposite conclusion. In *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980), the Texas Supreme Court held that police officers' destruction of the plaintiffs' home in attempting to apprehend three escaped convicts supported a cause of action under the takings clause of the Texas Constitution. *Id.* at 791. The court declined to "differentiate between an exercise of police power . . . and eminent domain," finding the distinction unhelpful "in determining when private citizens affected by governmental actions must be compensated." *Id.* at 789. However, the court noted that the defendant would be permitted on remand to "defend its actions by proof of a great public necessity." *Id.* at 792.

Similarly, in *Wegner v. Milwaukee Mutual Insurance Co.*, 479 N.W.2d 38 (Minn. 1991), the Minnesota Supreme Court held that "where an innocent third party's property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of the [Minnesota] constitution." *Id.* at 41-42. Similar to this case and *Steele*, *Wegner* involved the destruction of an innocent third party's home by police officers in their attempt to apprehend a suspect who had taken refuge inside. *Id.* at 39. In holding that the city was required to provide compensation

under the state takings clause, the court rejected the dichotomy between a state's police power and its power of eminent domain, emphasizing that it would be unjust for an innocent homeowner to bear the entire loss caused by government action benefitting the public as a whole. *Id.* at 40, 42. Relying on this principle, the court went further than *Steele* and held that the city could not avoid liability based on the doctrine of public necessity. *Id.* at 42.

Plaintiffs urge this Court to dispense with the distinction between police powers and eminent domain and adopt the reasoning of *Steele* and *Wegner*. *See* Docket No. 48 at 7-8; Docket No. 54 at 12. Plaintiffs suggest that the holdings in those cases better comport with the principle that property owners should not be forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Docket No. 54 at 12. Although the Court is sympathetic to plaintiffs' loss, it finds these arguments unpersuasive.

As an initial matter, the Court agrees that "simply labeling the actions of the police as an exercise of the police power cannot justify the disregard of the constitutional inhibitions." Docket No. 48 at 8 (quoting *Wegner*, 479 N.W.2d at 40). But while a state's police powers are "not without limit[,]. . . . [t]he limits . . . are largely imposed by the Due Process Clause." *AmeriSource Corp.*, 525 F.3d at 1154; *Town of Dillon*, 325 P.3d at 1039 ("Though broad, a municipality's police powers are limited by due process."). The holdings in both *Steele* and *Wegner* were based in part on a

determination that the distinction between the police power and the power of eminent domain is no longer helpful in determining whether an individual is entitled to just compensation. *See Wegner*, 479 N.W.2d at 40; *Steele*, 603 S.W.2d at 789. The Court agrees that this line is poorly defined. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (accepting court of appeals' determination that law fell within state's police power but stating that "[i]t is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid"); *Collopy v. Wildlife Comm'n, Dep't of Nat. Res.*, 625 P.2d 994, 1001 (Colo. 1981) (suggesting that difference between violation of just compensation clause and valid exercise of the state's police power lies in degree of deprivation)*; see generally* Christopher D. Supino, *The Police Power and "Public Use": Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. Va. L. Rev. 711 (2008) (discussing Supreme Court's inability to articulate principled distinction between Public Use Clause and police power). Nevertheless, the Court declines to dispense with the distinction for two reasons.

First, courts have continued to differentiate between an exercise of the police power and eminent domain in determining whether a compensable taking has occurred under the U.S. and Colorado constitutions. *See*, *e.g.*, *AmeriSource*, 525 F.3d at 1153-54 (stating that, because seizure of property "to enforce criminal laws" was "clearly within the bounds of the police power," property was "not seized for public use

within the meaning of the Fifth Amendment" (internal quotations omitted)); *Young v. Larimer Cty. Sheriff's Office*, 356 P.3d 939, 943 (Colo. App. 2014) (citing *AmeriSource* and holding that seizure of private property for use in criminal prosecution was within scope of city's police power and thus taking for public use did not occur). By contrast, the *Steele* court's decision to dispense with the distinction was supported by a series of recent state court cases applying the just compensation requirement of the Texas Constitution. *See Steele*, 603 S.W.2d at 789 (citing "[r]ecent decisions by this court . . . broadly appl[ying] the underlying rationale to takings by refusing to differentiate between an exercise of police power . . . and eminent domain").

Second, to the extent that the line between these two concepts is blurry, this case does not come close to that line. Not only have courts held that the enforcement of criminal laws clearly falls within the scope of a state's police power, *see Kelley*, 611 N.W.2d at 481 ("Enforcement of the criminal laws is clearly within the county's power to provide for the health, safety and welfare of its citizens."), but defendants in this case were also responding to an emergency situation.

At least one court has held that police officers' destruction of a store in the course of apprehending an armed felony suspect falls within the "emergency exception" to the just compensation requirement. *See Customer Co.*, 895 P.2d at 909. As the court in *Customer Co.* noted, "[t]he emergency exception has had a long and consistent history in both state and federal courts" and represents a "specific application of the

general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause." *Id.*; *see also Caltex*, 344 U.S. at 154 ("[T]he common law had long recognized that in times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."). Courts have generally accepted the continued viability of the emergency exception under both state and federal constitutions, even as they disagree over the distinction between police power and eminent domain. *See*, *e.g.*, *Customer* Co., 895 P.2d at 934 (Baxter, J., dissenting) (disagreeing that property damage in case was noncompensable, but recognizing continued viability of emergency exception); *Steele*, 603 S.W.2d at 789, 792 (rejecting dichotomy between police power and eminent domain, but stating that defendant could "defend its actions [on remand] by proof of a great public necessity"). *But see Wegner*, 479 N.W.2d at 42 (declining to permit public necessity defense and stating that "better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages").

The Court is persuaded by the California Supreme Court's reasoning in *Customer Co.* and finds that the undisputed facts in this case demonstrate that defendants' actions in apprehending Seacat fall within the

scope of the emergency exception. Law enforcement officials were faced with an armed suspect who had unlawfully entered plaintiffs' home and barricaded himself inside. Docket No. 47 at 6-7, ¶¶ 20, 22; Docket No. 67 at 9, ¶ 10. The ensuing nineteen-hour standoff was deemed a "high-risk, barricade suspect situation," Docket No. 47 at 4, 7, ¶¶ 11, 22, in which Seacat fired at GVPD officers on two occasions. *Id.* at 6, 10, ¶¶ 21, 36.[12] Finally, it is undisputed that "[a]ll law

[12] At least two courts have indicated that the emergency exception only applies "if the State demonstrates the existence of imminent danger and an actual emergency giving rise to actual necessity, an inquiry that is fact-specific." *Brewer v. State*, 341 P.3d 1107, 1118 (Alaska\2014); *see also TrinCo Investment Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (reversing dismissal of complaint under Fed. R. Civ. P. 12(b)(6) on ground that "[i]t [was] impossible," based on allegations in complaint, "to determine whether the requisite imminent danger and actual emergency giving rise to the actual necessity of the Forest Service's burning of TrinCo's property was present to absolve the Government under the doctrine of necessity"). In this case, there is no dispute that Seacat's actions posed a threat to the public and that defendants' actions were taken in response to that threat. To the extent *Brewer* and *TrinCo* further suggest that defendants must show their response was reasonable, the Court finds that such an inquiry sounds in due process rather than takings. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005) (holding that whether a government action "substantially advances" a legitimate state interest is "an inquiry in the nature of a due process, not a takings, test"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398,1409-10 (9th Cir. 1989) (looking to factors such as "the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm" in determining whether defendants' actions in breaching dam and destroying lake violated plaintiffs'

enforcement actions were done to remove Seacat from the residence while making all efforts to preserve life." *Id.* at 11, ¶ 44.[13]

Defendants were acting in response to a tangible threat to the health and safety of the public and the tactical decisions that ultimately destroyed plaintiffs' home were made pursuant to the state's police powers and not the power of eminent domain. *See Customer Co.*, 895 P.2d at 909. Accordingly, the damaging of plaintiffs' home does not constitute a compensable taking under either the U.S. or Colorado constitutions.

Summary judgment is therefore appropriate in favor of defendants on plaintiffs' takings claims.

C. Federal Due Process Claims

Plaintiffs claim that defendants violated their due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution by destroying their

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substantive due process rights), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

[13] In their motion to strike, plaintiffs argue that the same fact, asserted on page 31 of defendants' motion for summary judgment, is unsupported by a reference to the record. *See* Docket No. 80 at 17, ¶ 36. But plaintiffs admitted this fact in their response to defendants' summary judgment motion. Docket No. 54 at 4, ¶ 44. Accordingly, it is undisputed for purposes of summary judgment. To the extent Plaintiffs' Motion to Strike Defendants' Evidence in Motions Practice [Docket No. 80] asserts additional arguments not already addressed in this Order, those arguments are immaterial to the Court's resolution of the parties' cross-motions for summary judgment. Those portions of plaintiffs' motion to strike are therefore denied as moot.

property without providing just compensation. Docket No. 48 at 9-12.[14]

The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. This guarantee contains both procedural and substantive components. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). Procedural due process generally requires that a state follow certain procedures before depriving an individual of a protected liberty or property interest. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In contrast, substantive due process serves as a prohibition against arbitrary government action, regardless of the fairness of the procedures used. *Cty. of Sacramento*, 523 U.S. at 840, 845. Plaintiffs' complaint is unclear about whether they are asserting a violation of their procedural or substantive due process rights. *See* Docket No. 4 at 9-10. As

[14] Although plaintiffs also assert they were deprived of their due process rights under the Fifth Amendment, *see* Docket No. 48 at 9, only the Fourteenth Amendment is applicable where, as here, the defendants are state actors. *See Bartkus v. Illinois*, 359 U.S. 121, 124 (1959); *Lyle v. Dodd*, 857 F. Supp. 958, 966 (N.D. Ga. 1994) ("It is axiomatic that the Fifth Amendment due process clause applies only to the federal government, while the Fourteenth Amendment due process clause applies to the states.").

discussed below, however, plaintiffs' claim cannot survive summary judgment under either theory.

1. Procedural Due Process

Plaintiffs contend that defendants violated their procedural due process rights by "unilaterally determin[ing] . . . that taking of property was necessary and legal under the circumstances" and failing to provide just compensation. Docket No. 48 at 10. They further suggest that defendants lacked authority for their actions. *Id.* at 11. Both arguments are unavailing.

First, although due process generally requires that an individual be given "an opportunity for some kind of hearing prior to the deprivation of a significant property interest," *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19 (1978) (internal quotations omitted), pre-deprivation due process is not required when a state is confronted with an emergency situation. *See Miller v. Campbell Cty.*, 945 F.2d 348, 353 (10th Cir. 1991) (citing *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 299-300 (1981)); *Hodel*, 452 U.S. at 300 ("Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."). Because the undisputed facts in this case demonstrate that defendants were faced with an emergency situation, *see* Docket No. 47 at 4, 6-8, ¶¶ 11, 20, 22, 27, plaintiffs were not entitled to a hearing or other kind of process prior to the damaging of their home. Plaintiffs do not challenge this conclusion. *See* Docket No. 54 at 10; Docket

No. 63 at 7. Instead, they contend that the only issue in this case is "post-taking compensation." Docket No. 54 at 10. The meaning of this statement is unclear. However, to the extent plaintiffs are asserting that they have been denied post-deprivation procedural due process, their claim is belied by the existence of this lawsuit. *See Miller*, 945 F.2d at 354 (holding that "the condemnation process (or a revival of plaintiffs' Just Compensation claim should condemnation prove to be inadequate) offer[ed] the plaintiffs a sufficient post-deprivation hearing to obtain just compensation for the loss of their property").[15]

Plaintiffs also assert that there was no "law, regulation, or ordinance authorizing [defendants] to take property." Docket No. 48 at 11. It is not clear what plaintiffs are arguing here. If they mean to contend

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[15] Although plaintiffs argue that Colorado's inverse condemnation procedures are inadequate to compensate them for their loss, *see* Docket No. 83 at 7, they do not argue that the procedures available through the state and federal court systems are generally inadequate to satisfy due process requirements. The conclusion that plaintiffs' ability to pursue this lawsuit constitutes adequate post-deprivation due process is not altered by the fact that plaintiffs' claims may ultimately prove unsuccessful. *See Stanley v. McMillian*, 594 F. App'x 478, 480 (10th Cir. 2014) (unpublished) ("Plaintiff's speculation that the state court would likely dismiss his complaint for lack of exhaustion does not prove the state has failed to provide adequate procedural safeguards for his due process rights. . . ."); *see also Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.").

that defendants lacked formal powers of eminent domain, the Court has already determined that this case involves an exercise of the state's police powers in an emergency situation, not eminent domain. Moreover, defendants are statutorily authorized to enforce criminal laws – a power which necessarily entails the authority to apprehend suspects. Under Colo. Rev. Stat. § 31-15-401(1)(a), municipalities have the power "[t]o regulate the police of the municipality, including employing certified peace officers to enforce all laws of the state of Colorado . . . , and pass and enforce all necessary police ordinances." Additionally, § 2-5-40 of the Greenwood Village Municipal Code provides that members of the Greenwood Village Police Department "shall be the enforcement officers of the City and shall see that the provisions of the ordinances of the City and the laws of the State are complied with." Greenwood Village, Colo., Code § 2-5-40 (2011). There is no contention that defendants were not members of the Greenwood Village Police Department. Accordingly, any assertion that defendants' actions were not authorized by any law, regulation, or ordinance, *see* Docket No. 48 at 11, is without merit.

In summary, the Court finds that plaintiffs have failed to demonstrate a deprivation of their procedural due process rights. Dismissal of this claim is therefore appropriate.

2. Substantive Due Process

Plaintiffs also make a cursory reference to substantive due process. *See* Docket No. 48 at 9; Docket No. 63 at 7. But plaintiffs do not appear to assert a violation of their substantive due process rights separate from the claim that they were denied just compensation. *See* Docket No. 54 at 10 (stating that only issue in case is "post-taking compensation"). As previously determined, plaintiffs are not entitled to just compensation under the takings clauses of the U.S. and Colorado Constitutions, and plaintiffs' ability to seek just compensation in both state and federal court satisfies the requirements of post-deprivation procedural due process.

To the extent plaintiffs intended to assert a separate substantive due process claim based on defendants' actions during the incident, they have failed to demonstrate a genuine issue for trial. *See Concrete Works of Colo., Inc.*, 36 F.3d at 1518. In their motion for summary judgment, defendants note that "Plaintiffs do not specifically plead how Defendants' actions violated their rights." Docket No. 47 at 17. Instead of clarifying the nature of their claims, however, plaintiffs respond with the ambiguous assertion that this case involves only "post-taking compensation." Docket No. 54 at 10.

Moreover, although plaintiffs cite the standard that governs substantive due process claims, *see* Docket No. 48 at 9, they do not cite any facts or case law to show that defendants' actions were objectively

unreasonable or shocking to the conscience. *See generally Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472-73 (2015) (holding that objective reasonableness standard governs whether force deliberately used on pre-trial detainee violates Fourteenth Amendment due process); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting that "cognizable level of executive abuse of power" under Due Process Clause is "that which shocks the conscience"). Defendants highlight this deficiency in their response to plaintiffs' motion for summary judgment, asserting that plaintiffs have not "argue[d] that the decisions Varney made during the Incident were unreasonable or not done to protect life and the public health, safety and welfare." *See* Docket No. 53 at 15-16.[16] However, plaintiffs fail to remedy the issue in their reply, claiming only that defendants did not address the "lack of . . . substantive due process." *See* Docket No. 63 at 7.

Plaintiffs have not asserted a substantive due process claim based on the reasonableness of defendants' actions during the incident and thus have failed to

[16] Defendants also highlight this deficiency in their opposition to plaintiffs' takings claims. *See*, *e.g.*, Docket No. 47 at 26; Docket No. 60 at 6. Yet plaintiffs repeatedly assert that the reasonableness of defendants' actions is immaterial. *See* Docket No. 48 at 7 (stating that, while "ouster may well have been completely necessary for the safety of the public," plaintiffs are still entitled to compensation), 8 (stating that the "reasonableness or legitimacy of the police conduct" is not "the issue facing the Lechs").

demonstrate a genuine dispute of material fact to preclude summary judgment in defendants' favor.[17]

D. Remaining State Law Claims

Plaintiffs' five remaining claims arise under Colorado state law. Although the Court may exercise supplemental jurisdiction over state law claims if there is a jurisdictional basis for doing so, 28 U.S.C. § 1367(c)(3) provides that a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." The Tenth Circuit has instructed that, "if federal claims are dismissed before trial, leaving only issues of state law," courts should "decline to exercise pendent jurisdiction . . . absent compelling reasons to the contrary." *Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010) (brackets, internal citations, and internal quotation marks omitted). This rule is consistent with "[n]otions of comity and federalism," which "demand that a state court try its own lawsuits." *Id.* at 1230 (quoting *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995)).

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[17] Because the Court resolved plaintiffs' takings and due process claims without relying on the testimony of plaintiffs' expert, Dan Corsentino, or defendants' experts, Phil Hanson, Chris George, and Ernie Ortiz, the Court need not determine whether the testimony of those experts would be admissible at trial. Accordingly, Defendants' Motion to Preclude Plaintiff's Expert Dan Corsentino [Docket No. 44], Plaintiffs' Motion to Exclude Expert Testimony [Docket No. 45], and Plaintiffs' Motion to Strike Expert Testimony [Docket No. 77] are denied as moot.

Plaintiffs do not argue that the Court should retain jurisdiction over their state law claims if their federal claims are dismissed, and the Court does not find any compelling reason to do so. Accordingly, plaintiffs' first, second, third, fourth, and seventh (to the extent it asserts a violation of due process under Article II, § 25 of the Colorado Constitution) claims for relief are remanded to the state court for further proceedings. *See Thompson v. City of Shawnee*, 464 F. App'x 720, 726 (10th Cir. 2012) (unpublished) (where all federal claims were dismissed after case was removed to federal court, "district court had discretion either to remand the [state claims] to the state court or to dismiss them").[18]

IV. ATTORNEY'S FEES

Colo. Rev. Stat. § 24-10-110(5)(c) provides:

> In any action against a public employee in which exemplary damages are sought based on allegations that an act or omission of a public employee was willful and wanton, if the plaintiff does not substantially prevail on his claim that such act or omission was willful and wanton, the court shall award attorney

[18] Because the Court declines to retain jurisdiction over plaintiffs' state law claims, it need not consider those portions of Defendants' Reply in Support of Their Motion and Brief for Summary Judgment [Docket No. 60] that plaintiffs contend raise new arguments. *See* Docket No. 69 at 2. Accordingly, Plaintiffs' Motion to Strike Portion of Defendants' Reply or in the Alternative, Permit Sur-Reply by Plaintiffs [Docket No. 69] is denied. *See Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005).

> fees against the plaintiff or the plaintiff's attorney or both and in favor of the public employee.

By its terms, this provision applies only to plaintiffs' state tort claims, which allege willful and wanton conduct on the part of defendants. *See* Docket No. 4 at 6-7. Because those claims are being remanded to state court, defendants' request for attorney's fees is premature.[19]

V. CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendants' Motion and Brief in Support of Summary Judgment [Docket No. 47] is **GRANTED** in part and **DENIED** in part. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment [Docket No. 48] is **DENIED**. It is further

ORDERED that plaintiffs' fifth and sixth claims for relief are dismissed with prejudice. It is further

ORDERED that plaintiffs' seventh claim for relief is dismissed with prejudice insofar as it states a claim under the Fourteenth Amendment of the U.S. Constitution. It is further

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[19] In light of this resolution, the Court need not determine whether plaintiffs' complaint seeks exemplary damages, a point which the parties dispute. *See* Docket No. 47 at 35; Docket No. 54 at 29.

ORDERED that plaintiff's first, second, third, and fourth claims for relief are remanded to the District Court for Arapahoe County, Colorado, where the case was filed as case number 2016CV31378, for further proceedings. It is further

ORDERED that plaintiff's seventh claim for relief is also remanded to the District Court for Arapahoe County, Colorado, insofar as it states a claim under Article II, § 25 of the Colorado Constitution. It is further

ORDERED that defendants' request for attorney's fees is **DENIED**. It is further

ORDERED that Defendants' Motion to Preclude Plaintiff's Expert Dan Corsentino [Docket No. 44], Plaintiffs' Motion to Exclude Expert Testimony [Docket No. 45], Plaintiffs' Motion to Strike Expert Testimony [Docket No. 77], and Plaintiffs' Motion to Strike Portion of Defendants' Reply or in the Alternative, Permit Sur-Reply by Plaintiffs [Docket No. 69] are **DENIED AS MOOT**. It is further

ORDERED that all other pending motions, to the extent not addressed in this Order, are **DENIED AS MOOT**. It is further

ORDERED that, within 14 days of the entry of this Order, defendants may have their costs by filing a Bill of Costs with the Clerk of the Court. It is further

ORDERED that this case is closed.

DATED January 8, 2018.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01956-PAB-MJW

LEO LECH,
ALFONSIA LECH, and
JOHN LECH,

Plaintiffs,

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,
and
THE CITY OF GREENWOOD VILLAGE,

Defendants.

FINAL JUDGMENT

(Filed Jan. 9, 2018)

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order entered by Judge Philip A. Brimmer on January 8, 2018, it is

ORDERED that Defendants' Motion and Brief in Support of Summary Judgment (Doc. 47) is granted in part and denied in part. It is

FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Doc. 48) is denied. It is

FURTHER ORDERED that Plaintiffs' fifth and sixth claims for relief are dismissed with prejudice. It is

FURTHER ORDERED that Plaintiffs' seventh claim for relief is dismissed with prejudice insofar as it states a claim under the Fourteenth Amendment of the U.S. Constitution. It is

FURTHER ORDERED that Plaintiff's first, second, third, and fourth claims for relief are remanded to the District Court for Arapahoe County, Colorado, where the case was filed as case number 2016CV31378, for further proceedings. It is

FURTHER ORDERED that Plaintiff's seventh claim for relief is also remanded to the District Court for Arapahoe County, Colorado, insofar as it states a claim under Article II, § 25 of the Colorado Constitution. It is

FURTHER ORDERED that Defendants' request for attorney's fees is denied. It is

FURTHER ORDERED that Defendants' Motion to Preclude Plaintiff's Expert Dan Corsentino (Doc. 44), Plaintiffs' Motion to Exclude Expert Testimony

(Doc. 45), Plaintiffs' Motion to Strike Expert Testimony (Doc. 77), and Plaintiffs' Motion to Strike Portion of Defendants' Reply or in the Alternative, Permit Sur-Reply by Plaintiffs (Doc. 69) are denied as moot. It is

FURTHER ORDERED that all other pending motions, to the extent not addressed in this Order, are denied as moot. It is

FURTHER ORDERED that judgment is entered in favor of Defendants and against Plaintiffs. It is

FURTHER ORDERED that, within 14 days of the entry of this Order, Defendants may have their costs by filing a Bill of Costs with the Clerk of the Court. It is

FURTHER ORDERED that this case is closed.

Dated this 9th day of January, 2018.

FOR THE COURT:
JEFFREY P. COLWELL

By: s/C. Pearson
C. Pearson, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEO LECH, et al.,
Plaintiffs - Appellants,
v.
CHIEF JOHN A. JACKSON, et al.,
Defendants - Appellees.

COLORADO MUNICIPAL LEAGUE, et al.,
Amici Curiae.

No. 18-1051

ORDER

(Filed Dec. 27, 2019)

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

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk