No. 19-1123

In the Supreme Court of the United States

LEO LECH, ET AL.,
Petitioners,

v.

CHIEF JOHN A. JACKSON, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AND PROFESSOR ILYA SOMIN AS *AMICI CURIAE* SUPPORTING PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael T. Collins
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

Whether the complete and utter destruction of a family home to capture a suspect who happened to invade the home is a taking under the Fifth and Fourteenth Amendments of the Constitution.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Ilya Somin is a law professor at George Mason University who teaches constitutional and property law, and an adjunct scholar at the Cato Institute. He has written extensively about takings and property rights, and is the author *of The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* (rev. ed., University of Chicago Press, 2016), and co-editor of *Eminent Domain: A Comparative Perspective* (Cambridge University Press, 2017).

This case interests *amici* because the decision below undermines the historical value of the Takings Clause and increases government power at the expense, literally, of the individual.

SUMMARY OF ARGUMENT

To catch a criminal, police in the city of Greenwood Village effectively demolished Leo Lech's home. This

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

may have been a public good; the criminal was dangerous. But as with any taking of private property for the public good, Mr. Lech is entitled to just compensation for his destroyed home. The city has refused to compensate Mr. Lech, in violation of his Fifth and Fourteenth Amendment rights.

The Takings Clause goes back to the Magna Carta and is deeply rooted in English common law. In England, in times of war, the king had the prerogative to mine vital resources on his subject's land. Nevertheless, when he had extracted what was needed, the king had to rebuild the land. This rule was tempered by the defense of necessity—available to government and citizens—that allowed the destruction of property in some cases to save lives or property. These principles evolved together in early takings cases involving physical possession or destruction of property. But the court below upset this longstanding precedent.

The court below held that the capture of criminals, and more broadly the enforcement of laws, are within the police powers of the states. That would not matter much, except that police powers hold special significance in regulatory, rather than physical, takings. *Mugler v. Kansas*, 123 U.S. 623 (1887). In regulatory takings, the state might owe compensation if it uses its police power to permanently intrude on property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or to reduce its economic value to zero. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). But if a use of the police power merely incidentally disadvantages the economic interests of some property holders, there is usually no taking. *Mugler*, 123 U.S. 623. Similarly, there is no taking if the state is regulating in the place of traditional nuisance law. *Miller*

v. Schoene, 276 U.S. 272 (1928). But here, there was a physical taking pursuant to the police power, not a regulatory diminishment of the value of property.

There are different methods for challenging physical takings and valid exercises of the police power. A perfectly legal physical taking can be challenged if the state fails to provide just compensation, but the court below held that a taking pursuant to the police power requires a due process challenge alleging the exercise of the police power be unlawful. A due process claim is available in this case, but so is a takings claim. Otherwise, lawful exercises of state police powers are essentially unreviewable under the Takings Clause, regardless of the collateral damage. That is not how the clause has historically been understood. The Takings Clause is not limited to the government formal demand for land. It reflects a principle that the public good should not be done at the cost of the individual.

This is particularly pertinent in the era of modern policing. As *Washington Post* reporter Radley Balko has documented, the modern police department is a militarized organization wielding tremendous destructive power. *See, generally,* Radley Balko, *The Rise of the Warrior Cop: The Militarization of America's Police Forces* (2013). The focus of this destructive might has shifted from responding to well-armed violent criminals to seizing easily destructible drug caches. While it is a matter of debate whether these raids are a public good, it is incontrovertible that they are destructive to life, property, and often pets. Mistakes are often made, and innocent bystanders become victims. Police should not be allowed to wantonly destroy property without compensating for the collateral damage.

ARGUMENT

I. COURTS HAVE HISTORICALLY RECOGNIZED PHYSICAL TAKINGS ARISING FROM EXERCISES OF THE POLICE POWER

A. The Roots of the Takings Clause Demonstrate That It Is Applicable to Police-Power Takings

America's independence came not as much from failings in the English system of government as from the Crown's failure to apply its protective principles to the colonies. The Thirteen Colonies took their jurisprudence on takings, like so many other things, from English common law. The principles protecting private property from government interference survived and thrived in the state and federal constitutions. The decision below stands in contrast to that history.

1. Takings Roots in English Common Law

As this Court recently observed, our Constitution's Takings Clause can be traced back 800 years to Magna Carta. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). Specifically, the charter said: "No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Magna Carta, 1215, cl. 28. (U.K.).[2] Essentially, King John's men could not requisition private property without compensation.

This principle goes beyond merely using goods. It is long settled, both in England and the United States,

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[2] Unless otherwise noted, foundational documents referenced in this brief are the versions made available through Yale Law School's Avalon project, https://avalon.law.yale.edu.

that there are government needs that may require encroachment on private property. These limited needs gave rise to a qualified prerogative to take or damage that property pursuant to the police power. In 17th-Century England the role of saltpeter in manufacturing gunpowder gave rise to what would today be called a national security interest in mining saltpeter. *See The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13 (1606) (una voce). Yet, in exercising this prerogative, the king must leave the "Inheritance of the Subject in so good Plight as they found it." *Id.* Though the taking of the subject's property may benefit by the general defense of the realm, the specific injury to his land must receive reparations. *Id.* at 14.

While the king exercised his prerogative over saltpeter, a separate principle was developing: the trespass defense of necessity. When a trespass is necessary to prevent a greater evil, the trespasser may defend himself with the doctrine of necessity. Lord Coke notes that, in the case of a ferry caught in a storm, a passenger may jettison the cargo if doing so saves the passengers and crew. *Mouse's Case*, 12 Coke R. 63 (1608). Because the cargo was thrown over to save lives, and saving lives is a public good, the owner could not recover against the passenger. *Id.* Although that case concerns private citizens, the principle is also discussed when concerning firebreaks in the *Saltpeter Case*. 12 Coke R. 13. In an emergency, when a fire is spreading, the next house in line may be pulled down to stop the spread, with no man incurring liability. But when the houses of the suburbs are pulled down to erect ramparts in defense of the city, the damage needs to be repaired. "[A]fter the Danger is over, the Trenches and

Bulwarks ought to be removed, so that the Owner shall not have Prejudice in his Inheritance." *Id.*

2. The Takings Clause in U.S. constitutional history.

Before the Bill of Rights, the original federal Constitution did not include a Takings Clause. As this Court recently noted, however, the newly free American people bridled at the appropriation of their property by both sides in the Revolutionary War. *Horne*, 135 S. Ct. at 2426. Prominent founders, such as John Jay, lobbied state governments to compensate their citizens. *Id.* Several state constitutions forbade state appropriation of property in some form.

Massachusetts was the first colony to safeguard property from being taken without compensation:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Mass. Body of Liberties ¶ 8 (1641), available at https://history.hanover.edu/texts/masslib.html. Other state constitutions followed suit.

Some states treated the taking of property as similar to a draft or tax—requiring the consent of the owner or his elected representative before property could be taken for the public good. Virginia declared that those owning sufficient property for suffrage "cannot be taxed or deprived of their property for public

uses, without their own consent, or that of their representative so elected." Va. Declaration of Rights § 6 (June 12, 1776). Similarly, in Pennsylvania "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives," which accompanied a requirement of militia service. Penn. Const. art. VIII (Sept. 28, 1776).

An explicit compensation requirement appeared in Vermont's constitution: "private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. ch. I, art. II (1786). Vermont's constitution shows an understanding that, while the public good might require the infringement of private property, there is no need for the owner to bare the financial burden of that alone.

Yet some states omitted reference to physical taking altogether. North Carolina provided that "no freeman ought to be . . . disseized of his freehold . . . or deprived of his . . . property, but by the law of the land." N.C. Declaration of Rights art. XII (Dec. 18, 1776). Two other state constitutions banned taking property unless "by judgement of his peers, or by law of the land." Md. Declaration of Rights art. XXI (Nov. 11, 1776); S.C. Const. art. XLI (Mar. 19, 1778). Those constitutions' invocation of the "law of the land" language from Magna Carta show the due process component to police-power takings claims. By the mid-19th century, every state constitution had takings clause equivalent to the federal Constitution. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177 (1871) ("[T]his limitation on the exercise of the right of eminent domain

is so essentially a part of American constitutional law that it is believed that no State is now without it.").

These protections varied across the colonies and did not address the citizen's concerns with property seized by the armies in the Revolutionary War. In fact, this Court found that it could not grant compensation when—in an effort to avoid capture by the British—materials were seized by the army were later captured at the location where the materials were taken. *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357 (1788). But that was before the Fifth Amendment was ratified.

As the Court has recognized, "the Takings Clause was 'probably' adopted in response to 'the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.'" *Horne*, 135 S. Ct. at 2426 (quoting 1 Blackstone, *Commentaries*, Editor's App. 305–06 (1803)). Such practices would have been police-power physical takings. The physical taking of a house by the police in the course of police work is no less actionable under the Takings Clause.

B. Regulatory Takings Under the Police Power Are Rarely Actionable Under the Takings Clause, But Physical Takings Typically Are

The split between physical and regulatory takings emphasizes the proper role of police-powers analysis in takings claims. If a police-power regulation does not create a permanent physical occupation or total economic destruction of property, courts often allow it without compensation. While there is no blanket police-power exception to regulatory takings, they are

certainly treated differently. This case, however, was a complete physical taking.

Using their inherent police powers, states may pass regulations that may cause economic harm to the property of some. *See Mugler*, 123 U.S. 623. However, courts recognize a taking if the "regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). When, exactly, a state goes too far is determined on a case-by-case basis.

There are two exceptions which fall squarely into the category of "too far." First, this Court will find a compensable regulatory taking when the destruction that is effectively total. *Armstrong v. United States*, 364 U.S. 40 (1960) (finding an unconstitutional taking where state act entirely destroyed contractual and property right in mining); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (finding a taking when regulations "prohibit all economically beneficial use of land"). Second, permanent physical occupancies of part of the property are a *per se* taking. *Loretto*, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

Some regulations that affect the economic value of property are, however, not takings. The court below cites *Mugler v. Kansas* to distinguish between eminent domain and state exercise of police powers. Pet. App'x at 8–9. In *Mugler*, this Court found no taking in the diminished value of a brewery when the state criminalized alcohol production. *Mugler*, 123 U.S. at 669–70. While *Mugler* created a distinction in regulatory takings between eminent domain and the police power, the Court distinguished its holding from actual

physical takings. *Id.* at 668 (distinguishing *Pumpelly*, because it concerned a physical invasion of property rather than an incidental loss of economic value). The court below contradicts *Mugler* and creates a police-power exception for physical takings too.

Physical takings may fall under a police power exception if they follow common-law rules of nuisance. *See Miller*, 276 U.S. 272. *Miller* held that the state of Virginia was within its police power when it required the uncompensated destruction cedar trees within two miles of apple orchards after (1) a finding that the trees were host to cedar rust (which is dangerous to apple orchards); and (2) there was an opportunity to seek judicial review of that finding. *Id.* at 277–78. As *Lucas* elaborated, those uses of the police power are akin to common-law nuisance actions. 505 U.S. at 1022. Such destruction of property is allowed where there would be a tort right of action against the harmful or noxious use of property. *Id.* at 1029.

Mugler and *Miller* are also inapposite here because in those cases the property itself was seen as harmful or dangerous. Kansas banned alcohol because it was perceived to be harmful, and the cedar trees in *Miller* were thought to be carrying a blight. In cases like *Arkansas Game and Fish*, however, the property was destroyed or damaged not because it was itself a threat, but to diminish or eliminate a threat posed by something or someone else. An innocent owner is thus deprived of his property for the public good, no less than if it were taken to build a road or military base.[3]

[3] This is also why cases like Lech's differ from the current coronavirus lockdowns. There, allowing businesses to continue to function risks spreading the disease, at least probabilistically.

Although harming an individual's property is sometimes necessary for a public good, that individual should not bear the financial burden alone. "The Takings Clause is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The principle is the same where the public good necessitates destruction or seizure of individual property.

That concept is rooted in our revolutionary experience, where the nation's freedom necessitated seizure of personal property. *See Horne*, 135 S. Ct. at 2426 (discussing history of the clause). Yet even the expediency of war cannot overcome, without special circumstance, the right of just compensation for property taken for the public good. This principle carried over to our greatest period of internal strife: the Civil War.

During the military contests over St. Louis, the Confederate Army destroyed several bridges and the Union purposely destroyed others, to prevent their use by the Confederates. *See United States v. Pacific Rd.*, 120 U.S. 227, 228–29 (1887). Out of military necessity, the Union rebuilt bridges destroyed by both sides and attempted to charge the company that owned the bridges. *Id.* at 231. In ruling that the company did not owe the government anything, Justice Field elaborated on how the Takings Clause operates during wartime. *Id.* at 234–35. If the destruction was an "inevitable necessity," such as the random "destruction caused by the artillery in retaking a town from the enemy," then such actions are accidents and no legal liability

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By contrast, if the government were to seize a building to use it for housing COVID-19 patients, that would be a taking.

attaches. *Id.* at 234. But if, as here, the destruction is "done by the state deliberately," like destruction of a specific house to build a rampart, then "such damages are to be made good to the individual, who should bear only his quota of the loss." *Id.*; *see also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (reversing a demurrer where the property owners could show facts tending to prove that a fort's guns positioned to fire over seafront property could support a takings claim).

The Court has also heard many takings claims arising from the damming of rivers and flooding of land. Construing the "almost identical" Wisconsin takings clause,[4] the Court held that overflow from the statutorily authorized construction of a dam was a taking regardless of the argument that "damage [was] a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation." *Pumpelly*, 80 U.S. at 177. And 140 years later, temporary flooding was again held to be a compensable taking. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); *see also In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219 (Fed. Cl. 2019) (holding that the intentional flooding of homes to mitigate the effects of Tropical Storm Harvey was a taking even in an emergency).

Regulatory takings are different from purposeful destructions, so police-power analysis is inapplicable here. The fact that the state exercises its power to take property for the public good does not absolve it of the

[4] "The property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. 1, § 13.

duty of just compensation. The Takings Clause exists to compensate those harmed by *lawful* uses of power.

C. Necessity Can Be a Defense to Some Physical Takings Under the Police Power, But It Is Not Available Here

The court below did not analyze the destruction of Mr. Lech's home under the doctrine of necessity—a valid exception to some physical takings claims. This doctrine is rooted in the liability of ordinary citizens. *Mouse's Case*, 12 Coke R. at 63. State governments have historically used this affirmative defense in firewall cases. *See Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844). When property already faces impending destruction from a spreading fire, towns may pull down the property to prevent further spread. *Id.* at 464 ("[P]ulling [the house] down, rather hastened than caused its destruction.").

The reason necessity is an exception to normal takings liability has little to do with the state interest in preventing fire. "There was no voluntary sacrifice of the property of one proprietor for the safety of other proprietors." *Id.* The property is already in danger when necessity requires its destruction. This distinguishes firebreaks from situations where the good of all becomes the burden of one.

An early Minnesota case clarifies the point. Citing *Mouse's Case*, a court denied compensation for a firebreak that was justified not just by public need, but necessity. *McDonald v. City of Red Wing*, 13 Minn. 38, 40 (1868). But that court noted, relying on the *Saltpeter Case*, "that if there be no necessity, then the individuals who do the act shall be responsible." *Id.*

Even wartime takings can avoid compensation only when the necessity defense applies. Domestic wartime takings are classic uses of the police power, as the property is being taken to protect public health, safety, and welfare. In the Mexican-American War, this Court recognized a taking when a military officer requisitioned a trader's wagon and mules in battle and subsequently abandoned them, and the goods they carried, in retreat. *Mitchell v. Harmony*, 54 U.S. 115, 133–34 (1851). While goods may be destroyed to prevent them being taken by the enemy, the need must be "immediate and impending." *Id.* at 134. The individual facts of a case may prove necessity, but, in *Mitchell*, the officer who seized property for use in a future campaign needed to pay compensation. *Id.* at 134–35.

In contrast, no wartime compensation is due when the property would have been destroyed regardless. The Court thus found no taking when the evacuating army destroyed private oil depots in the Philippines to prevent their use by Japan. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952). The financial loss to plaintiffs was inevitable. *Id.* at 155 ("Had the Army hesitated, had the facilities only been destroyed after retreat, respondents would certainly have no claims to compensation."). Similarly, in a time of civil unrest, the taking of a YMCA building to defend it from rioters did not require compensation even though the building was damaged. *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969). A fireman is not liable for the water damage in putting out the fire.

Here the officers physically invaded and destroyed Mr. Lech's home. The house was not accidentally destroyed because it stood in the way of a raging fire or

invading army and there is no conceivable way the apprehended criminal could have done that kind of damage. While the action may have been necessary in the colloquial sense, just as damming a river may be necessary, it was not a necessity in the legal sense. The public benefited, but Mr. Lech should be compensated.

Government officers often need to reply to a crisis, be it a fire, an army, or a disease. In these cases where a destructive force is baring down, necessity dictates that the officer say, "this far, and no further." The principle here is simple: the invading army or fire would not compensate the person harmed. It would be an improper windfall to compensate the owner of the house used as a firebreak when owners of previous houses destroyed by the fire get nothing. Here, however, the house would still be standing if not for police action.

Nor is this a case of bombs falling where they may during a military action. Instead this is like *Mitchell*, where a merchant's property was taken for use in a future campaign. That is not to say the police were wrong here; they may have served the public good. But the Fifth Amendment requires Mr. Lech to receive just compensation for such a public-good taking.

II. ALLOWING TAKINGS CLAIMS CAN GIVE INCREASINGLY MILITARIZED POLICE INCENTIVE TO BETTER PROTECT PRIVATE PROPERTY

On July 29, 2008, heavily armed men rushed into the home of the mayor of Berwyn Heights, Maryland. The men blew open the door with guns blazing, killed the mayor's dogs, tracked dog blood all over the house, and held the mayor—in his underwear—and his

mother-in-law at gunpoint for hours. But they were not terrorists, they were Prince George's County police officers acting on bad information. They never offered an apology or payment for the mayor's door, or the destruction of his house or his dogs. The results of their settlement are unknown. Balko, *Rise of the Warrior Cop,* 309–12; Aaron C. Davis, "Police Raid Berwyn Heights Mayor's Home, Kill His 2 Dogs," *Wash. Post*, July 31, 2008, https://wapo.st/2XlEb3o; Ruben Castaneda, "Settlement in Md. Town Mayor's Lawsuit," *Wash. Post*, Jan. 24, 2011, https://wapo.st/2yFx2QV.

The above case involves less physical destruction then used on Mr. Lech's home, but it is an example of the growing trend of destructive police raids. There were an estimated 30,000 drug raids in 1995 and 60,000 in 2005. Balko, *Rise of the Warrior Cop*, at 307. Even in the early days, hundreds of raids were on the wrong address. *Id.* at 47. Because of the surprise nature of police raids, the damage is already done before the mistake is identified. If mistakes can victimize the mayors of D.C. suburbs, they can victimize anyone.

In response the violence of the late 1960s, LAPD Officer Daryl Gates proposed a special unit of heavily-armed marine-like police to respond to violent situations—Special Weapons Attack Teams or SWAT. *Id.* at 60–62. Gate's superiors refused to authorize a team with "attack" in the name, and the acronym was changed to "and tactics." The SWAT team has become a staple of the drug war where fear of losing evidence has justified no-knock raids on non-violent offenders. *See*, *e.g.*, *Hudson v. Michigan*, 547 U.S. 586 (2006) (allowing no-knock raids for drug seizures). Now, 80 percent of towns with at least 30,000 people have SWAT units. Balko, *Rise of the Warrior Cop*, 308.

Even if these raids are a social good—a contestable proposition—there will sometimes be wrong-door raids. If property is destroyed, there should be compensation to the innocent citizens who bare the economic brunt of these botched raids. The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

While the government wields power in the name of the public good, this responsibility comes with the implicit promise that power be wielded correctly. This is not limited to the Fifth Amendment Takings Clause; it is a central principle of the Bill of Rights and is borne out most clearly in police work done well.

The doctrine of exigent circumstances allows police without a warrant to search and seize evidence that might be destroyed. *See Kentucky v. King*, 563 U.S. 452 (2011) (officers knocked and announced their presence, but heard evidence being destroyed). Officers can also make an arrest without a warrant when in hot pursuit of a fleeing felon. *See United States v. Santana*, 427 U.S. 38 (1976). But in each of these cases officers need to be sure they are right about the circumstances or else the alleged criminal may go free. *See Welsh v. Wisconsin*, 466 U.S. 740 (1984) (denying exigent circumstance for officers when officers went to a drunk driver's home without a warrant). If police can make this judgment, they can decide whether to destroy property with the knowledge that it might be a taking.

Mr. Lech's home was destroyed after an hours-long standoff. That is longer than police get in cases of exigent circumstances. The police had time to weigh the

consequences. They may have decided to destroy the home and risk compensating Mr. Lech. They may have chosen to cordon off the area and wait out the suspect. But if the judgment of the court below stands, police will not need to account for the consequences of their decisions and the cost of achieving the public good will be borne by individual property owners instead of society at large.

CONCLUSION

For the foregoing reasons, and those expressed by the petitioner, the Court should grant certiorari.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael T. Collins
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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