No. 19-1123

In The
Supreme Court of the United States

LEO LECH, *et al.*,

Petitioners,

v.

CITY OF GREENWOOD VILLAGE, *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Using explosives and a battering ram attached to an armored personnel carrier, the Greenwood Village Police Department intentionally destroyed Petitioners' house. Afterwards, they offered the family $5,000 "to help with temporary living expenses." The family sued, arguing that they were entitled to Just Compensation under the Fifth Amendment for the intentional destruction of their house. The Tenth Circuit, however, held that no compensation was due because the home was destroyed pursuant to the police power rather than the power of eminent domain.

The question presented is whether there is a categorical exception to the Just Compensation Clause when the government takes property while acting pursuant to its police power.

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INTEREST OF AMICUS CURIAE[1]

Owners' Counsel of America (OCA) is an international network of lawyers dedicated to the principle that the right to own and use property is "the guardian of every other right" and the basis of a free society. James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998). Owners' Counsel of America was specifically founded to level the playing field in situations where private landowners find themselves pitted against powerful governmental entities with eminent domain powers and unlimited resources. To that end, OCA works for property owner across the nation to protect and advance the rights of private property.

OCA is non-profit organization sustained solely by its members and whose members have been involved in landmark property cases in nearly every jurisdiction in the nation, including as counsel or amicus in most of this Court's takings and eminent domain cases over the past forty years.

The brief will aid the Court in its consideration of the petition by explaining how the mere invocation of "police power" should be the *beginning* of the takings analysis, not the categorical end, as the Tenth Circuit concluded. The brief will also explain why private insurance is not an alternative to constitutionally-mandated just compensation where an exercise of the police power results in a taking. OCA urges the Court to grant certiorari to address the important issue presented by the petition.

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1. In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioners and Respondent have consented to this brief. No counsel for any party authored any part of this brief, and no person or entity other than amicus made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

This Court should review the Tenth Circuit's holding that action taken by the government under its police power—as opposed to an exercise of eminent domain—can never trigger a taking under the Fifth Amendment's Just Compensation Clause. This brief makes two main points.

1. Government's assertion that it destroyed property for a police power purpose is but one of the factors a court considers when an owner asserts the destruction resulted in a taking. Police power may be a compelling factor militating against compensation. But it should never be the sole factor, as the Tenth Circuit concluded.

2. The brief also addresses a question that often arises after the police or other government officials damage a home—or, as in this case, nearly destroy it: why should the homeowner be able to seek just compensation for a taking when insurance is available? The short answer is that nearly all homeowners' insurance policies exclude from coverage any loss caused by an order of a government or civil authority. A majority courts have interpreted this provision to preclude recovery for damage inflicted by the police in executing a search warrant or apprehending a fleeing suspect.

Consequently, if the Tenth Circuit's holding stands, many homeowners who suffer losses when their homes become are occupied or damaged by the police—no doubt a public purpose—through no fault of their own will be left without any remedy for damage inflicted by police searching for evidence, apprehending suspects, or otherwise exercising the police power.

The petition presents the Court an opportunity to clarify that an invocation of "police power" is not the dispositive fact in a takings analysis. Rather, the "character of the government action" is but one of the issues to be determined, not the conclusive one as the Tenth Circuit concluded. The Court should grant review.

ARGUMENT

I. The Character of the Government Action is But One Takings Factor, and is Not Dispositive

When private property is pressed into public service, the Fifth and Fourteenth Amendments require the government to provide just compensation. The overarching purpose of the takings doctrine is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While the paradigmatic government action triggering compensation is an affirmative exercise of eminent domain, for nearly a century this Court has expressly recognized that if government acts under its authority to protect the public health, safety, and welfare under the police power, if the action goes "too far," it will also trigger just compensation *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

This principle—that an exercise of sovereign power *other* than eminent domain may also be a taking—was hardly novel in 1922, because there has been a long tradition of courts recognizing government's obligation to provide compensation to owners who suffer an invasion of their property for the public good. In 1606,

for example, Lord Coke famously noted that a homeowner could not stop the King's "saltpetre men" from entering private property and damaging a home or barn when searching for saltpeter, a key ingredient in gunpowder. Gunpowder manufactured from English saltpeter was essential for the defense of the realm, and the King's men could enter and remove it, despite the destruction they frequently caused to homes, outhouses, and barns. But the sovereign's prerogative do so was limited by the principle that agents "are bound to leave the Inheritance of the Subject in so good Plight as they found it[.]" *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, 14 (1606) ("They ought to make the Places, in which they dig, so well and commodious to the Owner as they were before"). This Court recognized the same principle in cases such as *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (noting a wharf owner's argument that city's diversion of water pursuant to its police power could support a Fifth Amendment claim, but holding that the Fifth Amendment only limited the actions of the national government), and *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (rejecting argument that no taking was possible because defendant had not exercised eminent domain power and was acting pursuant to the state's regulatory power). In short, government's invocation of sovereign powers has not insulated it from takings.[2]

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2. The destruction of private property in a war by combatants for military necessity—to deprive the enemy of the property's use, for example—is not a taking. *See*, *e.g.*, *United States v. Pac. R.R.*, 120 U.S. 227 (1887). But even though the photos of the destruction wrought on the Lech family might look like they come from a war zone, this was civilian action, and these were police officers, not soldiers. The case should not be treated like a war.

Indeed, this Court has recognized that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]" *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). And there would be little doubt that if the Respondent's officials destroyed the Lech family home by flooding it, there would be a taking. *See*, *e.g.*, *United States v. Cress*, 243 U.S. 316, 328 (1917) ("Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment."). And even if a police power action did not destroy property, but, for example, required the Lech family to allow installation of a cable television box on their roof—occupying a mere one-eighth of a cubic foot of space—they would be compensated. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982) (even a *de minimis* physical occupation is a taking). So too is there a taking when the government's police powers limit property so severely that it has little economic uses remaining, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulations that deprive the owner of economically beneficial use are takings). Or when a regulation 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).

This Court has frequently cautioned against creating and applying categorical rules in all but a very narrow category police power takings. *See*, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 64-65 (1979) ("[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"). Nonetheless, the Tenth Circuit adopted a categorical

rule: no compensation because the police officers were protecting public safety. App. 14. Consequently, destroying the Lech home was "police action," not a "taking." This Court, by contrast, has never adopted such a crabbed, technical view of the word "taken"—or such an expansive, get-out-of-jail-free reading of "police power"—under the Fifth Amendment. According to the Tenth Circuit, the city's police dislodging a suspect from the Lech family home and in the process destroying it can't be a "taking" because the police's actions do not look the same as if the city were condemning the house to widen an adjacent highway.

But the same might be said for other situations in which this Court has recognized the possibility of takings liability. Public boating access isn't a "taking" because the Corps of Engineers was protecting navigation. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Mandatory cable box installation can't be a taking because New York City was promoting public access cable television. *Cf. Loretto*, 458 U.S. at 438. Protecting endangered species could not be a taking because the Government was exercising its commerce power. *Cf. Andrus*, 444 U.S. at 64-65. Rendering useless a state-recognized property interest can't be a taking because it was an exercise of the police power to prevent sinkholes. *Cf. Mahon*, 260 U.S. at 415 (Kohler Act enacted pursuant to state's police power went "too far").

In each of these examples, the Court—whatever the ultimate outcome (taking, no taking)—never reasoned that simply because the power being exercised was something other than eminent domain, that there could *never* be a taking as the Tenth Circuit concluded. Instead, the outcome in those cases turned on

other facts, in which the "character of the government action" is but one factor to consider, not the dispositive factor. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978) (to determine whether a police power action works a taking and requires compensation, the factfinder looks at the economic impact of the regulation (the loss in property value resulting from the regulation, for example), the property owner's "distinct investment-backed expectations," and the "character of the governmental action.") (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). The *Penn Central* takings factors do not focus on the label attached to the exercise of power, but on the impact of the action on the owner. *See Lingle*, 544 U.S. at 537 (regulation may be a taking if it is "so onerous that its effect is tantamount to a direct appropriation"). No one factor of *Penn Central*'s three-factor test is dispositive, and this applies regardless of the power the government exercises.

It may be that the character of the government action here was so important that the Lech family ultimately may not convince the trier of fact that they should be compensated. But that is far from the categorical bar adopted by the Tenth Circuit. After all, the takings doctrine is not a limitation on the government's power to take property for the public good. Rather, by requiring compensation, it forces a realistic evaluation of the cost of government action and whether it is fair to allocate the entire economic burden of public goods to a single owner. *Pa. Coal Co.*, 260 U.S. at 416 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). Indeed, to pursue a takings claim for

compensation, the property owner must admit or concede that the government action is a valid one. The usual remedy for a taking is not to stop the taking, but to obtain after-the-fact compensation. *See Lingle*, 544 U.S. at 536–37 (takings doctrine "is 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") (quoting *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 314-15 (1987)).

This is not to suggest that the Lech family should win their takings claim as a matter of law, but only—contrary to the categorical rule applied by the Tenth Circuit—that they should not *lose* as a matter of law. The character of the government action may, or may not, be ultimately more compelling than the economic impact of the action (the remaining uses the Lech family might have have), or whether they actually sustained any loss due to the availability of insurance (their distinct investment-backed expectations). These are the questions that the Tenth Circuit should have asked, not "what power was the government exercising?" *See*, *e.g.*, *YMCA v. United States*, 395 U.S. 85, 92 (1969) (was the government occupation of property designed to benefit the owner, would the rioters have destroyed the property anyway?).

This Court's takings doctrine is built around the idea that in addition to eminent domain, other exercises of government power have such a dramatic effect on private property that they are considered to be the functional equivalent of an affirmative exercise of the condemnation power, giving rise to a self-executing obligation to compensate the owner. *First English*, 482 U.S. at 316 ("While the typical taking occurs when

the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). The Tenth Circuit's blanket rule glosses over that essential point.

II. Destruction by Police is Usually Excluded From Insurance

When a home suffers damage, the owner usually has two potential sources to recover: (1) the person or entity who caused the damage, or (2) the homeowner's insurance. Most insurance policies include a standard exclusion for losses or damage caused, whether directly or indirectly, by any seizure or destruction of property by order of government authority. *See* 10A *Couch on Insurance* § 152.22 (2019). Most courts have concluded that a police or law enforcement officer acting within his authority constitutes an order of civil authority. Courts generally accord great deference to the police and will not second-guess the government's exercise of its power when deciding whether the order of government or civil authority exclusion applies. *See*, *e.g.*, *Cal. Cafe Restaurant v. Nationwide Mut. Ins. Co.*, C.A. No. 92-1326, 1994 WL 519449 (C.D. Cal. Sept. 14, 1994). In those jurisdictions, the government actor exclusion would apply unless the insured's loss "result[ed] from the behavior of an actor who, in carrying out a government's order, acts so egregiously that his behavior is not properly characterized as having been the act ordered." *Id.* at *2. The exclusion will apply "whether or not the government's decision is susceptible to after-the-fact characterization by the judiciary as unreasonable or as an abuse of its

discretion." *Id.* Some courts recognize coverage, but that is the minority rule.[3]

The Massachusetts Supreme Judicial Court, for example, concluded that damage inflicted by police officers executing a search warrant fell under an exclusion for "destruction of property by order of governmental authority." *Alton v. Manufacturers and Merchants Mutual Ins. Co.*, 624 N.E.2d 545, 546-47 (Mass. 1993).[4] *Alton* is consistent with other decisions finding

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3. *See Allen v. Marysville Mut. Ins. Co.*, 404 P.3d 364 (Kan. Ct. App. 2017). In *Allen*, a fleeing suspect broke into the plaintiff's home where he shot at police officers. When the suspect refused to come out of the house, the plaintiffs, who were at the scene, gave the police their house keys and permission to enter and search the house. The police, out of an abundance of caution, obtained a warrant to search the house. After the warrant arrived, the police fired at least 15 tear gas canisters into plaintiffs' home, which broke windows, damaged the sheetrock walls, and caused from $34,000 to $36,000 in damage. The court held that "there's simply no cause and effect relationship between the actions officers took to get Garcia out of the house and the issuance (or execution) of the search warrant." *Id.* at 368.

4. In *Alton*, the police obtained and executed warrants to search for cocaine, drug paraphernalia, and other evidence of drug distribution in a building owned by the plaintiff. When executing the warrants, the police caused $17,274 in damage. *Id.* at 546. The homeowner argued that a search warrant is not an "order of governmental authority" under the policy. *Id.* The court rejected the argument, however, because the search warrant read, "[y]ou are therefore commanded within a reasonable time … to search for the following property," which read like a court order. *Id.* The owner further argued that, if the search warrant was an order, it ordered the police to search for evidence, not to destroy or inflict damage on the house. *Id.* But the court held that the policy excluded any damage caused either directly or indirectly from the order and any damage was indirectly caused by the issuance of the search warrant. Thus, the court concluded

that actions by police to apprehend a suspect fall under the exclusion for an order of civil authority. *See*, *e.g.*, *Port Washington Nat. Bank & Trust Co. v. Hartford Fire Ins. Co.*, 300 N.Y.S. 874 (N.Y. App. Div. 1937). In *Queens Ins. Co. of America v. Perkinson*, 105 S.E. 580 (Va. 1921), the Virginia Supreme Court held that a fire set by two policemen at the direction of the mayor to force a fleeing suspect out of a house fell within an exclusion for "loss caused directly or indirectly … by order of any civil authority." *Id.* at 217. The exclusion can apply even if the police are negligent or excessive in executing the order. *See*, *e.g.*, *Port Washington Nat. Bank & Trust Co.,* 300 N.Y.S. at 876.[5]

There may be limited circumstances that a homeowners' policy might provide coverage. For example, a homeowner may recover under its policy if she can show that law enforcement exceeded authority or that the order was invalid. *See Kao v. Markel Insurance*

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that the damage fell within the order of government authority exclusion and was not covered. *Id.* at 547.

5. In that case, federal agents raided a property that, without the plaintiff's knowledge, contained an illegal still. *Id.* at 875. Federal law required the agents to destroy the still. The agents used acetylene torches and, in doing so, accidentally started a fire that damaged the property. *Id.* The court held that it must presume the officers acted lawfully, so the loss was caused by the statutory mandate to destroy the still. *Id.* Thus, the court reversed the plaintiff's verdict at trial because the damage fell under the exclusion for loss or damage caused directly or indirectly … by order of civil authority." *Id.* The dissent would have found that the agent's actions fell outside the exclusion because the statute only required destruction of the still, but the agents went well beyond that, and exceeded the scope of the order, when they burned down the building. *Id.* at 876-77.

Co., 798 F. Supp. 2d 472 (E.D. Pa. 2010).[6] Egregious acts by law enforcement are usually found to be outside the government authority exclusion. In these jurisdictions, therefore, a homeowner may obtain reimbursement under a homeowners' policy for damages caused by a law enforcement officer who exceeds his or her authority. But that will not help homeowners, like Petitioners, who suffer damage through no fault of their own,[7] when the police act properly in

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6. In *Kao*, the court held that damage caused by the police in executing a search warrant fell outside the exclusion for damage caused by "destruction of property by Order of Governmental Authority" where the search warrant was invalid. *Id.* at 478-79. The plaintiffs owned two buildings that each contained three rental units. *Id.* at 474. Based on a purchase from an undercover informant, the police obtained a search warrant for one of the two buildings, but did not specify which unit in that building. *Id.* at 474-75. When the police executed the warrant, they searched every unit in both buildings and caused extensive damage. *Id.* at 475. The insurer denied the claim under the government acts exclusion in the policy. The court accepted that, if the search warrants were valid, the governmental authority exclusion would preclude plaintiffs' claim. *Id.* at 476. But the court also agreed with the plaintiffs that, if the police acted without proper authority—acted under an invalid warrant or unreasonably executed the warrant—then the order of government authority exclusion would not apply. *Id.* at 477. The court further agreed with plaintiffs that, because the search warrants covered only one building and failed to specify which unit in that building could be searched, the police's action was improper. *Id.* at 478-79. Thus, the exclusion did not apply and the plaintiffs' losses were covered by the policy.

7. *See Bankers Fire & Marine Ins. Co. v. Bukacek*, 123 So.2d 157, 165 (Ala. 1960). In *Bukacek*, a revenue agent used forty sticks of dynamite to disable a still and the resulting explosion caused extensive damage to the property. The Alabama Supreme Court found that the agent's aggressive actions exceeded the authority granted by statute to merely disable the still. Thus, the

apprehending a suspect, search for evidence of a crime, or otherwise validly exercise their police power.

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exclusion for loss "caused, directly or indirectly, by … order of any civil authority" did not preclude coverage. *Id.* at 158.

CONCLUSION

The police commandeered and destroyed Petitioners' home to apprehend a dangerous suspect. Under the Tenth Circuit's holding, Respondents are immune as a matter of law simply because the officers acted under their police power. Petitioners do not challenge that this was necessary or proper, and only seek their day in court and the chance to prove that they should not alone bear the ruinous financial costs of actions that benefited the public. On that day, the Lech family may win. Or they may lose. But it is simply premature to categorically prohibit them from proving their case under the long-standing analysis where the character of the government action, the Leches' expectations (the availability of insurance, for example), and the uses remaining to their damaged home are but factors in the calculus.

The Court should grant the petition to review this important question.

Respectfully submitted.

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