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 FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

This Court, along with lower federal and state courts, has historically and consistently distinguished between the power of eminent domain and the police power. The question presented is whether damage sustained to a third-party's rental property caused by law enforcement's admittedly reasonable efforts to apprehend an armed, aggressive and barricaded suspect gives rise to a compensable taking of property under the Fifth Amendment of the United States Constitution.

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STATEMENT OF THE CASE

Petitioners' claim for a taking of their property without just compensation in violation of the Fifth Amendment of the United States Constitution stems from a high-risk, barricaded gunman event that occurred on their property on June 3-4, 2015 (the "Incident"). During the Incident, the Greenwood Village Police Department ("GVPD") was responsible for safely apprehending an armed individual, wanted on multiple felony arrest warrants, who had shot at police officers multiple times and had barricaded himself in Petitioners' residence. Despite diligent efforts on the part of law enforcement, the barricaded gunman refused to obey direction, refused to exit the residence, and refused to surrender. Indeed, during the 19-hour standoff, the GVPD spent hours negotiating with the barricaded individual, and only utilized escalated force as was necessitated by the circumstances. Ultimately, however, given the continued tangible threat to the safety and welfare of the public and law enforcement caused by the armed, aggressive, barricaded individual, the GVPD was forced to employ tactics to apprehend the individual that resulted in damage to Petitioners' rental property. The lawful use of Respondents' police power during this Incident is distinct from the government's power of eminent domain. Just compensation under the Fifth Amendment, therefore, is not warranted as no taking of property for public use occurred.

1. The facts in this case are largely undisputed, although Petitioners fail to accurately state all of the

facts and fail to provide all of those facts material to the consideration of the question presented. Consequently, Respondents provide additional factual information for this Court's consideration.

In January 2013, Leo and Alfonsina Lech purchased property at 4219 S. Alton Street, in Greenwood Village, Colorado (the "Property"), as an investment and as a place for John Lech, their son, to rent. [Pet. App. 4 & 21]. The residence on the Property was a traditional bi-level home that backed directly to Interstate 225. [*Id.* 21]. At the time of the Incident, John Lech lived at the Property with his girlfriend, Anna Mumzhiyan, and her nine-year-old son. [*Id.* 4 & 21].

On the afternoon of June 3, 2015, an Aurora Police Department ("APD") officer was dispatched to a Wal-Mart to assist in a shoplifting investigation. [*Id.* 21]. When the officer contacted the suspect, he fled and attempted to run over the officer while doing so. [*Id.* 22; Resp. App. 34-35, 74-76 & 95-96]. The APD officer followed the suspect, later identified as Robert Johnathan Seacat ("Seacat"), found Seacat's vehicle abandoned, and saw Seacat cross Interstate 225 on foot. [Pet. App. 22; Resp. App. 76 & 96]. A citizen also approached the officer and advised that she observed Seacat with a black semi-automatic pistol. [Pet. App. 22; Resp. App. 77].

Dispatch advised GVPD that APD officers were pursuing an armed suspect near Greenwood Village's northern border. [Pet. App. 22]. The GVPD was also notified that Seacat was wanted for theft, was thought to

be trying to carjack a vehicle for his escape, and had attempted to run over an APD officer. [Resp. App. 76-80 & 95-97].[1] Shortly after, the GVPD was notified that a burglar alarm had been triggered at the Property. [Pet. App. 4 & 22]. GVPD officers responded and learned that Ms. Mumzhyian's son was home alone when Seacat entered the home, but was able to safely escape the residence. [*Id.*]. The boy told a GVPD officer that Seacat was trying to access a vehicle as a getaway car. [Resp. App. 83-85 & 97-99]. Anticipating Seacat may try to steal a car from the garage, officers positioned their vehicles to block the driveway. [Pet. App. 4 & 22]. In response, Seacat fired his gun from inside the garage and a bullet went through the garage door and hit the hood of a police car from which an officer was exiting. [*Id.* 4 & 22-23]. GVPD also learned that there were two unsecured firearms and ammunition in Petitioners' house, that Seacat had three outstanding felony warrants for his arrest, and that Seacat was believed to have narcotics in his possession. [Resp. App. 46-47, 48-49, 55-57, 69-70 & 88-89].

From the outset, GVPD deemed the Incident a high-risk, barricaded suspect situation. [Pet. App. 4 & 23]. GVPD has an Emergency Response Team ("ERT") and a Crisis Negotiations Team ("CNT") that are specially trained and used to support the GVPD in

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[1] Pursuant to the Greenwood Village Municipal Code and Charter, the GVPD was created for the safety and good order of the City and to help perform City functions. [Resp. App. 1]. By City Code, GVPD officers have a duty to see that all City ordinances and Colorado laws are followed. [*Id.*].

barricade and high-risk situations. [Resp. App. 2-7 & 71-72]. GVPD Commander, Dustin Varney ("Varney"), who was the Operations Division Commander and in charge of overseeing the ERT and CNT, took command. [Pet. App. 23; Resp. App. 51-53 & 63-66]. Varney activated the ERT and CNT, notified various GVPD command staff of the situation, set up incident and tactical command posts, and secured the scene.[2] [Pet. App. 23]. In addition to shutting off the water and gas and restricting overhead airspace, Varney also had a reverse 911 call sent to residents to provide information on the situation and notify them of safety protocols. [*Id.*].

In an attempt at peaceful resolution, negotiations with Seacat began immediately. [Resp. App. 81-82, 98 & 100-102]. During negotiations, Seacat made various demands, including a demand to talk with his sister—a request GVPD acceded to by bringing his sister from Boulder to the Property. [Pet. App. 24]. Further, GVPD contacted other members of Seacat's family for their assistance to get Seacat to surrender, and played recorded messages from Seacat's family members on a loudspeaker. [*Id.*]. Negotiation attempts continued for about four and a half hours, but Seacat would not surrender. [Pet. App. 4 & 24].[3]

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[2] Experienced officers from APD, Arapahoe County Sheriff's Office ("ACSO") and Douglas County Sheriff's Office ("DCSO") were in the command post with Varney, assisted Varney during the Incident, and provided GVPD with specialized equipment, expertise and consultation. [Resp. App. 69, 72-73 & 97-99].

[3] Seacat made a number of false statements during negotiations. For instance, he lied and said his name was "Geoff." [Resp.

The GVPD believed that Seacat was barricaded on the top floor of the bi-level residence, which afforded him an elevated position above the officers who were at street level, putting the officers at a clear tactical disadvantage. [Resp. App. 117]. Seacat's presumed location also caused concern about his danger to the public generally, as his elevated position gave him an advantage to fire his weapon at the public as well as officers. [Resp. App. 36-37 & 117].

Given Seacat had been barricaded in Petitioners' residence for about five hours and given the unsuccessful negotiations up to that point, Varney authorized the deployment of cold gas munitions through a window in the residence in an effort to get Seacat to come out. [Pet. App. 4-5 & 24]. This tactic did not trigger any response from Seacat. [*Id.* 24]. Varney also shut Seacat's cell phone off and authorized the use of a throw phone. [*Id.* 5 & 24]. This was done to control Seacat's outside communications (an important negotiations and safety tactic) and to avoid Seacat's cell phone going dead. [Resp. App. 100-102 & 107-110]. To facilitate transfer of the throw phone, Varney sought to use a robot and authorized a BearCat armored vehicle to breach the home to deliver the robot. [Pet. App. 5 & 24]. These tactics provided the safest method for officers to enter the residence. [*See* Resp. App. at 100-111]. However, because of the slick varnish of the floors, the robot was

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App. 85-87]. Seacat also repeatedly hung up on negotiators and would not answer his phone at times. [*Id.*]. Despite efforts to communicate GVPD's intentions to deliver a throw phone and convey exit plans for Seacat, he did not respond. [Resp. App. 87-90].

unable to navigate to the second floor where GVPD believed Seacat was located. [Resp. App. 67-68 & 114-116].

Some eight and a half hours after Seacat had entered the home, and after not hearing from Seacat for hours, Varney authorized a tactical team to enter the residence in an effort to apprehend him. [Pet. App. 5 & 24-25]. But as the officers tried to reach the second level of the residence, Seacat fired at the officers. [*Id.*]. Tactical team members reported hearing Seacat reloading his weapon.[4] [Resp. App. 103-104]. As a result, the tactical team was ordered to exit the home. [Pet. App. 5 & 25]. At various times after, Varney approved the use of gas munitions to get Seacat to surrender, but such efforts were not successful. [*Id*. 25].

In the early morning hours of June 4, 2015, a throw phone was successfully delivered to the second floor of the residence. [*Id.*]. Despite the continuous ringing of the throw phone and announcements over the loudspeaker requesting Seacat to answer, Seacat never came out of hiding or answered the phone. [*Id.*]. At 4:05 a.m., Seacat's cell phone was turned back on, but negotiators were unable to reach him. [*Id.*].

Given GVPD's limited visibility into the home, and Seacat's continued evasion from officers within the second story, at about 5:14 a.m., Varney approved an explosive ordnance disposal to the east side of the

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[4] GVPD also believed Seacat had acquired the two other unsecured firearms in the residence by that time. [Resp. App. 103-106].

residence above the garage in an effort to obtain sightlines into the residence, locate Seacat, and limit his movements. [*Id.* 5 & 25]. Additional gas munitions were also used to try to flush Seacat out, and negotiation efforts continued, all to no avail. [*Id.* 25].

As there was no sustained success to communicate or negotiate, and all other tactics had failed, Varney approved the use of the BearCat to open up holes in the back of the residence. [*Id.* 5 & 25-26]. There were several carefully considered purposes for this action: (1) to create sightlines to locate Seacat; (2) to negate his ability to ambush officers sent in to apprehend him; (3) to make Seacat feel exposed; and (4) to create ports so officers could, if necessary, shoot into the residence from a distance. [*Id.* 26].

Later, almost 19 hours after Seacat's initial breakin, Varney approved a tactical team to enter the residence to arrest Seacat. [*Id.* 5 & 26]. The tactical team contacted Seacat, disarmed him, and took him into custody. [*Id.*]. After Seacat's arrest, officers found several baggies, later identified as heroin and methamphetamine, with his belongings and on his person. [Resp. App. 91-94].[5] In GVPD's efforts to preserve life, no citizen or law enforcement officer was seriously injured or killed during the Incident, nor did Seacat suffer any serious injury due to law enforcement actions. [Resp. App. 16-19, 38-40 & 119 ¶ 44].

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[5] Petitioners' description of Seacat as a mere "shoplifter" is clearly misleading given Seacat's actions and the events as issue. [Pet. 2-3].

Shortly after the Incident, and pursuant to GVPD policy, the National Tactical Officer's Association ("NTOA") completed an external review of the Incident per GVPD Chief John A. Jackson's request.[6] [Resp. App. 20-26]. The NTOA found that apart from a few minor, immaterial concerns, law enforcement acted in a "highly commendable manner" and their actions were successful, though Petitioners' property had unfortunately been damaged. [Resp. App. 18-19]. The NTOA also found that Seacat was "a heavily armed and assaultive adversary," and that the combined law enforcement personnel under the command of GVPD acted professionally and in accord with best practices. [*Id.*].

After the Incident, the Property was deemed uninhabitable, and Petitioners decided to have the residence demolished. [Pet. App. 5 & 27; Resp. App. 12-14, 31-32 & 44]. There is no evidence in the record that Petitioners "were forced to tear the home down." [Pet. 4]. Rather, Petitioners made no effort to determine whether the residence could be remediated. [Resp. App. 12-14; 31-33]. The City of Greenwood Village offered to assist Petitioners with temporary living expenses and the payment of their insurance deductible in a gesture of good faith, which Petitioners refused. [Pet. App. 5 & 27; Resp. App. 122-124]. Petitioners were

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[6] The NTOA is a premier law enforcement professional organization focusing on tactics and police response to critical incidents. It has an excellent reputation for critical, objective review and analysis of law enforcement special operations teams and their response to critical incidents. [Resp. App. 17].

afforded coverage for damage to the residence in the approximate amount of $345,000 through Safeco, their homeowner's insurance provider. [Resp. App. 27-30].[7] Afterwards, Petitioners built a larger and more valuable house. [*Id.* 30].

2. Petitioners sued the Respondents in State Court for a taking of their property without just compensation under both the Fifth Amendment and Article II, Section 15 of the Colorado Constitution, as well as for violation of their due process rights under the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution, and four state tort claims. Respondents removed the action to federal court. The United States District Court for the District of Colorado granted Respondents' Motion for Summary Judgment in part and denied it in part. [Pet. App. 55-56]. The district court dismissed Petitioners' claims under the Fifth and Fourteenth Amendments, as well as their takings claim under the Colorado Constitution. [*Id.*]. The district court remanded Petitioners' tort claims and the Article II, Section 25 claim to the District Court for Arapahoe County, Colorado.[8] [*Id.* 56]. Contrary to Petitioners' inaccurate description of the district court's holding concerning their Fifth Amendment and state takings claim, Respondents aver that the

[7] While insurance coverage may ordinarily not be relevant, the Owner's Counsel of America dedicated a good portion of its amicus brief to the argument that insurance companies deny such claims—a dilemma Petitioners never faced.

[8] Petitioners ultimately dismissed their claim under Article II, Section 25 of the Colorado Constitution, but pursued their four tort claims in state court.

district court found that Petitioners' takings claims failed because: (1) the damage to Petitioners' Property was done pursuant to the police power and not the power of eminent domain, and so Respondents' conduct did not constitute a compensable taking for purposes of the Takings Clause; and (2) that this case clearly involves the use of police powers in an emergency situation. [*Id.* 42-46].

Petitioners appealed to the Tenth Circuit, but only with respect to the district court's decision concerning their takings claims under the Fifth Amendment and Article II, Section 15 of the Colorado Constitution. [*Id.* 2]. In challenging the district court's ruling, Petitioners argued: (1) the district court erred in finding that when the government acts pursuant to its police power, its actions do not constitute a taking for purposes of the Takings Clause; and (2) even assuming the distinction between the police power and the power of eminent domain is dispositive of the taking question, the district court erred in finding that officers' conduct fell within the police power.[9] [*Id.* 7-8]. The Tenth Circuit rejected Petitioners' challenges, affirmed the district court's finding and held "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 that Respondents were acting pursuant to their police power in causing the damage to Petitioners' Property. [*Id.* 14 & 19]. The

[9] Petitioners also advanced arguments related to the emergency exception, but the Tenth Circuit did not rule on the application of the emergency exception. [*Id.* 3 n.2].

Tenth Circuit explained that the police power is limited by the Due Process Clause, a claim which Petitioners pursued but did not appeal, as well as state statutory remedies for willful and wanton conduct, which Petitioners did pursue. [*Id.* 18].

Petitioners subsequently requested a rehearing *en banc*, which the Tenth Circuit summarily denied with no request that the court be polled. [*Id.* 61-62].

REASONS FOR DENYING THE WRIT

The Tenth Circuit correctly recognized the distinction between the police power and the power of eminent domain, its application of the law to the facts of this case, and correctly found that Respondents' conduct fell within the police power and did not constitute a taking as provided under the Takings Clause. Contrary to Petitioners' contention, the Tenth Circuit considered and relied upon well-settled Supreme Court, Tenth Circuit and other circuit court precedent in reaching its determination. Moreover, Petitioners' arguments suggesting this case supports a growing trend of federal court precedent in contravention of this Court's precedent are unfounded. Rather, the cases with like facts and legal analysis as presented here establish consistency with this Court's precedent. Likewise, the facts and circumstances of this case, coupled with the unanimous, unpublished decision from the Tenth Circuit, render this case unsuitable for review. Thus, there is no basis to grant certiorari review.

A. The Tenth Circuit's holding does not conflict with this Court's precedent and was correctly decided.

Although Petitioners suggest that the Tenth Circuit's holding below conflicts with this Court's Fifth Amendment decisions, their arguments fall flat. This Court has a long-standing history of distinguishing between the police power and the power of eminent domain, and has throughout the years routinely applied that legal distinction. In that respect, Petitioners' efforts to justify review because the Tenth Circuit's decision somehow disregards certain prefatory language in *Arkansas Game & Fish Comm'n v. U.S.*, 568 U.S. 23 (2012) is missing the point: the Tenth Circuit correctly decided this case based on the Respondents' use of the police power when apprehending a dangerous, barricaded fugitive.

Petitioners begin their argument with two cases from 1871, one of which discusses the flooding of land and Wisconsin's takings clause, *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871), and the other which discusses the government's use of three steamboats, *U.S. v. Russell*, 80 U.S. 623 (1871). Neither case addressed the police power in enforcing the criminal law. Rather, this Court in *Pumpelly* concluded that where land is "actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking," but specifically advised that "[b]eyond this we do not go, and this case calls us to go no further."

Pumpelly, 80 U.S. at 181. The *Russell* case is even more removed from the facts of this case as it concerned a dispute over the amount of payment owed to the owner of steamboats—not the fact of compensation itself—and this Court's jurisdiction. *Russell*, 80 U.S. at 631-32. Though Petitioners argue these cases foreclose the Tenth Circuit's decision, that position is simply unsupportable.

Sixteen years later, this Court in *Mugler v. Kansas*, 123 U.S. 623 (1887) pointedly addressed the *Pumpelly* holding, which the petitioner in that case cited as the basis for compensation. *Id.* at 667-68. Justice Harlan, the author of the *Mugler* decision, distinguished *Pumpelly* as a case arising under the state's eminent domain power rather than the police power. *Id.* at 668. Indeed, the Court held that when a state acts to preserve the "safety of the public," the state "is not, and, consistently with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain. . . . The exercise of the police power by the destruction of property . . . is very different from taking property for public use. . . ." *Id*. at 668-69. While acknowledging the purposes of the Takings Clause, the Court nonetheless held that "[t]hese principles have no application to the case under consideration" because the state's action was "exerted for the protection of the health, morals, and safety of the people." *Id.* at 668. And notably, the Court

held that all property is subject to the state's police power. *Id.* at 665.[10]

Following *Mugler*, this Court in *Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois*, 200 U.S. 561 (1906) continued the discussion and stated that the police power "has always been exercised by municipal corporations, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss. . . ." *Id.* at 593 (citing *Village of Carthage v. Frederick*, 25 N.E. 480, 481 (N.Y. 1890)) (internal quotations omitted). The Court went on to explain that:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attached under the Constitution. . . . There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking

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[10] Courts have continued to rely on *Mugler* up to the present day in distinguishing the police power from the power of eminent domain. *See*, *e.g.*, *Bachmann v. U.S.*, 134 Fed. Cl. 694 (2017) (citing *Mugler* for the proposition that "the Supreme Court of the United States has drawn a distinction on the one hand between the exercise of the police power to enforce the law . . . and, on the other hand the government 'taking property for public use.' ").

> of private property without just compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.

Id. at 593-94 (internal citations and quotations omitted).

Thereafter, in *Omnia Commercial Co. v. U.S.*, 261 U.S. 502 (1923), this Court discussed the power to requisition steel that ultimately affected the performance of a contract. This Court explained that "[i]f, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable." *Id.* at 510 (emphasis in original). Continuing down that road, several decades later this Court in *Bennis v. Michigan*, 516 U.S. 442, 443-44 & 453 (1996) rejected a Fifth Amendment takings claim related to the forfeiture of a vehicle due to violation of criminal law. This Court held that when a state acquires property "under the exercise of governmental authority other than the power of eminent domain," no just compensation is due. *Id.* at 452. These cases establish that in variable circumstances this Court's precedent has consistently distinguished the exercise of the police power to protect the public safety and welfare from the power of eminent domain in deciding whether just compensation is constitutionally required.

Notwithstanding this line of cases from this Court, Petitioners attempt to discredit the Tenth Circuit's decision, primarily focusing on the Tenth Circuit's reliance on *Mugler* and its progeny, by arguing that *Mugler* only stands for the proposition that "it is not a taking when the government abates a nuisance or forbids certain harmful uses of property." [Pet. 13]. That overly simplistic argument was addressed in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 145 (1978), and again in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023-24 (1992). As explained in *Lucas*, the "[h]armful or noxious use analysis was . . . simply the progenitor of our more contemporary statements that land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests," and that "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory takings—which require compensation—from regulatory deprivations that do not require compensation." *Id*. at 1026 (internal quotations omitted).[11] Thus, while analyzed in the regulatory context, these cases establish this Court's contemporary considerations based on *Mugler* that the distinction between the police power and the power of eminent domain exists and is based on considerations of state actions taken to preserve the safety and welfare of the public.

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[11] These cases also address Petitioners' arguments related to *Horne v. Dep't of Agriculture*, 576 U.S. 350 (2015) in that in the regulatory takings context, if the facts give rise to a regulatory taking versus a valid regulatory deprivation, a constitutional violation may result. The facts and circumstances of this case are clearly different from the standard regulatory takings analysis.

In turn, with respect to *Mugler*, the Tenth Circuit first correctly recognized that Petitioners did not challenge the distinction between the police power and the power of eminent domain in the regulatory takings context. [Pet. App. 8]. The Tenth Circuit then properly applied the reasoning in *Mugler* to this case, versus the inapplicable reasoning in *Pumpelly* or *Russell*, that just compensation is not due when a state properly exercises its police power to protect the public safety and welfare. [*Id.* 13-14]. And though no challenge has been raised by Petitioners in their Petition as to whether Respondents were acting pursuant to their police powers in protecting the public safety and welfare when the property damage at issue occurred, the Tenth Circuit analyzed and aptly determined that Respondents were doing so. [*Id.* 14-18].

As another point of contention, Petitioners argue review by this Court is warranted given this Court's holdings in *Arkansas Game & Fish Comm'n* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which they claim are contrary to the Tenth Circuit's holding. Petitioners did not address these cases in detail before the district court or in briefing or oral argument to the Tenth Circuit, and they were only substantively discussed later in Petitioners' request to the Tenth Circuit for *en banc* review. Given the facts and circumstances of this case compared with

these two cases, as well as the above precedent,[12] further review is not merited.

First, the *Loretto* case presented a question of "whether a minor *but permanent* physical occupation of an owner's property authorized by government constitutes a 'taking' . . . ," wherein New York law provided "that a landlord must permit a cable television company to install its cable facilities upon his property." *Loretto*, 458 U.S. at 421 (emphasis added). The Court concluded that a regulation resulting in a permanent physical occupation of property is a taking, but cautioned that its holding was "very narrow." *Id.* at 441. It specifically stated that it did not question "the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* (emphasis in original). In that way, this Court recognized the distinction between the power of eminent domain and the valid exercise of a state's police power, while drawing a very specific and narrow *per se* rule concerning only permanent physical appropriations of private property for public use.

Second, in *Arkansas Game & Fish Comm'n*, this Court considered "whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary," and held "simply and only, that government-induced flooding temporary in duration gains no

[12] Importantly, this Court did not address *Mugler* or *Bennis* in either *Arkansas Game & Fish Comm'n* or *Loretto*. This further demonstrates the distinction between the cases upon which Petitioners rely and the legal principles at issue here.

automatic exemption from Takings Clause inspection." *Arkansas Game & Fish Comm'n*, 568 U.S. at 26, 38. Petitioners pull out a few words and phrases from this case in an effort to show that the Tenth Circuit's ruling is out of line because it creates a "blanket exclusionary rule." [Pet. 6-7]. Yet, as provided above, this Court has historically and consistently distinguished between the valid exercise of a state's police power and the power of eminent domain, and courts, including the Tenth Circuit here, routinely consider the facts and circumstances of the case to determine whether damage to property is the result of the valid exercise of a state's police power to protect the public safety and welfare or whether property is taken for public use. As a result, Petitioners' conclusory argument concerning the need to review the Tenth Circuit's holding is baseless.

Notably, both *Arkansas Game & Fish Comm'n* and *AmeriSource Corp. v. U.S.*, 525 F.3d 1149 (Fed. Cir. 2008), were analyzed and ultimately decided by the Federal Circuit.[13] *AmeriSource Corp.* was decided prior to *Arkansas Game & Fish Comm'n*, and importantly *AmeriSource Corp.* was never even referenced in the *Arkansas Game & Fish Comm'n* decision. The reason for that is straightforward—*AmeriSource* concerned the exercise of police power in enforcing the criminal law that did not result in a taking of property for public use, similar to the circumstances here, whereas *Arkansas Game & Fish Comm'n* concerned the power of eminent domain. *Id.* at 1154. This difference

[13] The Tenth Circuit relied upon *AmeriSource* in its decision. [Pet. App. 9-10, 14-15 & 17-18].

further supports the Tenth Circuit's reliance on the decisions it references and the irrelevance of *Arkansas Game & Fish Comm'n.*

Despite Petitioners' efforts to demonstrate error and inconsistency with this Court's precedent sufficient to justify review of the Tenth Circuit's decision, their efforts fail. The Tenth Circuit's holding is consistent with this Court's precedent.

B. This case does not implicate any conflict in the federal or state courts that requires review by this Court.

Petitioners also claim that review is necessary because lower courts are "deeply divided" on the application of the Takings Clause to cases involving the police power. [Pet. 14]. But the Petitioners contradict their own argument on the very same page of their Petition, accepting that "the most recent federal appellate decisions have *uniformly* adopted the kind of categorical exception adopted below. . . ." [Pet. 14 (emphasis added)]. In that respect, Petitioners concede the Respondents' position—that this Court's precedent on the distinction between the exercise of the police power versus the power of eminent domain is firmly established, and the distinction has been confirmed by the uniformity of lower federal court decisions. In fact, not only is the Tenth Circuit's decision consistent with its prior precedent and other federal courts that have considered facts and circumstances similar to those presented here, but most state courts analyzing the

distinction between the power of eminent domain and the police power have also ruled consistently. The alleged distinction created by Petitioners, thus, is misleading.

Beginning with the four state courts of last resort that Petitioners claim have considered like issues and support their position, such cases do not concern important federal questions that justify this Court's review. Indeed, the state court decisions Petitioners reference concern almost exclusively state constitutional claims, some of which contain broader rights than the federal Takings Clause.[14] Moreover, the cases discussed are factually distinct and discuss considerations unique to the state at issue.[15] Thus, these cases do not support the need for review.

First, in *Brewer v. State*, 341 P.3d 1107, 1109 & 1112 (Alaska 2014), firefighters were instructed to intentionally set fire to landowners' vegetation to deprive the advancing wildfires of fuel and save structures—conduct that was expressly permitted by state statute. The landowners asserted a takings claim under the Alaska Constitution, which the court emphasized it liberally interpreted in favor of property owners, and which provides broader protections than

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[14] Indeed, if state legislatures find it appropriate to afford greater rights under their constitutions related to inverse condemnation, they can do so. That, however, does not impact the federal Takings Clause.

[15] Notably, the cases on which Petitioners rely were decided between 1972 and 2014. That timeframe does not support Petitioners' argument that a "dangerous" split in authority exists given the timeframe involved.

the federal Takings Clause. *Id.* at 1111. The court determined that because the Alaska legislature had expressly enacted statutes related to fighting wildfires and that such conduct benefitted the public as a whole, the damage done was for a public use as identified in the Alaska takings clause. *Id.* at 1112. The court, however, did not end its analysis there, and found remand was necessary to determine whether the doctrine of necessity applied. *Id.* at 1118. In that respect, the Alaska court stated that it too has recognized the distinction between eminent domain and the police power, particularly in the context of enforcing criminal law. *Id.* at 1115 (citing *Waiste v. State*, 10 P.3d 1141, 1155 (Alaska 2000)). The court, though, stated its task was to define the limits in which a state's otherwise valid exercise of police power may require compensation in the context of firefighting. *Id.* Thus, *Brewer* does not create the kind of division Petitioners assert exists.

Second, *Garrett v. City of Topeka*, 916 P.2d 21, 36 (Kan. 1996) concerned a regulatory takings analysis under the Kansas Constitution in which a city resolution was deemed to have interfered with a landowner's investment and caused economic loss. The court never discussed the use of the police power in enforcing the criminal law, nor analyzed how such circumstances impact a takings claim. As such, this case is inapplicable and does not support a divide in authority.

Third, *Soucy v. State*, 506 A.2d 288 (N.H. 1985) involved property damaged by a fire that a court ordered remain unimproved so it could be used as evidence in a criminal proceeding. Petitioners' interpretation of

the court's holding, however, is distorted. In considering a taking under the New Hampshire Constitution, the court found the facts concerned the "judicial power" and that application of a balancing of interests was necessary. *Id.* at 291-92. Conversely, as to the Fifth Amendment claim asserted, the court cited Supreme Court precedent stating "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed," *id.* at 293 (citing *Monongahela Bridge Co. v. U.S.*, 216 U.S. 177, 193 (1910)), and found that no taking had occurred and dismissed the claim. *Id.* at 293-94. This case, therefore, is certainly distinct and does not support the argued division in authority.

Lastly, Petitioners reference *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), which they acknowledge concerns a state regulatory takings analysis. While Petitioners cherry-pick a quote from *Just* that they argue supports their position, that case also states that in the context of the distinction between the power of eminent domain and the police power, "the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm." *Id.* at 767. It follows that this case does not present any concerning divide in authority as Petitioners argue.

Notwithstanding these inapposite cases, other state courts of last resort have determined, consistent with this Court's precedent and other federal courts as discussed below, that law enforcement actions within

the scope of their police powers do not constitute a taking. *Eggleston v. Pierce Cnty.*, 64 P.3d 618 (Wash. 2003) (holding under Washington Constitution, which is different from and offers greater protection than its United States constitutional counterpart, that the police power and power of eminent domain are essential and distinct and that "not every government action that takes, damages, or destroys property is a taking.");[16] *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (considering whether a convenience store owner who brought takings claim under state constitution was entitled to just compensation for damages caused by police in apprehending a barricaded suspect, and finding 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.");[17] *Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475 (Iowa 2000) (finding "damage

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[16] In discussing *Eggleston*, Petitioners refer to another Washington Supreme Court case, *Brutsche v. City of Kent*, 193 P.3d 110 (Wash. 2008), that considered whether damage done to property when law enforcement used a battering ram to gain entry was a violation of either the state or federal constitutions. Despite Petitioners' claim that the *Brutsche* court "established a broad rule that the police power never causes a taking as a matter of federal law," that interpretation of the court's holding is simply incorrect. [Pet. 17 n.5]. Rather, the court held that the damage done to the property did not constitute a permanent physical occupation of the property, which distinguished it from *Loretto*, and that the property owner could not establish a taking under the federal constitution. 193 P.3d at 121.

[17] This Court refused to accept certiorari review in either *Eggleston v. Washington*, 555 U.S. 1075 (2008) or *Customer Co. v. City & Cnty. of Sacramento*, 516 U.S. 1116 (1996).

caused to the doors on plaintiff's property by the officers was a reasonable exercise of the police power and therefore does not amount to a taking of plaintiff's property" under the Iowa Constitution). These cases, which are more on point to the facts and circumstances of this case, establish that there is considerably more uniformity in state court decisions of last resort than Petitioners claim.

Turning to the federal decisions that have considered like issues, Petitioners reference only *AmeriSource Corp.*, 525 F.3d 1149 (Fed. Cir. 2008) and *Johnson v. Manitowoc County*, 635 F.3d 331 (7th Cir. 2011). Petitioners fail to mention or discuss the decisions in *Lawmaster v. Ward*, 125 F.3d 1341 (10th Cir. 1997), *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir. 1971), *Zitter v. Petruccelli*, 744 Fed. Appx. 90 (3d Cir. 2018) (unpublished) or *Bachmann v. U.S.*, 134 Fed. Cl. 694 (2017), upon which the Tenth Circuit also relied in reaching its decision.[18] Far from creating a conflict or division, therefore, the Tenth Circuit's reliance on these cases, which in turn rely upon this Court's

[18] And since the Tenth Circuit's findings were issued in this case, additional decisions have come down with consistent holdings. *See*, *e.g.*, *Modern Sportsman, LLC v. U.S.*, 145 Fed. Cl. 575 (2019) ("When properly exercised, the police power provides the government with the authority, under limited circumstances, to take or require the destruction of property without compensation, as the Takings Clause is not implicated in such limited circumstances."), *appeal docketed*, No. 20-1107 (Fed. Cir. Nov. 1, 2019).

decisions in cases like *Bennis* or *Mugler*, represent conformance with established precedent.[19]

Further, in review of the federal cases upon which the Tenth Circuit relied, those cases refer to and rely upon the distinction between the power of eminent domain and the police power. *See*, *e.g.*, *Lamm*, 449 F.2d at 1203 ("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."); *see also AmeriSource Corp.*, 525 F.3d at 1154 (relying on *Bennis* in explaining that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain"). And even more importantly, most of these cases discuss the distinction between the power of eminent domain and the police power when private property is damaged or destroyed while enforcing the criminal law. *See*, *e.g.*, *Lawmaster*, 125 F.3d at 1344-46 (finding no Takings Clause violation where federal agents physically damaged property while executing a search warrant); *see also Bachmann*,

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[19] This Court also did not find it necessary to review any of the federal court decisions upon which the Tenth Circuit relied in which petitions for certiorari were sought. *AmeriSource Corp. v. U.S.*, 556 U.S. 1126 (2009) (denying certiorari); *Johnson v. Manitowoc Cnty.*, 565 U.S. 824 (2011) (denying certiorari); *Lawmaster v. U.S.*, 510 U.S. 870 (1993) (denying certiorari); *Lamm v. Volpe*, 405 U.S. 1075 (1972) (denying certiorari).

134 Fed. Cl. at 696 (holding "[w]hen private property is damaged incident to the exercise of police power, such damage is not a taking for the public use. . . . Instead, both the owner of the property and the public can be said to be benefitted by the enforcement of criminal laws and cessation of the criminal activity.").

The only federal court decision Petitioners reference that they claim comes to a contrary holding from those federal cases discussed above is *Patty v. U.S.*, 136 Fed. Cl. 211 (2018). But not only do Petitioners mischaracterize the decision in that case, it is distinguishable from this case. Petitioners argue that the court in *Patty* determined that "[i]t is a taking when the government needs to commandeer a vehicle for law-enforcement purposes." [Pet. 22]. Yet the *Patty* court did not rule on the substantive Fifth Amendment issues raised, but only found that plaintiffs had stated facts sufficient to survive a motion to dismiss. *Patty*, 136 Fed. Cl. at 216. Further, the facts in *Patty* as alleged are distinct from those presented in this case—primarily because in *Patty* the government allegedly took and damaged the plaintiff's truck as a mere convenience in pursuing an unrelated law enforcement activity. *Id*. ("Plaintiffs' truck was not evidence in a criminal prosecution, involved in a police investigation, seized pursuant to criminal laws, or subject to forfeiture proceedings."). Given the procedural posture in *Patty* and the factual differences, Petitioners' reference to it and related concerns are meritless.

On the whole, in almost all of the cases discussing and analyzing these issues, both federal and state

courts recognize the historical distinction this Court has drawn between the power of eminent domain and the police power. While federal and state courts have routinely determined that exercise of the police power in enforcing the criminal law, which in turn inflicts damage to real property, is not compensable under the Takings Clause, those results do not implicate the dreaded "magic formula" Petitioners fear. [Pet. 22]. Rather, it is clear that courts afford law enforcement the benefit of a broad understanding of the police power in enforcing the criminal law so as to protect the safety and welfare of society. That power is then checked by the Due Process Clause and potentially state tort or other liability as the state legislatures may decide.[20] Petitioners' concerns regarding unnecessary litigation over the scope of the police power are, thus, belied by these safeguards.[21] It follows that Petitioners' arguments concerning a split in authority and the alleged impacts are illusory and do not require this Court's intervention.

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[20] *Lambert v. California*, 355 U.S. 225, 228 (1957); *see also AmeriSource*, 525 F.3d at 1154 (stating "[a]s expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause."); *see*, *e.g.*, C.R.S. § 24-10-118(2)(a).

[21] Given Petitioners' advocacy for a yet undefined, amorphous test to determine whether facts and circumstances like the ones presented here warrant compensation under the Takings Clause, their concerns regarding unnecessary litigation surrounding the scope of the police power seem inconsistent. [Pet. 22].

C. None of Petitioners' policy arguments justify a grant of certiorari.

Petitioners raise two primary policy arguments against the Tenth Circuit's decision, which can be distilled as follows: (1) its interpretation of the police power is too broad and will swallow liability under the Takings Clause; and (2) something needs to be done to temper law enforcement SWAT tactics to protect innocent property owners. [Pet. 23-25]. Neither of these claims presents a question warranting certiorari.

1. Petitioners' argument that the Tenth Circuit's adoption of the Federal Circuit's definition of the police power "is now sitting around like a loaded gun, ready for mischief" is baseless. [*Id.* 23]. At the outset, the Tenth Circuit relied upon the definition of the police power set forth in *Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994), which quoted this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). Even still, the Federal Circuit in *AmeriSource* specifically defined and quoted the definition it used for the state's police powers from this Court's decision in *The License Cases*, 46 U.S. 504, 584 (1847), *overturned in part on other grounds by Leisy v. Hardin*, 135 U.S. 100 (1890). *AmeriSource Corp.*, 525 F.3d at 1153; *see also Nebbia v. People of New York*, 291 U.S. 502, 524 (1934) (referring to Justice Taney's decision in *The License Cases* that "what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."). The origins of the definition of the police

power, therefore, are not new but have been in existence for over 170 years—during which time Petitioners' hypothesized widespread "mischief" has failed to materialize.

Further, Petitioners' concerns over the broad nature of the police power hold little weight. Despite their assertions that the Tenth Circuit's decision will essentially eliminate claims for inverse condemnation, Petitioners do not provide this Court with any real basis for that concern. [Pet. 23-24]. In fact, it is unclear how the Tenth Circuit's decision that law enforcement's apprehension of a dangerous fugitive was within its police powers will impact, for example, an inverse condemnation case related to a water main break that causes property damage. Petitioners' conclusory statements that the Tenth Circuit's finding will eliminate inverse condemnation claims, thus, are simply exaggerated and untrue.

2. Petitioners also argue that the Tenth Circuit's ruling promotes law enforcement's ability to engage in unchecked destructive tactics, which Petitioners claim are becoming increasingly common. [*Id.* 24-25]. Notably absent from Petitioners' arguments, though, are the entirety of the actual facts and circumstances of this case that necessitated the law enforcement action taken. And while Petitioners argue there has been a dangerous expansion of the police power, they have also previously acknowledged that the police power is limited by the Due Process Clause, which limitation was also discussed in the Tenth Circuit's decision. Additionally, it is within the province of the legislature to

provide for further limitations of the police power or when compensation is required—such as Colorado's statutory scheme related to willful and wanton destruction of property. *See*, *e.g.*, C.R.S. § 24-10-118(2)(a). These considerations obviously negate concerns that federal and state courts are haphazardly allowing the intentional destruction of property without the possibility of compensation. Petitioners' efforts to create a larger policy issue based on the facts of this case so that this Court will consider review are faulty and groundless.

Moreover, even though Petitioners claim that they are not asking this Court to review or second guess the law enforcement tactics utilized in this case, that is the practical consequence of their argument. If liability attached to police actions in cases like the one at issue here, the logical consequence would be that law enforcement would have to take into account the costs of any damages and weigh them against the risk to life on the part of officers and the public. Not only would that result be directly contrary to the very purpose of the police power derived from this Court's precedent, but it would deteriorate the fabric of a just and orderly society. Despite Petitioners' efforts to insert an overly broad policy consideration in hopes to obtain review, the facts and circumstances of this case do not justify such consideration.

D. This case would be a poor vehicle for review of the constitutional question at issue.

Lastly, the question Petitioners present lacks a critical component with respect to takings jurisprudence and is, therefore, ill-suited for this Court's review. In addition to correctly deciding that the police powers fall outside of the Takings Clause generally, the district court also found separate grounds for dismissal of Petitioners' takings claims, namely that the GVPD's actions fell under the "emergency exception." [Pet. App. 43]. As articulated by the California Supreme Court in *Customer Co.*, "[t]he emergency exception has had a long and consistent history in both state and federal courts. It is a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of police power often requires no compensation under the just compensation clause." 895 P.2d at 909. The California Supreme Court's analysis tracks with this Court's own decisions, wherein it has confirmed that "[a]t the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879). The emergency exception even finds support in the Court's more modern jurisprudence. *See Lucas*, 505 U.S. at 1029 n.16 ("The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to

prevent the spreading of fire' or to forestall other grave threats to the lives and property of others.").

If the Court is interested at all in revisiting this aspect of takings jurisprudence, it should wait until a petition properly frames both considerations evaluated by the district court. Ruling on one issue without the other risks piecemeal litigation and would lead to grave uncertainty about whether particular conduct would subject law enforcement to liability under the Fifth Amendment. For example, if, as Petitioners argue, there is no distinction between the police powers and the power of eminent domain, would a municipality that causes property damage during a response to an active shooter be otherwise immune from liability because it occurred during an emergency? The scope of the question presented by the Petitioners does not reach this fundamental and necessary inquiry.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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