No. 19-1123

In the Supreme Court of the United States

LEO LECH, *et al.*,

Petitioners,

v.

CHIEF JOHN A. JACKSON, *et al.*,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The brief in opposition confirms both the narrowness and the urgency of the question presented. Respondents do not dispute that the ruling below turned entirely on the Tenth Circuit's embrace of a categorical rule: Exercises of the police power cannot give rise to compensable takings. See, *e.g.*, Resp. Br.11.[1] And Respondents confirm that the decision below represents a growing trend among the lower federal courts in embracing just such a categorical rule. Resp. Br. 25–27.

Certiorari is warranted because this categorical rule flies in the face of this Court's repeated holdings rejecting categorical exceptions to the just-compensation requirement of the Fifth Amendment. Certiorari is also warranted because lower courts are split: Federal courts increasingly apply a categorical exemption for the "police power," but many state high courts have refused to. The question presented is important, and this case is a good vehicle to resolve that question. The petition for certiorari should be granted.

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[1] At points, Respondents seem to treat the police power exemption relied upon below as an exemption for powers exercised by law enforcement. *E.g.*, Resp. Br. 12. At other times, they refer to a broad conception of the police power as encompassing "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." Resp. Br. 29 (quotation marks omitted). It is the latter, broad meaning that the opinion below uses. See App. 14 (holding that the "police power" is the government's "authority to provide for the public health, safety, and morals." (quotation marks omitted)).

A. The categorical rule applied below conflicts with this Court's precedents.

The petition establishes that the holding below conflicts directly with this Court's precedents, which uniformly direct lower courts to avoid any categorical rules that would exclude particular kinds of government conduct from the Takings Clause. Pet. 6–14.

Respondents resist this conclusion by repeatedly stressing that there is a "distinction between the police power and the power of eminent domain." Resp. Br. 10, 11, 16, 17. So there is. But it does not follow that the exercise of the police power can never cause a taking.

To be sure, some of this Court's nineteenth-century and early twentieth-century precedents suggest that valid exercises of the police power do not require compensation. *E.g.*, *Mugler* v. *Kansas*, 123 U.S. 623, 668–69 (1887). But these decisions were all written against the backdrop of a far more restrictive view of the valid scope of the police power—a view that, for better or worse, this Court has abandoned. Since at least *Pennsylvania Coal* v. *Mahon*, this Court has been clear that its just-compensation analysis does not hinge solely on the character of the government's actions but instead largely on "the extent of the diminution" of a property interest. 260 U.S. 393, 413 (1922). "When [that diminution] reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation[.]" *Ibid.*

This Court's modern cases are even clearer. Contrary to the opinion below, the Court has repeatedly held that compensation can be required even where the government has not violated the scope of its pow-

ers under the Due Process Clause—most recently in *Arkansas Game & Fish Commission* v. *United States*, 568 U.S. 23 (2012). See also *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 241–42 (1984) (holding that even "classic exercise[s] of a State's police powers" can require compensation); Pet. 6–7; 13–14.

Respondents assert that *Arkansas Game & Fish* is different because that case "concerned the power of eminent domain." Resp. Br. 19. But the Court's opinion in *Arkansas Game & Fish* says no such thing.[2] To the contrary, the Court's opinion uses the phrase "eminent domain" exactly once—and then only to note that the government in *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166 (1872), had unsuccessfully "argued that the land had not been taken because the government did not exercise the right of eminent domain to acquire title to the affected property." 568 U.S. at 32; see also *ibid.* (explaining that *Pumpelly* had "reject[ed] that crabbed reading of the Takings Clause"). In other words, not only are Respondents mistaken in characterizing *Arkansas Game & Fish* as a case about the "eminent domain power," the opinion itself points out that the government can effect a taking without using the "eminent domain power" at all.

Respondents' discussion of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is similarly unavailing. Respondents concede that *Loretto* explicitly held that an exercise of the police power could nonetheless require the payment of just

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[2] Respondents' only citation for this characterization of *Arkansas Game & Fish* is to *Amerisource Corp.* v. *United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008), which does not discuss *Arkansas Game & Fish*.

compensation—that is, that *Loretto* squarely rejects the categorical rule adopted below. Resp. Br. 17–18. They protest only that *Loretto* should not matter because its holding was "narrow." *Id.* at 18. So it was. But it was not a narrow exception to a categorical exemption for the "police power.' It was a narrow exception to the general rule that "most takings claims turn on situation-specific factual inquiries." *Arkansas Game & Fish*, 568 U.S. at 31–32 (noting that *Loretto* represents one of the few "bright lines" in all of this Court's takings jurisprudence). The narrowness of *Loretto* is due to its adoption of a bright-line rule—permanent physical invasions are *always* a taking—not because it creates a limited exception to some other, broader bright line.

On Respondents' view, though, this Court's precedent is nothing but bright lines: Exercises of the eminent domain power categorically require compensation, and exercises of the police power are categorically exempt from takings analysis (except for certain exercises of the police power like the one in *Loretto*, which are categorically exempt from the categorical exemption). Resp. Br. 12–19.

But, as explained in the petition, this Court's cases are nowhere near so rigid. Pet. 7. To be sure, there are some government actions that are unlawful because they violate the Due Process Clause or some other constitutional guarantee. And unlawful acts can be enjoined or (absent sovereign immunity) result in an award of consequential damages. *Ibid.* There are also, however, perfectly lawful government actions that result in takings. They do not give rise to claims for consequential damages, and they cannot generally be enjoined, but a property owner is nonetheless entitled to compensation for the property

taken or destroyed. See, *e.g.*, *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2175–76 (2019).

Respondents' insistence that lawful acts cannot be takings is wrong, and this error leads them astray (just as it did the Tenth Circuit). It is why, for example, Respondents are mistaken in relying on *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923). Resp. Br. 15. Respondents quote the decision accurately—it does, of course say 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." 261 U.S. at 510. But it says this in the context of saying that the government does not owe consequential damages to a third party when it takes property. The plaintiff in *Omnia* had a contract to purchase steel from the Allegheny Steel Company that was frustrated when the United States requisitioned the Company's entire production of steel for the year. *Id.* at 508. It sued, seeking its lost profits. *Ibid.* And it lost because the government only needs to pay for what it takes: The Allegheny Steel Company was entitled "to the just compensation guaranteed by the Constitution" for the steel taken, but the plaintiff could not recover for damages it suffered as a result of the government's lawful taking of the property. *Id.* at 510–11. Nothing in the opinion stands for the radical proposition that the Allegheny Steel Company's right to compensation would have evaporated if only government agents had seized or destroyed its steel as an exercise of "the police power."[3]

[3] This Court has long held that the term "taken" in this context encompasses the "destruction" of property as well. *E.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

Here, of course, Petitioners do not bring a claim for consequential damages—they do not say, for example, that the loss of the house interfered with a planned business meeting. Instead, they, like the Allegheny Steel Company, are entitled to the value of the actual property taken or destroyed.

Respondents' reliance on *Bennis* v. *Michigan*, 516 U.S. 442 (1996), suffers from the same erroneous conflation of the compensation requirement with the illegality of the government's action. Resp. Br. 15. Respondents suggest that *Bennis* stands for the proposition that "when a state acquires property 'under the exercise of governmental authority other than the power of eminent domain,' no just compensation is due." *Ibid.* But that cannot be true—after all, that is exactly the "crabbed reading of the Takings Clause" this Court has long rejected. *Arkansas Game & Fish*, 568 U.S. at 32. And, indeed, *Bennis* says no such thing. *Bennis* held only 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." *Bennis*, 516 U.S. at 452 (emphasis added). That is, *Bennis* holds that there exist other legal avenues by which they government can acquire property.

And of course there are: Civil judgments, foreclosures, and forfeitures are all means of extinguishing legal title without creating a Fifth Amendment taking. The government does not owe compensation when it wins a forfeiture judgment any more than it owes compensation when it forecloses on a tax lien. But saying there are *other lawful means* to acquire property without effecting a taking is different from saying, as Respondents do, that the government does

not affect a taking *so long as it acts lawfully*. Cf. Resp. Br. 15. Again, takings are frequently perfectly lawful invasions of property; they are simply lawful invasions that require compensation. See *Knick*, 139 S. Ct. at 2176–77. Nothing in *Bennis* is in tension with that basic truth.

This Court's precedents have, over and over, recognized that valid exercises of the police power can cause takings for which the government must pay just compensation. And this Court has also emphatically forbidden the creation of new categorical exemptions from those requirements. The lower court's adoption of a blanket "police power" exemption therefore conflicts directly with this Court's plain instructions, and the petition for certiorari should be granted.

B. The split of authority is no less real because the cases comprising the split involved different facts and circumstances.

Respondents admit that there is a split of authority on the question presented. Resp. Br. 20-21 ("[*M*]*ost* state courts analyzing the distinction between the power of eminent domain and the police power have also ruled consistently." (emphasis added)). They attempt to minimize any split, though, by arguing that the cases at issue concerned different "facts and circumstances." Resp. Br. 20. But that is precisely the point of the question presented: Do facts and circumstances matter in an inverse condemnation case, or are all exercises of the police power categorically exempt from the Fifth Amendment's Just Compensation Clause? The state court cases Petitioners identified all say that the specific circumstances matter (even if those circumstances do not always mean compensation is owed). The deci-

sion below, like other recent federal cases, says compensation is never due so long as the government is using the "police power." That is sufficient to demonstrate a split worthy of review.

So it does not matter that *Brewer* v. *State*, 341 P.3d 1107 (Alaska 2014), was about firefighting or that *Garrett* v. *City of Topeka*, 916 P.2d 21 (Kan. 1996), was about regulatory takings; both cases rejected a police power exception to the Takings Clause. Nor does it matter that *Soucy* v. *State*, 506 A.2d 288 (N.H. 1985), concerned what the court called "the judicial power" because the court's decision was premised, in part, on an explicit distinction between the judicial power (which it held is categorically exempt from the Fifth Amendment) and the police power, which it acknowledged is not. *Id.* at 292. And Respondents' only response to *Just* v. *Marinette Cty.*, 201 N.W.2d 761 (Wis. 1972), is to quote a sentence from the opinion that directly conflicts with the ruling below. Compare Resp. Br. 23 ("'[T]he 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.'" (quoting *Just*, 201 N.W.2d at 767)) with App. 15 (noting that no compensation would be owed if the Lechs' home was destroyed "for the public good" rather than "for public use").[4] The state decisions are irreconcila-

[4] Respondents also half-heartedly complain that some of these cases concerned state constitutions. Resp. Br. 21. But all of them relied in whole or in part on federal authority. See, *e.g.*, *Brewer*, 341 P.3d at 1115 & nn. 42–44. And none explicitly premises its holding on some unique aspect of its state's constitution. In the absence of such an express statement of independent state grounds, this Court has generally presumed that state courts are applying the U.S. Constitution in these circum-

ble with the federal decisions, which is a split of authority worthy of this Court's intervention.

C. The question presented is important.

The question presented is important because virtually everything state and local governments do is an exercise of the police power. If exercises of the police power cannot give rise to a claim for just compensation, then valid claims for just compensation will be vanishingly rare. The ruling below is the latest in a growing trend of federal courts adopting this exception, and this Court's intervention is warranted to return the lower courts to the appropriate fact-dependent approach to the Just Compensation Clause.

Respondents argue that there is no cause for concern because the broad sweep of the police power has long been established. Br. 29–30. So it has, but the scope of the police power is not at issue in this case. Federal courts have only recently begun holding that the "police power" is categorically exempt from the Just Compensation Clause. Pet. 23. It is *that* growing trend that threatens to undermine this Court's just-compensation jurisprudence more generally, and it is that growing trend that justifies this Court's intervention. *Ibid.*

Respondents' remaining arguments—that the S.W.A.T. tactics here were reasonable (Resp. Br. 30–31) or that police officers face unique pressures that should exempt their actions from the Just Compensation Clause (Resp. Br. 31)—do not go to the importance of the question presented but only to the ultimate merits of this case. And even there they are of

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stances. See *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983). That is sufficient to demonstrate a split.

limited relevance: Petitioners do not dispute (and this Court would not have to resolve) the reasonableness of the police's tactics. Pet. 25. Neither do the incentives of individual police officers matter. After all, no individual officer could be held liable under the Just Compensation Clause—and, in any event, any number of genuinely vital government activities are nonetheless subject to the requirements of the Clause. The question of whether activities undertaken through the "police power" should entirely be exempt from Just Compensation analysis is an important one, and the petition for certiorari should be granted so this Court can answer it.

D. This case is a good vehicle.

Respondents argue that this case is a poor vehicle for review only because the district court had an alternate ground for its decision, which the 10th Circuit did not reach. That is no barrier to this Court's review: The fact that other issues may have to be resolved in further proceedings has never been a reason not to grant review of a cleanly presented question that was the sole basis of a lower court's decision. See, *e.g.*, *Arkansas Game & Fish Comm'n*, 568 U.S. at 40 (2012) (reversing and noting that "preserved issues remain open for consideration on remand").[5]

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[5] Though the question is not presented, the district court was wrong to rely on an "emergency exception" to the Takings Clause. The emergency doctrine was historically a defense to individual tort liability, not to governmental takings liability. See *United States* v. *Russell*, 80 U.S. 623, 628 (1871) ("[T]he officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."). Petitioners and Respondents would certainly litigate this issue in the event

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For the foregoing reasons and the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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of a remand, but the existence of this dispute is no barrier to this Court's answering the question presented, which was dispositive below