No. 24-755

IN THE

Supreme Court of the United States

MOLLIE SLAYBAUGH, *et al.*,

Petitioners,

v.

RUTHERFORD COUNTY, TENNESSEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The jurisprudence of the Fifth Amendment Takings Clause has consistently distinguished between incidental property damage by law enforcement during the course of a reasonable search and seizure from takings based on eminent domain and regulatory actions. Petitioner's phrasing of the question presented—"[d]oes a common law privilege to *access* property categorically absolve the government's duty of just compensation for property it physically destroys?"—is an overbroad and imprecise characterization of the holding below and raises a question that the U.S. Court of Appeals for the Sixth Circuit did not address because such question was not before it. The question presented in this matter is narrower—whether damage to property caused by law enforcement *reasonably* utilizing their search-and-arrest privilege to apprehend a suspect constitutes a "taking" within the meaning of the Fifth Amendment.

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents Rutherford County, Tennessee and the Rutherford County Sheriff's Department (collectively "Rutherford County") and Town of Smyrna, Tennessee ("Town of Smyrna") (collectively "Respondents"), file this Brief in Opposition to the Petition for a Writ of Certiorari ("Petition"), and to the Brief of *Amicus Curiae* Anthony Banaszak in Support of Petitioners ("*Amicus* Brief"), and respectfully request that the Court deny the Petition.

STATEMENT OF THE CASE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In this case, Petitioners Mollie and Michael Slaybaugh ("Petitioners" or "the Slaybaughs") seek recovery under the Fifth Amendment Takings Clause for damages caused by police officers who used undisputedly reasonable efforts to apprehend a dangerous fugitive (who was their son) barricaded within their home.

I. Factual Background

The Slaybaughs reside in the Town of Smyrna, Rutherford County, Tennessee. On January 23, 2022, the Slaybaughs agreed to let their adult son, James Conn ("Conn"), stay at their house. That evening, Mrs. Slaybaugh looked out a window and noticed two police cars parked outside her neighbor's home. She opened her front door and found two police officers standing on the doorstep, one with a gun drawn and the other holding

a flashlight. The officers told Mrs. Slaybaugh that her son was wanted for questioning regarding a homicide investigation (Conn was suspected of killing a Robertson County Sheriff's Deputy), and they asked her to step outside. According to the Slaybaughs, this was when they first learned that their son was in trouble with the law. *See* Pet. App. 4a-5a.

Mrs. Slaybaugh asked the officers if she could go back inside but the officers refused to allow her back in her home. Finally, after several hours of waiting for Conn to emerge, the police left and Mrs. Slaybaugh spent the night at her daughter's house (Mr. Slaybaugh was at a different property throughout this time). The next morning, Mrs. Slaybaugh returned to her home, which was now surrounded by police. The officers had obtained an arrest warrant for Conn and a search warrant for the home. Mrs. Slaybaugh again asked to speak with her son, but police again told her that she was not permitted to enter the home. Hours passed and Conn still had not come outside. At that point, officers fired approximately 35 tear gas cannisters into the home, entered, and arrested Conn without anyone suffering serious physical injury. *See* Pet. App. 4a-5a.

The actions of law enforcement in apprehending Conn, including the damage caused to the home, was undisputedly reasonable. *See* Pet. App. 24a. However, according to the Complaint, the apprehension of Conn caused "extensive damage to both the internal and external structure of [the Slaybaughs'] home and the contents inside" in the approximate amount of $70,000. *See* Pet. App. 5a. The Slaybaughs requested compensation from Respondents, and Respondents declined to pay for the damage. *See* Pet. App. 5a.

II. Procedural History

Petitioner sued Respondents under the takings clauses of both the United States Constitution and Tennessee Constitution. Pet. App. 38a. Petitioner alleged liability under the Fifth Amendment directly, asserting that the same is "self-executing," and under 42 U.S.C. § 1983. Pet. App. 38a. Respondents filed their respective motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. App. 38a. The district court granted Respondents' motions to dismiss, concluding that "the weight of authority indicates that claims based on damages caused by the exercise of police power in the course of enforcing criminal laws do not provide a basis for taking claims under the Fifth Amendment" and that Respondents' "valid use of their police power . . . did not constitute a taking, for purposes of the Fifth Amendment." Pet App. 62a, 65a. Having found that no taking had occurred, the district court held that Respondents "had no responsibility to compensate [the Slaybaughs]." Pet App. 65a. The district court likewise denied Petitioners' claims under the Tennessee Constitution, noting that the language of the Tennessee Constitution mirrors the Fifth Amendment Takings Clause language of the U.S. Constitution and therefore "offer[s] protections co-extensive with those of the Takings Clause in the Fifth Amendment." Pet. App. 65a-66a.

Petitioners appealed to the Sixth Circuit, which declined to adopt a categorical "police power" exception but nevertheless affirmed the district court's grant of Respondents' motions to dismiss, finding that "the Slaybaughs have not stated a takings claim based on the facts alleged" and that Petitioner's "Complaint

demonstrates that the officers' actions while arresting Conn were privileged, so police did not infringe on the Slaybaugh's legally cognizable property interests." Pet. App. 8a-9a. Notably, the Sixth Circuit found that "the search-and-arrest privilege covers police use of force when carrying out a lawful arrest, is deeply rooted in the common law and our nation's history, is consistent with our concept of reasonableness under the Fourth Amendment, and, as applied here, exempts law enforcement from liability for damage to the Slaybaugh's home." Pet. App. 11a-12a. The Sixth Circuit concluded:

> We only hold that in cases where police damage property while carrying out a lawful search or arrest, property owners are not entitled to compensation under the Takings Clause for that damage as long as the officers' conduct is reasonable.

Pet. App. 23a.

Petitioners sought rehearing *en banc*, which was denied because no judge requested a vote on the suggestion for rehearing. Pet. App. 28a. Petitioners thereafter filed their Petition for a Writ of Certiorari with this Court on January 14, 2025. *Amicus Curiae* Anthony Banaszak filed his Brief in support of Petitioners' Petition on February 3, 2025.

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Further, "[a] petition for a writ of certiorari is rarely granted when

the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* This case is not an appropriate vehicle for this Court to address whether a taking occurs under the Fifth Amendment as a result of property damage by law enforcement for many reasons, including:

1. Despite Petitioners' attempt to liken the instant case to *Baker v. City of McKinney, Texas*, 84 F. 4th 378 (C.A.5 2023), *cert. denied*, 145 S. Ct. 11 (2024), the "necessity" issue in *Baker* is not the issue before this Court. It is inappropriate for Petitioners to ask this Court to summarily reverse the narrower holding below, which does not extend to all cases involving property damage by actions taken out of public necessity, so that Petitioners can have a second chance to challenge the broader question in *Baker*.

2. This case is not suitable for summary reversal because the Sixth Circuit considered and relied upon years of history and precedent—not "entirely" on dicta from this Court's holding in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) as urged by Petitioners—in determining that Petitioners have no Fifth Amendment takings remedy. In any event, the statements from *Cedar Point Nursery* relied upon by the Sixth Circuit are an explication of the rules of law governing the property rights at issue and support the Sixth Circuit's holding.

3. The ruling of the lower court was heavily dependent on the facts of the case, where law enforcement, only following the issuance of warrants, utilized their search-and-arrest privilege in an undisputedly reasonable manner to forcefully enter the Slaybaughs' home to apprehend a dangerous fugitive barricaded therein.

4. There is no circuit split as to the precise issue decided by the Sixth Circuit, nor is there a circuit split as to the overall question of whether property damage caused by the actions of law enforcement constitutes a taking under the Fifth Amendment.

5. Petitioners' insistence that there is a "growing, nationwide trend" of law enforcement causing "massive property damage" without compensating the property owners is belied by the scant number of federal circuit courts of appeals that have yet to address this issue. As such, this issue would benefit from further percolation in the lower courts.

The Sixth Circuit correctly determined, consistent with every other federal circuit court that has addressed the interaction between the Fifth Amendment and incidental damage caused by law enforcement, that consequential damages resulting from reasonable police activity in exercising their search-and-arrest privilege to apprehend a fugitive do not give rise to a takings claim under the Fifth Amendment. The facts of this case, coupled with not only the analysis provided by the

Sixth Circuit but also prior analyses by this Court and other federal circuit courts that have examined this issue, render this case unsuitable for review. There is, therefore, no basis to grant certiorari.

I. This Case Is Not An Appropriate Vehicle For Petitioners To Challenge The Issue In *Baker*.

Petitioners specifically request that this Court summarily reverse the holding below so that the Sixth Circuit can consider the broader "necessity" exception contemplated by *Baker v. City of McKinney, Texas*, 84 F. 4th 378, 385-388 (C.A.5 2023), *cert. denied*, 145 S. Ct. 11 (2024). Pet. Br. at 5-6. However, the broader issue of necessity is not the question before this Court in this matter and has no bearing on whether the narrower decision below should be disturbed. Likewise, the cases cited by Petitioners that may involve the broader "necessity" privilege such as intentional burning (*Bishop v. Mayor & City Council of Macon*, 7 Ga. 200 (Ga. 1849) and *City of New York v. Lord*, 17 Wend. 285 (N.Y. 1837)), wartime appropriation of private property (*Mitchell v. Harmony*, 54 U.S. 115 (1851)), wartime property damage (*Grant v. United States*, 1 Ct. Cl. 41 (Ct. Fed. Cl. 1863)), and property damage by a private citizen (*Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456 (Minn. 1910)) have no bearing on the Sixth Circuit's decision below, which does not involve the broad issue of "necessity" but rather the narrower issue of the search-and-arrest privilege specifically afforded to law enforcement. Nor does this case present the open question of whether the line of "inevitable destruction cases" (*e.g.*, intentional burning of buildings which would inevitably be consumed by fire or wartime destruction of property which would inevitably be seized by enemy forces) should extend to

property damage by law enforcement. *See Baker v. City of McKinney, Texas*, 145 S. Ct. 11, 13 (2024) (SOTOMAYOR, J., statement respecting denial of certiorari) (noting that "[t]his Court's precedents suggest that there may be, at a minimum, a necessity exception to the Takings Clause when the destruction of property is inevitable" but that "[w]hether the inevitable-destruction cases should extend to this distinct context remains an open question"). It is therefore inappropriate for Petitioners to ask this Court to summarily reverse the narrower holding below, which does not extend to all cases involving property damage by actions taken out of public necessity, so that Petitioners can have a second chance to challenge the broader question in *Baker*.

II. Summary Reversal is Not Appropriate.

Petitioners squabble with the Sixth Circuit's application of the search-and-arrest privilege to the Fifth Amendment analysis and urge this Court to summarily reverse this case on grounds that the Sixth Circuit's decision was entirely based on improperly interpreted "dicta" from *Cedar Point Nursery*, 594 U.S. at 152, 160-161. Pet. Br. at 5.

Despite Petitioners' dismissal of the language of *Cedar Point Nursery* cited by the Sixth Circuit as "a few lines of dicta" (Pet. Br. at 5), the same is not mere "*obiter* dicta" mentioned in passing but instead part of a thoughtful analysis of the rules of law governing the property rights at issue. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) (citing *County*

of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989), *abrogated in part by Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (KENNEDY, J., concurring and dissenting); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight. . . .") (O'CONNOR, J., concurring)). *Cedar Point Nursery* examined various "pre-existing limitation[s]" on property rights and determined that *because* the physical invasion by the defendants did not fall under a "traditional background principle of property law", the access regulation at issue amounted to "simple appropriation of private property." *Cedar Point Nursery*, 594 U.S. at 160-162. Thus, the Court's recognition of a specific background limitation on property rights afforded to law enforcement engaged in a reasonable search and arrest[1] was an important explication of the governing rules of law underpinning property rights in the Fifth

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1. *Cedar Point Nursery*, 594 U.S. at 161:

> The common law also recognized a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances. Restatement (Second) of Torts §§ 204-205. Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, *see, e.g.*, *Sandford v. Nichols*, 13 Mass. 286, 288 (1816), government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners. *See generally Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L.Ed.2d 930 (1967).

Amendment context and should be afforded greater weight than Petitioners suggest.

Furthermore, Petitioners unfairly characterize the Sixth Circuit's holding as "hing[ing] entirely" on its interpretation of *Cedar Point Nursery* (Pet. Br. at 5) and fail to recognize the numerous other authorities relied upon by the Sixth Circuit that support its interpretation of *Cedar Point Nursery*, including this Court's recognition that "the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments" may be limited by '"existing rules or understandings that stem from an independent source such as state law.'" Pet. App. 10a (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)).

Regardless, Petitioners' central argument is that this Court should summarily reverse the decision below due to a misapplication of law. Even if Petitioners are correct that "*Cedar Point*'s dicta concerns only the right to exclude" (Pet. Br. at 12), the same does not disturb the Sixth Circuit's reliance on the host of historical precedent and background limitations on property rights from English common law to the present to support its conclusion that the search-and-arrest privilege extends to damaging property during a reasonable search and seizure. *See* Pet. App. 13a-19a. The search-and-arrest privilege, which includes the privilege to ***break*** and enter (*see* Restatement (Second) of Torts § 204 cmt. b) (emphasis added), is separate and distinct from other privileges concerning merely the right to exclude such as addressed by *United States v. Causby*, 328 U.S. 256 (1946) (damage to chicken farm from overhead governmental aircraft constituted a taking notwithstanding government's

privilege to fly over property); *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871) (flooding was an exercise of eminent domain and therefore required just compensation notwithstanding regulation conferring on dam owner the right to overflow the dam); and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (permanent physical occupation of a CATV box was a taking requiring just compensation notwithstanding state regulation permitting the box to be installed).

This is not a case involving a lower court's clearly erroneous application of Supreme Court precedent such that summary reversal would be appropriate.

III. The Sixth Circuit's Ruling Is Intertwined With The Facts Of The Case.

This case is not appropriate for certiorari because the question decided by the Sixth Circuit is heavily dependent on the facts of the case. The Sixth Circuit specifically found that "[t]he Slaybaughs did not allege any facts suggesting that . . . police unreasonably executed those warrants when arresting Conn." Pet. App. 24a. The Sixth Circuit's decision below does not recognize a blanket privilege to law enforcement property damage but rather recognizes that such privilege applies only "as long as the officers' conduct is reasonable" Pet. App. 23a. Thus, had the facts alleged by Petitioners shown that the damage caused by law enforcement was unreasonable, the Sixth Circuit may have reached an entirely different result.

Amicus Curiae Banaszak, for example, may be subjected to the same analysis by the Sixth Circuit but may see an entirely different result. Mr. Banaszak's Complaint, currently pending in the United States District Court for the Eastern District of Michigan, alleges facts that the force used by law enforcement officers was unreasonable (*e.g.*, despite law enforcement visualizing the unarmed suspect, law enforcement nonetheless used "highly destructive" tactics such as using a "BearCat" to go through walls that were not even connected to the suspect's apartment and firing chemical munitions into rooms of the property that were not part of the suspect's apartment). Verified Complaint at 2-5, *Banaszak v. City of Bay City*, No. 1:23-cv-11753 (E.D. Mich. July 21, 2023). Mr. Banaszak claims in his *Amicus* Brief that such efforts were made by law enforcement "without regards to their need or effectiveness." Am. Br. at 4. If the facts of Mr. Banaszak's case ultimately show that the force used to enter the property was unreasonable, then, under the Sixth Circuit's decision below, the officers' conduct would not fall within the scope of the privilege. *See* Pet. App. 12a ("[F]or an officer's conduct to fall within the scope of the privilege, his entry and any accompanying force ***must*** be reasonable.") (emphasis added).

Thus, the decision below does not stand for the kind of "categorical" absolution that Petitioners claim (Pet. Br. at 5), nor does it stand for the "automatic death-knell to Banaszak's pending federal claims as well as countless others" that *Amicus Curiae* Banaszak posits (Am. Br. at 3).

IV. There Is No Circuit Split For This Court To Resolve.

a. There Is No Circuit Split As To The Precise Question Decided Below.

The Sixth Circuit was careful to circumscribe its holding to comport with the unique circumstances of this case, where the reasonableness of law enforcement action is conceded. Here, reasonable law enforcement actions under the search-and-arrest privilege do not constitute a "taking" under the Fifth Amendment. Pet. App. 22a. As noted by Justice Sotomayor in her statement respecting denial of certiorari in *Baker*, "[o]nly a few Courts of Appeals have weighed in on the extent to which the Takings Clause applies to exercises of the police power." *Baker*, 145 S. Ct. at 13 (SOTOMAYOR, J., statement respecting denial of certiorari); *see also Johnson v. Manitowoc County*, 635 F. 3d 331, 336 (C.A.7 2011) (holding that "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain"); *AmeriSource Corp. v. United States*, 525 F. 3d 1149, 1154 (C.A. Fed. 2008) (holding that the Takings Clause does not apply outside the eminent domain context); *Lech v. Jackson*, 791 Fed. Appx. 711, 717 (C.A.10 2019) (holding that the Takings Clause does not apply to exercises of the government's police power); *Yawn v. Dorchester County*, 1 F. 4th 191, 195 (C.A.4 2021) (holding that government actions taken pursuant to the police power are not *per se* exempt from the Takings Clause and employing a "foreseeability" test); *Baker*, 84 F. 4th at 385-388 (holding that the Takings Clause does not require compensation for damaged property when it is "objectively necessary" for

officers to damage the property in an active emergency to prevent imminent harm to persons). None of these other circuit courts of appeals have decided the precise question below, nor have they addressed the search-and-arrest privilege. Nor have Petitioners cited to any such cases. There is therefore no circuit split for this Court to resolve.

b. There Is No Circuit Split As To The Broader Application Of The Fifth Amendment To Property Damage By Law Enforcement.

Of the cases cited above that address the application of the Takings Clause to exercises of police power, only *Yawn*, 1 F. 4th 191, has held that exercises of police power are not *per se* exempt from the Takings Clause. *See id.* at 195. Importantly, *Yawn* (which concerned an aerial pesticide spray to prevent the spread of the Zika virus) is also the only one of these cases that involves some "police power" outside the context of law enforcement officers effectuating a search or seizure. The decision in *Yawn* does not conflict with the Sixth Circuit's decision below because *Yawn* did not involve the search-and-arrest privilege afforded to law enforcement. Therefore, the facts of *Yawn* do not fall into the Sixth Circuit's analysis. *See* Pet. App. 23a (expressly confining the Sixth Circuit's analysis to "cases where police damage property while carrying out a lawful search or arrest" and where "the officers' conduct is reasonable"). However, even if *Yawn* did create a circuit split on this issue, such split is lopsided with the majority of circuits that have decided this issue being in line with the Sixth Circuit.

Every federal circuit that has addressed this issue in the law enforcement context has agreed, albeit under

different rationales, with the decision of the Sixth Circuit below. Further, the differences in the reasoning of the circuit courts of appeal (*i.e.*, that the Fifth Amendment Takings Clause is limited only to exercises of eminent domain (*Johnson*, 635 F. 3d at 336; *AmeriSource Corp.*, 525 F. 3d at 1154), that there exists a "police power" exception (*Lech*, 791 Fed. Appx. at 717), that there exists a "public necessity" exception (*Baker*, 84 F. 4th at 385-388), or that the search-and-arrest privilege precludes the implication of a protected property interest (this case)) do not reflect substantially different views of the law itself. Under any of these rationales, the Slaybaughs would not be entitled to compensation under the Fifth Amendment under the facts of this case.

i. The Cases Cited By *Amicus Curiae* Banaszak Do Not Present A Conflict.

The state supreme court cases cited by *Amicus Curiae* Banaszak (Am. Br. at 6-7) likewise do not evidence a split in authority as to the constitutional question herein. The Texas Supreme Court case of *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980) is based on the Texas Constitution, which contains different language from the Fifth Amendment Takings Clause of the U.S. Constitution. Specifically, the Texas Constitution provides that "[n]o person's property shall be ***taken, damaged or destroyed for or applied to*** public use without adequate compensation being made. . . ." *Steele*, 603 S.W.2d at 788 (citing Tex. Const. art. I, § 17) (emphasis added); *c.f.* U.S. Const. amend. V (" . . . nor shall private property be ***taken for*** public use, without just compensation.") (emphasis added). The *Steele* Court recognized the distinction between "[t]he taking, the damaging, or the

destruction of property," stating that "the terms have a scope of operation that is different" and noting specifically that "[p]roperty that is taken is transferred from one owner to another." *Steele*, 603 S.W.2d at 789. The *Steele* Court concluded, however, that under the language of the Texas Constitution, "[t]he fact of being damaged entitles [the plaintiff] to the protection extended by this constitutional provision, as fully as if his property had been actually taken or destroyed." *Id.* at 790. Similarly, the Minnesota Supreme Court case in *Wegner* involved a state constitutional provision that expressly included damage and destruction. *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 40 (Minn. 1991) ("This action is based on the plain meaning of the language of Minn. Const. art I, § 13, which requires compensation when property is damaged for a public use.").[2] Neither the Fifth

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2. Other state supreme courts have interpreted similar state constitutional language expressly including "damage" and "destruction" but have found that the same do not apply outside the eminent domain context. *See Hamen v. Hamlin Cnty.*, 955 N.W.2d 336 (S.D. 2021) (holding that the South Dakota constitutional language that "[p]rivate property shall not be taken for public use, or damaged, without just compensation" only applies to damage to property by eminent domain and not police power); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 901 (Cal. 1995) (noting that even though the term "damaged" was included in the California Constitution, it still had not been used outside the eminent domain context); *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 222 (Okla. 1997) ("[T]he addition of the 'or damaged' language to the taking provision merely expanded the circumstances when a private owner may recover for damage to adjacent property when a governmental action involves a public use or public work.") (internal quotations omitted). Notably, the California Supreme Court in *Customer Co.* criticized *Steele* as "poorly reasoned and internally inconsistent" and stated that "*Wegner* and *Steele* . . . do not represent a consensus on the issue before us[, but t]o the

Amendment under the U.S. Constitution, nor under the Tennessee Constitution, contain any similar "damagings" clauses. *See* Tenn. Const. art. I, § 21.

Finally, while the case of *Lord*, 17 Wend. 285 cited by *Amicus Curiae* Banaszak interpreted the United States Constitution, it is an intentional burning case that does not involve the law enforcement search-and-arrest privilege. Thus, while *Lord* may be relevant to the question of whether there exists a broader "necessity" exception to the Fifth Amendment Takings Clause, it does not speak to the narrower holding of the Sixth Circuit.

V. This Issue Would Benefit From Further Percolation In The Lower Courts.

Petitioners' insistence that there is a "growing, nationwide trend" of law enforcement causing "massive property damage" without compensating the property owners (Pet. Br. at 1) is belied by the fact that the majority of the circuit courts of appeals (First, Second, Third, Fourth, Eighth, Ninth, Eleventh, and D.C. Circuits) have not yet squarely addressed whether property damage by law enforcement officers implicates the Fifth Amendment. In her statement respecting denial of certiorari in *Baker*, Justice Sotomayor noted the Sixth Circuit's decision below yet still stated that "[w]hether any such exception exists (and how the Takings Clause applies when the government destroys property pursuant to its police power) is an important and complex question that would

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contrary, nearly every other court to consider this question has held that constitutional just-compensation principles do not apply to damages caused by law enforcement officers in the course of performing their duties." *Customer Co.*, 895 P.2d 901.

benefit from further percolation in the lower courts prior to this Court's intervention." *Baker*, 145 S. Ct. at 13 (SOTOMAYOR, J., statement respecting denial of certiorari). Since this Court's denial of certiorari in *Baker* in December of 2024, the Seventh Circuit has heard oral argument in the case of *Hadley v. City of S. Bend*, No. 24-2448 (7th Cir. Feb. 26, 2025) (appeal from No. 3:24-CV-29 DRL-MGG, 2024 WL 3495017 (N.D. Ind. July 18, 2024) (following the authority of *Johnson*, 635 F. 3d 331, and noting that "Ms. Hadley has not cited any authority for the proposition that damage from lawful police investigations or searches are compensable under the Fifth Amendment (aside from a state tort or other claim). To the contrary, a long tradition counsels that lawful policing activities are not Fifth Amendment takings")). The Ninth Circuit has also heard oral argument in the case of *Pena v. City of Los Angeles*, No. 24-2422 (9th Cir. Jan. 16, 2025) (appeal from No. CV 23-5821-JFW(MAAX), 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024) (concluding that "the weight of authority indicates that claims based on damages caused by the government's exercise of police power in the course of enforcing criminal laws does not provide a basis for a taking claim under the Fifth Amendment")). Opinions in *Hadley* and *Pena* have not yet been issued.

As evidenced by recent appellate activity, the issue of law enforcement property damage in the Fifth Amendment context is actively percolating among the lower courts. Allowing this issue to further percolate in the lower courts "encourages the lower courts to act as responsible agents in the process of development of national law." Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 719 n.123 (1984). Respondents

therefore submit that the Court should deny certiorari in this case for the reasons set forth hereinabove and in accord with *Baker*, 145 S. Ct. at 13 (SOTOMAYOR, J., statement respecting denial of certiorari).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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