No. 25-1158

IN THE

Supreme Court of the United States

AMY HADLEY,

Petitioner,

v.

CITY OF SOUTH BEND, INDIANA, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JOSEPH W. SMITH
Counsel of Record
MATTHEW S. CLARK
CLARK JOHNSON & KNIGHT, LTD.
233 East 84th Drive, Suite 301
Merrillville, IN 46410
(219) 322-0830
jsmith@cjklaw.com

Attorneys for The City of South Bend and The South Bend Police Department

PETER J. AGOSTINO
ANDERSON AGOSTINO & KELLER, P.C.
131 South Taylor Street
South Bend, IN 46601

Attorneys for St. Joseph County, St. Joseph County Police Department, and The Board of Commissioners of St. Joseph County

393254

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QUESTION PRESENTED

Petitioner's Questions Presented should be restated as the single question of:

> Whether—in spite of all precedent to the contrary—property damaged in a law enforcement search is "taken for public use," so as to allow a claim under the Fifth Amendment, even though, at all times, the search was reasonable under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner Amy Hadley was the Appellant below.

Respondents The City of South Bend, The South Bend Police Department, St. Joseph County, The St. Joseph County Police Department, and The Board of Commissioners of St. Joseph County were the Appellees below.

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STATEMENT OF THE CASE

I. Nature of the Case.

This lawsuit arises from the execution of a search warrant for a wanted fugitive who was believed (incorrectly, as it turned out) to be hiding at Petitioner Amy Hadley's house. Pet.App.31a-51a. Petitioner's house was damaged in the course of the search. Pet.App.31a-51a. In both the District Court and the Court of Appeals, Petitioner conceded that the officers acted lawfully in damaging her property during the search. Dist. Ct. dkt. 19 at 4-5; Br.App't at 32. Despite these concessions, Petitioner asserts claims under 42 U.S.C. § 1983 against the City of South Bend and St. Joseph County, alleging that they deprived her of her Fifth Amendment rights by failing to compensate her for the damage. However, for the past 750 years, neither the common law nor the Fifth Amendment has provided a right to recover for property damage reasonably incurred during a lawful search.

II. Material Allegations of the Complaint.

In June 2022, Petitioner's house was misidentified as the location where a fugitive, John Parnell Thomas, was active on social media. Pet.App.32a (¶4); Pet.App.36a (¶25).[1] The officers were led to Petitioner's house by a mistake in their investigation. Pet.App.36a (¶25). A St. Joseph County officer was tracking a Facebook account that he believed Thomas was using. Pet.App.36a (¶26). The IP address led them to Hadley's house, but there was

1. Thomas was wanted for burglary and murder. *See State v. Thomas*, 71D02-2205-F4-16; *State v. Thomas*, 71D02-2206-MR-10.

an error in the chain of information. Pet.App.36a (¶26). Petitioner and her children had no connection to Thomas. Pet.App.36a (¶27).

Officers surveilled the house on June 9 and 10, 2022, but did not see Thomas. Pet.App.36a-37a (¶¶28-29). While they were surveilling the house, the officer tracking Thomas' Facebook account believed that Thomas had logged into his Facebook account at Petitioner's house. Pet. App.37a (¶29). The officer then applied for and obtained a search warrant to search the house for Thomas. Pet. App.37a (¶29). Petitioner does not challenge the validity of the search warrant. Pet.App.34a (¶13).

On June 10, 2022, South Bend and St. Joseph County officers surrounded Petitioner's house and, through a bullhorn, ordered anyone inside the house to exit. Pet. App.32a (¶4); Pet.App.36a (¶24); Pet.App.37a (¶30). Petitioner's son, who was the only person inside the house at the time, exited the house as ordered. Pet.App.37a (¶¶30-31). Officers continued to direct orders at the house through a bullhorn, but no one was inside. Pet.App.38a-40a (¶¶34-35, ¶40). Officers launched as many as thirty tear gas canisters into the house. Pet.App.40a-41a (¶¶40-41).

Officers then entered and searched the house, doing extensive damage to it and to items within. Pet.App.33a (¶7); Pet.App.40a-41a (¶¶41-41).[2] Thomas was not found. Pet.App.42a (¶44).

2. The "family kitten" appears to have been unharmed.

Petitioner sought compensation for the damage from South Bend and St. Joseph County. Pet.App.44a (¶¶57-59). South Bend denied her claim. Pet.App.44a-45a (¶¶60-62). St. Joseph County never responded to Petitioner's written demand for compensation. Pet.App.44a (¶¶59-60).[3]

III. Proceedings Below.

Petitioner filed her Complaint in Indiana state court on December 15, 2023. Pet.App.31a. The St. Joseph County Defendants removed to the District Court.

In her Complaint, Petitioner asserts claims under Indiana law and Section 1983, alleging that the failure to compensate her for the damage done to her home violated the Indiana Constitution and the Fifth Amendment. Pet. App.31a-51a.

The St. Joseph County defendants moved to dismiss, asserting, *inter alia*, that damage to property that occurs during the execution of a search warrant does not implicate the Fifth Amendment.

The South Bend defendants also moved to dismiss, asserting, *inter alia*, that Petitioner failed to state a claim because her property was not taken for public use under the Fifth Amendment, and that Petitioner had not alleged that a policy or custom of the City of South Bend was the

3. Petitioner incorrectly states that *both* South Bend and St. Joseph County denied her written demands for compensation. *See* Pet.6. Petitioner clearly alleges that "*[o]nly South Bend* responded" to her letters. *See* Pet.App.44a (¶¶59-60; emphasis added).

moving force behind a deprivation of her constitutional rights.[4]

On July 18, 2024, the District Court granted the motions to dismiss, remanding the state-law claims back to state court. Pet.App.17a-26a.

Petitioner appealed.

On October 7, 2025, the Court of Appeals for the Seventh Circuit affirmed the Judgment. Pet.App.1a-16a. The Court of Appeals held that its prior decision in *Johnson v. Manitowoc County*, 635 F.3d 331 (CA7 2011), controlled, and declined Petitioner's invitation to overturn that decision. Pet.App.4a-5a. The Court of Appeals held in *Johnson* 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." Pet. App.7a. Because the *Johnson* facts so closely paralleled Petitioner's allegations, the Court of Appeals felt no need to revisit the broader language of the *Johnson* holding. Pet.App.13a. The Court of Appeals also expressed concerns about Petitioner's proposed rule, observing that it presented some very difficult administrability problems. Pet.App.15a-16a.

On November 7, 2025, the Court of Appeals denied Petitioner's petition for rehearing and rehearing *en banc*. Pet.App.27a-28a.

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4. In its Motion to Dismiss, the City of South Bend asserted that its Police Department is not a suable legal entity under Indiana law. Petitioner agreed that the South Bend Police Department should be dismissed from the case.

After obtaining an extension under Supreme Court Rule 13.5, Petitioner timely filed her Petition for a Writ of Certiorari on April 6, 2026.

REASONS TO DENY THE PETITION

I. The Circuit "Split" Is Illusory.

Petitioner principally bases her Petition on the ground that there is a split within the circuits on the controlling issues. The circuit split suggested by Petitioner is illusory. Although some of the circuits have taken different paths, all of the circuits to have addressed this issue have converged in holding that reasonable property damage incurred during a law enforcement search is not compensable under the Takings Clause. The circuits are therefore unified on the question that is actually presented here.

A. Courts Recognizing that Damage by Law Enforcement Actions Is Not a Taking for Public Use Because It Is an Exercise of the Police Power, Not the Eminent Domain Power.

As discussed in Part II.D, below, the police power/eminent domain distinction is well established, including by this Court in *Bennis v. Michigan*, 516 U.S. 442 (1996), and other opinions. Numerous courts have relied on this distinction in holding that damage caused by law enforcement actions is not a taking under the Fifth Amendment.

As an initial matter, Petitioner is wrong about the nature of the police power/eminent domain distinction.

This distinction has never been understood to mean that *all* exercises of the sovereign's police power are immune to Takings Clause scrutiny. As this Court has repeatedly recognized, an exercise of the police power that goes too far may be considered a taking under the Fifth Amendment. Philip Nichols recognized this principle in the first edition of his landmark treatise *Eminent Domain*, which he published in 1909, more than a decade before this Court formally recognized this principle in *Pennsylvania Coal v. Mahon*. *See* P. Nichols, The Power of Eminent Domain, § 17 (1909) (a police power regulation that "approaches eminent domain loses its own constitutional characteristics and acquires those of [eminent domain]"). In the context of the Fifth Amendment, the phrase "police power" has always been used as a shorthand to refer to police power actions that do not stray into the realm of eminent domain. *See* Nichols, § 17 ("The unclassified residuum of valid legislation is justified as an exercise of what is called for the sake of convenience as the police power. . . .").

The Federal, Third, Seventh, and Tenth Circuits have each recognized the traditional distinction between the police power and the eminent domain power, and have applied that rule in holding that property seized or damaged through the exercise of the state's law enforcement functions is not taken for public use. The highest courts of Arizona, California, Oklahoma, and Iowa have done the same.

The Federal Circuit recognized the police power/eminent domain distinction in *Acadia Technologies, Inc. v. United States*, 458 F.3d 1327 (CAFed 2006). In *Acadia Technologies*, the United States seized imported goods

that were believed to bear a counterfeit trademark. *Id.* at 1328-29. The owner of the goods sued, claiming that, by the time that its goods were returned, they were good only for scrap. *Id.* at 1329. The Federal Circuit held that the Takings Clause did not apply because the seizure of evidence is not a taking for public use. *Id.* at 1331. The Federal Circuit relied on this Court's holding in *Bennis v. Michigan*, 516 U.S. 442, 452 (1996), that the Takings Clause does not require the government to compensate an owner for property that it obtained "under the exercise of governmental authority other than the power of eminent domain."[5]

The Federal Circuit reaffirmed the police power/eminent domain distinction in *AmeriSource v. U.S.*, 525 F.3d 1149, 1153-55 (CAFed 2008). In *AmeriSource*, the Federal Circuit extended the reasoning of *Acadia Technologies* to claims made by an innocent third party whose property (pharmaceuticals) was seized as evidence by the government, but the property was never introduced in evidence and was rendered worthless while in the government's possession. *Id.* at 1150, 1152-53. The Federal Circuit held that, because the property was seized pursuant to the government's police power, it was not taken for public use under the Takings Clause. *Id.* at 1152-53. The Federal Circuit in *AmeriSource* relied on its prior *Acadia Technologies* opinion and on this Court's *Bennis* opinion. *Id.* at 1153-54.

The Seventh Circuit recognized the police power/eminent domain distinction in *Johnson v. Manitowoc*

5. The *Bennis* opinion is discussed in greater depth in Part II.D, below.

County, 635 F.3d 331 (CA7 2011). In *Johnson*, the Seventh Circuit held that the police power/eminent domain distinction leads directly to the conclusion that the Takings Clause does not apply to claims that law enforcement officers damaged property during a search: "[T]he 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." 635 F.3d at 336. Because the search was "taken under the state's police power," the Takings Clause did not apply. *Id.* The *Johnson* panel cited the Federal Circuit's *AmeriSource* opinion, which, as already mentioned, relied on *Bennis*. *Id.*

The Seventh Circuit, citing the opinion below, reaffirmed the police power/eminent domain distinction in *O'Donnell v. City of Chicago*, where it held that immobilizing, towing, impounding, and disposing of vehicles was "an exercise of the City's police power to enforce its traffic code, and thus isn't a taking." 163 F.4th 411, 414 (CA7 2025). While recognizing that some police power actions may be takings, the court "regarded the exercise of law enforcement authority as a 'classic example' of police power that does foreclose takings claims." *Id.*

The Third Circuit has recognized the police power/eminent domain distinction in a pair of unpublished opinions. The Third Circuit held in *McKenna v. Portman* that, because the seizure of property pursuant to a search warrant is an exercise of the police power, not the eminent domain power, there is no taking. 538 Fed.Appx. 221, 224 (CA3 2013). In *Zitter v. Petruccelli*, the Third Circuit held that the government did not violate the Takings Clause when seizing contraband oysters because they had seized

them pursuant to a lawful search warrant. 744 Fed.Appx. 90, 96 (CA3 2018). Both opinions relied on *Bennis* and *Johnson*. *McKenna*, 538 Fed.Appx. at 224; *Zitter*, 744 Fed.Appx. at 96.

In an unpublished opinion, the Tenth Circuit recognized the police power/eminent domain distinction in holding that damage to a home, sustained during law enforcement efforts to capture a dangerous fugitive, was not a taking for public use:

> [We] hold 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 we further hold that this distinction remains dispositive in cases that, like this one, involve the direct physical appropriation or invasion of private property.

Lech v. Jackson, 791 Fed.Appx. 711, 717 (CA10 2019); *see also id.* at 715-17 (citing, *inter alia*, *Bennis*, *AmeriSource*, *Johnson*, and *Zitter*). The court observed that it had

> implicitly treated the distinction between the police power and the power of eminent domain as dispositive of the taking question. . . . In *Lawmaster v. Ward*, we held that the plaintiff failed to establish a Takings Clause violation where federal agents physically damaged his property—by, for example, tearing out door jambs and removing pieces of interior trim from his home—while executing a search warrant. 125 F.3d 1341, 1344-46, 1351 (10th Cir. 1997).

Id. at 716. The *Lech* court had no trouble concluding that, just like the execution of the search warrant in *Lawmaster*, efforts to apprehend a fugitive are an exercise of the police power, not the eminent domain power, and are therefore not a taking for public use. *Id.* at 719.

In *Moton v. City of Phoenix*, the Arizona Supreme Court recognized the police power/eminent domain distinction in holding that compensation was not required for an order to repair or demolish a residential structure that was dilapidated and unfit for human habitation. 100 Ariz. 23, 26-27 (1966).

In *Customer Co. v. City of Sacramento*, the California Supreme Court recognized the police power/eminent domain distinction in denying a state constitutional claim for compensation related to a claim very similar to Petitioner's. 10 Cal.4th 368, 388 (1995). In so holding, the Court recognized that "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." *Id.*

In *Sullivant v. City of Oklahoma City*, the Oklahoma Supreme Court, citing, *inter alia*, *Customer Co.*, recognized the police power/eminent domain distinction in holding that the state constitution did not require compensation for damage done to property in the execution of a search warrant. 940 P.2d 220, 225-26 (Okla. 1997).

In *Kelley v. Story County Sheriff*, the Iowa Supreme Court recognized the police power/eminent domain distinction in holding that the state constitution did not

require compensation for damage to property in the execution of a search warrant. 611 N.W.2d 475, 479-81 (Iowa 2000). In support, the Court cited, *inter alia*, *Customer Co.* and *Sullivant*. *Id.* at 482-83.[6]

Petitioner asserts that the Fourth, Ninth, and Eleventh Circuits reject the police power/eminent domain distinction. Petitioner is mistaken.

The Fourth Circuit did not reject the police power/eminent domain distinction in *Yawn v. Dorchester County*. The Fourth Circuit in *Yawn* recognized that *some* police power actions may be takings, but ultimately resolved the case on the lack of intent to destroy the plaintiff's property. 1 F.4th 191, 194-95 (CA4 2021).

The Ninth Circuit did not reject the police power/eminent domain distinction in *Pena v. City of Los Angeles*, as discussed in the next section.

The Eleventh Circuit did not reject the police power/eminent domain distinction in *Alford v. Walton County*, 159 F.4th 844 (CA11 2025). The Eleventh Circuit in *Alford* did not discuss, or even mention, the police power/eminent domain distinction. It based its decision on this Court's

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6. A notable case involving law enforcement actions that *would* be a taking for public use under the Fifth Amendment is *Blackman v. City of Cincinnati*, where a police officer commandeered a privately-owned vehicle in order to pursue a fleeing suspect. 140 Ohio St. 25, 25-26 (1942). The Ohio Supreme Court, reviewing the state constitution and state statutes, recognized that the appropriation of the vehicle was an exercise of the eminent domain power, but denied compensation based on agency principles. *See id.* at 27-28.

Cedar Point Nursery opinion, which did recognize the traditional police power/eminent domain distinction. *See id.* at 858 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 161 (2021)).[7]

B. Courts Recognizing that Damage Reasonably Caused by Law Enforcement Officers Is Uncompensable under a "Necessity" Exception.

In *Baker v. City of McKinney*, the Fifth Circuit rejected the police power/eminent domain distinction, 84 F.4th 378, 383 (CA5 2023), but it did so because it failed to account for the usage of term "police power" in the context of the Takings Clause. In the context of the Takings Clause, the term "police power" has always been understood, including by this Court, to mean exercises of the police power that do not stray into the realm of eminent domain, as already discussed. In any event, the Fifth Circuit ultimately recognized that damage caused by law enforcement officers in the course of their duties is not a taking for public use in cases of "necessity" or "emergency." *Id.* at 388. In doing so, its language tracked both the objective reasonableness standard of the Fourth Amendment and the police power/eminent domain distinction itself. *See id.* ("the Takings Clause does not require compensation for Baker's damaged or destroyed property because . . . it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons").

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7. Petitioner characterizes *Cedar Point* as not an eminent domain action. Petitioner is mistaken. *Cedar Point* involves a traditional exercise of the eminent domain power—the forced transfer of an easement interest.

In *Pena v. City of Los Angeles*, the Ninth Circuit expressly declined to reach the issue of the police power/eminent domain distinction. 158 F.4th 1033, 1040 (CA9 2025). Rather, the court held only that there is no taking "when law enforcement officers destroy private property while acting reasonably in the necessary defense of public safety." *Id.* The Ninth Circuit's formulation of the "necessity exception," like the Fifth Circuit's, tracks the Fourth Amendment objective-reasonableness requirement and the police power/eminent domain distinction.

C. Courts Recognizing that Damage Reasonably Caused by Law Enforcement Officers Is Uncompensable under a "Search and Arrest" Exception.

In *Slaybaugh v. Rutherford County*, the Sixth Circuit rejected the police power/eminent domain distinction, but it did so based on the same faulty understanding of the police power/eminent domain distinction that infected the Fifth Circuit's *Baker* opinion. *See* 114 F.4th 593, 597 (CA6 2024). In any event, the Sixth Circuit held that damage to property in the course of a search or arrest is not compensable under the Takings Clause because it would have been privileged at common law. *Id.* at 598. In holding that damage incident to a search or arrest is not a compensable taking, the court used language that reflected the Fourth Amendment objective-reasonableness standard: "Importantly, for an officer's conduct to fall within the scope of the privilege, his entry and accompanying force must be *reasonable*." *Id.* at 599 (emphasis added). The Sixth Circuit in fact recognized its precedent holding that "where police comply with the Fourth Amendment, . . . no compensation is owed." *Id.* at

601. The *Slaybaugh* court concluded its Fifth Amendment analysis by holding that, because the complaint did not allege that the officers had acted unreasonably or otherwise unlawfully, the takings claim failed. *Id.* at 604.

D. Under Any of These Analyses, Damage Reasonably Caused by Law Enforcement Officers During a Search or Arrest Is Not a Taking for Public Use.

Although the analyses discussed above diverge, the courts are unified in the ultimate conclusion that damage to property that was reasonably incurred during a search or arrest is not a taking for public use under the Fifth Amendment.

This convergence is patent in the cases discussed above. In each case where property was reasonably damaged by law enforcement officers in executing a search warrant, seizing contraband, or apprehending a fugitive, the court held that there was no taking for public use. *See Acadia Tech.*, *AmeriSource*, *Johnson*, *McKenna*, *Zitter*, *Lech*, *Lawmaster*, *Customer Co.*, *Sullivant*, *Kelley*, *Baker*, *Pena*, and *Slaybaugh*, *supra*.

Petitioner suggests that her claim would have survived the pleadings stage in the First, Second, Third, Fourth, Fifth, Ninth, or Eleventh Circuits. Pet.28. This is wrong. Petitioner does not say how the First, Second, or Third Circuits would analyze her claim. As already discussed, the Third Circuit has, in fact, recognized the police power/eminent domain distinction and applied it to law enforcement actions. *See McKenna* and *Zitter*, *supra*. Petitioner's reading of the Fourth and Eleventh

Circuit opinions is wrong, as already discussed. Nor would Petitioner's claim survive the pleadings in the Fifth or Ninth Circuits. Petitioner concedes that the officers reasonably (albeit mistakenly) believed that a wanted and dangerous fugitive was hiding in her home, and acted reasonably in damaging her home in order to apprehend him. Neither the Fifth Circuit nor the Ninth Circuit would find a taking for public use under these facts.

Petitioner's suggested circuit split is illusory. Petitioner presents not a single precedent holding that the Fifth Amendment obligates the state to compensate for damage to property that was reasonably caused by law enforcement officers in the execution of a search warrant or in apprehending a fugitive. She asks this Court to be the first. The Court should decline.

II. The Question Presented Is Not Novel.

For more than 750 years, the common law has not recognized a right to recover for damage to property incidental to law enforcement actions. This common law principle pre-dates the adoption of a statute on the subject in 1275. This Court has repeatedly recognized that police power actions that do not stray into the realm of eminent domain are beyond the scope of the Takings Clause. Petitioner presents no reason for the Court to disrupt 750 years of common law, statutory, and constitutional tradition.

A. The Common Law Did Not Provide a Right to Recover for Property Damaged During a Law Enforcement Search.

The principle that law enforcement actions do not give rise to an obligation to compensate far predates the Founding. This common-law principle was confirmed by statute in 1275.

In *Wilson v. Arkansas*, in which this Court recognized the knock-and-announce rule, the Court noted that the knock-and-announce rule traces back to sometime before a 1275 statute, which the Court described as

> providing that if any person takes the beasts of another and causes them "to be driven into a Castle or Fortress," if the sheriff makes "solem[n] deman[d]" for deliverance of the beasts, and if the person "did not cause the Beasts to be delivered incontinent," the King "shall cause the said Castle or Fortress *to be beaten down without Recovery*."

514 U.S. 927, 932 n.2 (1995) (alterations in original; emphasis added) (quoting 3 Edw. I, ch. 17, in 1 Statutes at Large from Magna Charta to Hen. 6 (O. Ruffhead ed. 1769)).

As set out above, the same statute that this Court cited in support of the knock-and-announce rule also recognized that there was no right to recover for property damage incurred in aid of replevin. *See id.* In 1603, the King's Bench recognized that the 1275 statute was "but an affirmance of the common law in such points." *Semayne's Case*, 5 Co.Rep. 91a, 93a, 77 Eng.Rep., 194, 196 (K.B.1603);

see also Wilson, 514 U.S. at 932 n.2 (quoting *Semayne's Case*).

Like the knock-and-announce rule, the principle that there is no right to recover for property damage caused by law enforcement dates back to before 1275.

B. Under Founding-Era Traditions, There Was No Right to Reimbursement for Damages Reasonably Caused by Law Enforcement Officers.

The *Conductor Generalis* was a guidebook for law enforcement officers that was published in several editions in the late-colonial and post-revolutionary periods. *See* J. Conley, "Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America," 6 J. Legal Hist. 257, 265, 267 (1985); L. Boyer, "The Justice of the Peace in England and America from 1506 to 1776: A Bibliographical History," The Quarterly Journal of the Library of Congress, Vol. 34, No. 4 (Oct. 1977), 323 & nn. It provided guidance to sheriffs, constables, and other local law enforcement authorities on subjects like obtaining and executing search warrants and performing arrests. Throughout, it cites to, *inter alia*, Hawkins, Hale, and Coke in support of the rules that are expressed therein.

The 1764 and 1788 editions—the editions closest to before and after the Founding—discussed when a law enforcement officer is justified in breaking open a door to effect an arrest. When a fugitive is "sheltered in a house" and a person (either a law enforcement officer or a private person) "is denied quietly to enter into it," the person may

break open the door if they have knocked and announced, and if (among other listed justifications) a warrant has been issued for the fugitive's arrest. J. Parker, *Conductor Generalis* (New York 1788) at 27-28; J. Parker, *Conductor Generalis* (Woodbridge, N.J. 1764) at 29.

The *Conductor Generalis* recognized differing liabilities between a private person and a law enforcement officer if they unjustifiably break a door in pursuit of a fugitive:

> But if it seems that he that arrests is a *private man* barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 *H.H.* 82.
>
> But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint. 2 *H.H.* 92.

Conductor Generalis (1788), at 28 (emphasis in original); *Conductor Generalis* (1764), at 29 (same).

The guide also distinguishes between liability for private persons and law enforcement officers when executing a warrant to search for stolen goods:

> [T]he doors may be broken open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion is punishable. 1 *H.H.* 151.

Conductor Generalis (1788) at 28; *Conductor Generalis* (1764) at 30 (same). Later returning to this subject, the *Conductor Generalis* says:

> If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. 2 *H.H.* 151.
>
> If the goods be not in the house, yet it seems the officer is excused, that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search made: but it seems the party that made the suggestion is punishable in such case; for as to him the breaking of the door is *in eventu* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. *id.*

Conductor Generalis (1788) at 383-84; *Conductor Generalis* (1764) at 386 (same).

The *Conductor Generalis* also discusses official immunity:

> If an action is brought against a constable, for any thing done by virtue of his office, he, and also all others which in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give

> special matter in evidence, and if he recovers, he shall have double costs. 7 F. c. 5.

Conductor Generalis (1788) at 109; *Conductor Generalis* (1764) at 111 (same).

The *Conductor Generalis* reflects Founding-era Americans' expectations about official duties and liabilities. Breaking open a door was considered justified if an arrest warrant had been issued and the constable is "denied quietly to enter." Whereas a private person may be liable for breaking a door to apprehend a felon if the person is adjudged not to be a felon, the constable will not be liable. In the case of a warranted search for stolen goods, a constable was not liable for breaking open the door, even if the goods were not located during the search. The *Conductor Generalis* never suggests that either the officer or the sovereign would be obligated to compensate a property owner if the constable breaks down a door in the exercise of the constable's duties, and in fact says that the constable would be immune from any such claim. These Founding-era expectations inform how the Court should interpret the text of the Constitution. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 245 & n.30 (2022); *Birchfield v. North Dakota*, 579 U.S. 438, 458 (2016).

C. The Founders Did Not Intend to Establish a Constitutional Obligation to Compensate for Damage Reasonably Caused by Law Enforcement Officers.

There is no evidence that uncompensated property damage by law enforcement officers was the evil that the

Founders sought to prevent through the Takings Clause. Rather, the available evidence suggests that the evil that the Founders sought to prevent through the Takings Clause was the uncompensated appropriation of private property for use by the government.

In St. George Tucker's 1803 edition of Blackstone's *Commentaries*, Tucker wrote that the Takings Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war." 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 305-306 (St. George Tucker ed., 1803). This has been described as "the only more or less contemporaneous statement of why the [Takings Clause] was passed." W. Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Colum. L. Rev. 782 (1995) at 835-36. This purpose is reflected in the plain text of the Amendment, which refers to private property that is *taken* for public use.

Petitioner presents no historical authority demonstrating that the Takings Clause was intended to obligate the state to compensate property owners for damage reasonably caused by law enforcement officers in the exercise of their official duties. It was not.

D. This Court Has Repeatedly Recognized the Distinction Between the Police Power and the Eminent Domain Power in Interpreting the Takings Clause.

Petitioner presents her first Question Presented as if it were a matter of first impression for this Court. It is not. The Court has recognized many times that police power actions that do not stray into the realm of eminent domain are outside the scope of the Takings Clause.

This Court first confronted this issue in 1878, in *Northwestern Fertilizing Co. v. Village of Hyde Park*, where it held that an ordinance that effectively shut down a processing plant was not a taking for public use because it was a valid exercise of the state's police power to abate a public nuisance. 97 U.S. 659, 667-70 (1878). The Court cited favorably an 1827 opinion of the New York Supreme Court[8] holding that a regulation prohibiting the interment of the dead within certain parts of the city was not a "taking [of] private property for public use, without compensation; but stands on the ground of being an authority to make police regulations in respect to nuisances." *Coates v. City of New York*, 7 Cow. 585, 585 (N.Y. 1827).[9]

The *Northwestern Fertilizing* Court observed that "Perhaps the most striking application of the police power

8. Prior to the establishment of the New York Court of Appeals in 1846.

9. The *Northwestern Fertilizing* opinion reports the text of the *Coates* opinion as "'stands on the *police power* to make regulations in respect to nuisances.'" 97 U.S. at 668 (emphasis added).

is in the destruction of buildings to prevent the [spread] of a conflagration. This right existed by the common law, and the owner was entitled to no compensation." 97 U.S. at 669-70 (citing 2 Kent, Com. 339, and notes 1 and *a* and *b*).

In 1887, the Court in *Mugler v. Kansas* held that a law prohibiting alcoholic beverages did not violate the Takings Clause as to the breweries that were rendered valueless thereby. 123 U.S. 623, 664 (1887). The Court observed that "[i]t cannot be supposed that the states intended, by adopting [the fourteenth] amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." *Id.*; *see also Chicago, Burlington, & Quincy Ry. Co. v. People of the State of Illinois*, 200 U.S. 561, 594 (1906) ("the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers" (internal quotation marks omitted)).

The *Mugler* Court relied on its holding in *Northwestern Fertilizing Co.*, and distinguished *Pumpelly v. Green Bay & Miss. Canal Co.*[10] because *Pumpelly* "arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people." *Id.* at 667-68. The Court described *Pumpelly* as a permanent physical invasion of the property and "'a practical ouster of [the owner's] possession.'" *Id.* (quoting *Northern Transportation Co. v. City of Chicago*, 99 U.S. 635, 642 (1878)). The *Mugler* opinion forecasted the Court's *Pennsylvania Coal* holding

10. 80 U.S. 166 (1871).

when it explained that a police power regulation does not "come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Id.* at 669.

In 1905, the Court upheld Detroit and San Francisco garbage ordinances, against challenges that the ordinances violated the Takings Clause, because the ordinances were valid exercises of the police power to protect public health. *Gardner v. People of the State of Michigan*, 199 U.S. 325, 331-32 (1905); *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 323-24 (1905).

The Court in *Hudson County Water Co. v. McCarter* eloquently described the police power/eminent domain distinction:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that

> this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

209 U.S. 349, 355 (1908).

In 1921, the Court again recognized the police power/eminent domain distinction in *Block v. Hirsh*, where it said that, under "the police power in its proper sense, . . . property rights may be cut down, and to that extent taken, without pay." 256 U.S. 135, 155 (1921). The Court again forecasted its *Pennsylvania Coal* holding in recognizing that "there comes a point at which the police power ceases and leaves only that of eminent domain. . . ." *Id.* at 156.

The Court in *Pennsylvania Coal v. Mahon* recognized the police power/eminent domain distinction, even while holding that the police power action in that case went "too far," and, thus, encroached into the realm of eminent domain:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied

> limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

260 U.S. at 413.

In *Samuels v. McCurdy*, this Court rejected a Takings Clause claim for the value of "intoxicating liquors," which were then illegal under state law, and which had been seized by the sheriff pursuant to a warrant. 267 U.S. 188, 190-91 (1925). In rejecting the Takings Clause challenge, the Court quoted at length its reasoning in *Mugler*. *Id.* at 195-97.

In *Lingle v. Chevron U.S.A., Inc.*, the Court again recognized the police power/eminent domain distinction, but also went a step further and defined it:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.

544 U.S. 528, 539 (2005).

In *Bennis v. Michigan*, the Court again approved the police power/eminent domain distinction when it held that the just-compensation obligation does not arise if the government obtained the property "under the exercise of governmental authority other than the power of eminent domain." 516 U.S. at 452. The property at issue in *Bennis* (an automobile) was forfeited because it was used in the commission of a crime, so there was no taking. *Id.* at 443-44, 452.

Petitioner suggests that *Bennis* did not address whether the forfeiture was a taking under the Fifth Amendment, and that *Bennis* therefore "did not establish a sweeping rule that the Takings Clause applies only to eminent domain, as the Federal Circuit took it to mean." Pet.15. Petitioner gets *Bennis* wrong.

In *Bennis*, a Michigan court "ordered the [petitioner's] automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's [criminal] activity." 516 U.S. at 443. The Court held "that the Michigan court order did not offend . . . the Takings Clause of the Fifth Amendment." *Id.* The *Bennis* Court clearly held that the former owner of the forfeited automobile was not entitled to compensation under the Takings Clause because her interest in the automobile was transferred to the state by virtue of the forfeiture proceeding, not by virtue of the state's eminent domain power. *Id.* at 452; *see also id.* at 446 ("We granted certiorari in order to determine whether Michigan's abatement scheme . . . has taken [the petitioner's] interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment."). Contrary to the Petition, *Bennis* is a

Takings Clause opinion, and, although it did not employ the phrase "police power," it explicitly approved the police power/eminent domain distinction.[11]

This Court's Takings Clause jurisprudence shows that this distinction has been the guiding principle in takings cases.

Where the governmental action was a classic taking or functionally equivalent to a classic taking, the Court has held that compensation must be made: *Horne v. Department of Agriculture* involved a classic exercise of eminent domain—the appropriation by the government of raisins, to be used for governmental purposes. *See* 576 U.S. 350, 355 (2015). In *Cedar Point Nursery*, the government required a property owner to set aside part of their property for public use, effectively transferring an easement interest. 594 U.S. at 162. *Pumpelly* involved the damming of a river for the purpose of improving navigability, which resulted in the flooding of the plaintiff's property. 80 U.S. at 167. The applicability of the Takings Clause to those facts is patent. It is no different from constructing a road over someone's property. *United States v. Cress* involved identical issues. 243 U.S. 316, 326-27 (1917). *Armstrong v. United States* involved the extinguishment of materialmen's liens upon the government taking possession of the boats that were subject to the liens. 364 U.S. 40, 41-42 (1960). *Loretto v. Teleprompter Manhattan CATV Corp.* involved a law requiring building owners to allow cable television lines to be attached to their buildings, effectively transferring

11. This is not an exhaustive list of this Court's opinions recognizing the police power/eminent domain distinction.

an easement interest. 458 U.S. 419, 421 (1982). *Arkansas Game and Fish Commission v. United States* involved the temporary, but repeated, flooding of property to afford a longer growing season for other property owners. 568 U.S. 23, 27-28 (2012).[12] *Lucas v. South Carolina Coastal Council* involved a prohibition on building any permanent habitable structure in a "critical area," which, when the critical area was expanded to include the plaintiff's property, deprived it of all beneficial economic use. 505 U.S. 1003, 1007-1009 (1992).[13] *United States v. Causby* involved an airport for Army and Navy aircraft rendering a neighboring property uninhabitable and unfit for continued use as a chicken farm; the Court held that the low-flying aircraft "which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it." 328 U.S. 256, 264-65 (1946).

By contrast, the Court has consistently held that the Takings Clause is not implicated in cases that it has described as proper exercises of the state's police power. *See*, *e.g.*, *Bennis*, 516 U.S. at 452-53 (forfeiture of automobile used in prostitution offense); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (order to cut down infected cedar trees without compensation, in order to prevent the infection from spreading to nearby apple orchards; describing the statute under which the order was issued as an "exercise of the police power"); *Mugler*, 123 U.S. at

12. The Court did not hold that a taking had occurred, but instead remanded for further proceedings. 568 U.S. at 38-40.

13. As in *Arkansas Game and Fish Commission*, the Court did not hold that a taking had occurred, but remanded for further proceedings on that issue. 505 U.S. at 1031-32.

664 (rejecting takings claim for value of brewery, because the outlawing of alcohol was a proper exercise of the police power); *Northwestern Fertilizing Co.*, 97 U.S. at 669-70 (rejecting takings claim for ordinance that effectively shut down the plaintiff's business, because it was an exercise of the police power to abate a public nuisance).

The distinction between actions that are the functional equivalent of eminent domain, on the one hand, and actions to protect the health and safety of the public, on the other, is the principle which has guided the courts, including this Court, in recognizing that police power actions are outside the scope of the Takings Clause unless they stray into the realm of eminent domain. Petitioner presents no reason for the Court to depart from this principle. Damage to property by law enforcement in the reasonable exercise of their duties is not a "classic taking" or "functionally equivalent to the classic taking." The Court should deny the Petition.

III. Property Owners Have Never Enjoyed a Right to Exclude Law Enforcement Officers Executing a Warrant.

The Court should deny the petition for the additional reason that property owners have never enjoyed a right to exclude law enforcement officers engaged in a lawful search.

In *Lucas*, this Court held that a police power regulation cannot be a taking unless the interest deprived was part of the owner's title:

> This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal v. Mahon*, 260 U.S., at 413, 43 S.Ct., at 159.

505 U.S. at 1027 (alteration in original). The Court gave as one example regulations prohibiting nuisances—there could never be a taking for prohibiting a nuisance because maintaining a nuisance has never been a right that property owners enjoy. *Id.* at 1029-30.

Just as Americans have always understood that the right to use and enjoy property is subject to the implied limitation of police power regulations, Americans have always understood that the right to exclude others from their property yields to the State's authority to issue search warrants. This limitation was enshrined in the text of the Fourth Amendment. Just as the Fifth Amendment assumes that government has inherent authority as sovereign to take private property for public use, the Fourth Amendment assumes that government has inherent authority as sovereign to override property owners' right to exclude. The Fifth Amendment limits the assumed eminent domain power by requiring the payment

of just compensation. The Fourth Amendment limits the assumed warrant power by requiring probable cause, particularity of the place to be searched and the persons or things to be seized, and reasonableness.

The sovereign's implied warrant power carries with it not just the right to authorize entry onto property, but to use force to do so. Upon knocking and announcing, if the officers seeking to execute a search warrant are not granted entry, the officers may lawfully break the door without first returning to the magistrate to ask for a separate authorization to break the door. *Wilson*, 514 U.S. at 931-32; *see also United States v. Banks*, 540 U.S. 31, 37 (2003) ("Since most people keep their doors locked, entering without knocking will normally do some damage, a circumstance too common to require a heightened justification when a reasonable suspicion of exigency already justifies an unwarned entry."). This rule far predates the Founding. *See Semayne's Case*, 5 Co.Rep., at 91b ("In all cases when the King is a party, the sheriff (if the doors be not open) may break open the party's house, either to arrest him, or to do other execution in the K.'s process, if otherwise he cannot enter." (footnote omitted)). Damage reasonably caused by law enforcement officers executing a search warrant therefore does not deprive the owner of the property of part of their title, and the Takings Clause is not implicated.

The Court endorsed this approach in *Cedar Point Nursery*. In that opinion, the Court reasoned that, "[b]ecause 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." 594 U.S. at 161. Under this reasoning, because Petitioner concedes that the search complied with the Fourth Amendment, she cannot pursue a takings claim.

Petitioner suggests that this passage of *Cedar Point Nursery* is dicta. Pet.24. Respondents disagree, but it does not matter whether this passage is dicta because the same principle underlies *Lucas*. The Court in *Lucas* did not hold that the regulation at issue was a taking. Rather, the Court held only that there *would* be a taking *if* the restriction was not already part of the state's property law. 505 U.S. at 1030-32. If "the proscribed use interests were not part of [the owner's] title to begin with," then there has been no taking of any part of the owner's title, and the Takings Clause is not implicated. *Id.* at 1027. All property is owned subject to the sovereign's inherent right to engage in reasonable searches. Because the right to exclude does not permit a property owner to exclude the sovereign's officers engaged in a lawful search, no property interest is taken when property is subjected to a lawful search.

Petitioner next attacks *Cedar Point Nursery* by arguing that it addresses only the entry, not "any resulting destruction." Pet.25. Again, Petitioner is wrong. The Court has already recognized that the sovereign's inherent prerogative to search property includes the right to damage that property, if reasonable. *See Wilson* and *United States v. Banks*, *supra*. The entry onto property and the damaging of that property during the search are not capable of being so neatly parsed out.

The sovereign's right to engage in reasonable searches is a "pre-existing limitation upon the land owner's title." *Lucas*, 505 U.S. at 1028-29. Because property owners have never enjoyed the right to exclude law enforcement officers engaged in a lawful search, no property right is taken when law enforcement officers reasonably damage property during that search. The Court should therefore deny the Petition.

IV. The Fourth Amendment Protects Property Owners from Unreasonable Searches.

Respondents do not suggest that damage to property during a search can never violate the Constitution. But the standard that should be applied is the familiar Fourth Amendment objective-reasonableness standard, not the Takings Clause.

The objective-reasonableness standard may be readily applied to property damage incurred during a search. If a search was unreasonable because, say, the property that was searched was not the property that was identified in the warrant, then the owner may be entitled to recover for all of the property damage that was done during the search. If a search was initially reasonable, but the searching officers inflicted an unreasonable amount of property damage, then the owner may be entitled to recover to the extent that the damage was objectively unreasonable.

Petitioner, however, disavows any such claim. She challenges neither the search warrant nor the reasonableness of the damage to her property. Instead, she asks the Court to establish an entirely new class of

liability under the Fifth Amendment. The Court should decline.

V. The Circumstances of this Case Present a Poor Vehicle for Review.

The Petition is a poor vehicle for the Court's review because, as discussed above, the actions of Respondents' officers did not deprive Petitioner of her right to just compensation under any of the analyses employed in any of the Circuits. Review of this issue should wait for a case where the differences in the Circuits' approaches matter.

Additionally, the Petition is a poor vehicle for review because the standard that Petitioner proposes, while ostensibly *per se*, is riddled with holes. Even though she asserts that the text "contains zero exceptions," Pet.12, Petitioner herself has proposed a number of exceptions and qualifications.

The holding that Petitioner urged in the Court of Appeals was:

> Hadley is entitled to just compensation as an entirely innocent homeowner with no connection to the sought-after suspect; whose property the City and County intentionally and severely damaged through a military-style assault on her home to execute a warrant to apprehend the suspect, only; when the property otherwise would not have been damaged.

Br.App't at 45. Petitioner also suggested that *de minimis* or incidental damage would not be subject to the just-

compensation requirement, and that the government may not have to pay if the sought-after criminal was the owner of the property that was damaged. Br.App't at 25-26.

Consequently, Petitioner's rule would recognize several exceptions and qualifications:

- If the owner is the sought-after suspect.
- If the owner is not "innocent."
- If the owner has some connection to the sought-after suspect.
- If the damage was *de minimis* or incidental.

Under Petitioner's proposed interpretation of the Takings Clause, public officials would have to determine whether any of these exceptions or qualifications apply *before* taking any action that would intentionally or foreseeably damage any property, or, under *Knick v. Township of Scott*, they may violate the owner's constitutional rights. *See* 588 U.S. 180, 189 (2019) ("a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it").

In affirming the dismissal of the Complaint, the Seventh Circuit expressed

> concerns about the administrability of Hadley's proposed holding. It raises difficult questions, not least of which is, how does one determine innocence? For example, must an ancillary

> criminal proceeding conclude to show innocence before proceeding with a takings claim? Does having "no connection" with a suspect—as Hadley asserted herself—render the landowner "innocent"?
>
> These questions highlight the problems with Hadley's proposed holding. On the one hand, she urges us to impose a bright line: that a taking occurred simply because the government damaged her property. But on the other hand, her proposed holding rests on fact-bound nuances and subtleties that would be difficult to apply and are unaddressed by our precedent.

Pet.App.15a-16a.

Just as Petitioner's circuit split is illusory, so is her bright-line rule. Consideration of the issues should wait for a case where the petitioner has not taken litigation positions that are contrary to the rule that they ask the Court to adopt.

VI. The *Amici* Provide No Basis for Granting the Petition

Several *amici* have submitted briefs in support of the Petition. *Amici* provide no reason for the Court to grant review. The *amicus* briefs either (1) repeat arguments that Petitioner has already made in her Petition, or (2) assert that present-day policy concerns justify review. Restating Petitioner's arguments does not advance the Court's consideration of the Petition. Nor do arguments about present-day policy concerns. The Court is asked

in this case to interpret the text of the Constitution, not to make policy decisions. Pleas for policy changes should be addressed to the elected branches, not to this Court.

CONCLUSION

For the above and foregoing reasons, This Honorable Court should DENY the Petition for a Writ of Certiorari, or issue a *per curiam* opinion AFFIRMING the decision below.

Respectfully submitted,

Joseph W. Smith
Counsel of Record
Matthew S. Clark
Clark Johnson & Knight, Ltd.
233 East 84th Drive, Suite 301
Merrillville, IN 46410
(219) 322-0830
jsmith@cjklaw.com

Attorneys for The City of South Bend and The South Bend Police Department

Peter J. Agostino
Anderson Agostino & Keller, P.C.
131 South Taylor Street
South Bend, IN 46601

Attorneys for St. Joseph County, St. Joseph County Police Department, and The Board of Commissioners of St. Joseph County

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