

No. 26-222

IN THE
Supreme Court of the United States

CUP FOODS, INC., *et al.*,

Petitioners,

v.

CITY OF MINNEAPOLIS, MINNESOTA, *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA**

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Following civil unrest after the murder of George Floyd near Petitioners' properties, Respondents placed temporary barricades in the nearby public intersection and exercised their discretion to limit, but not eliminate, police presence in the area. Rejecting Petitioners' takings claims and affirming summary judgment in favor of Respondents, the Minnesota Court of Appeals found no evidence in the record that Respondents physically occupied Petitioners' properties, authorized third-party occupation of Petitioners' properties, or appropriated Petitioners' right to exclude others from their properties. There was also no evidence alleged or in the record that Respondents damaged Petitioners' properties, and Petitioners continued to operate their businesses. The Minnesota Supreme Court declined to review the Minnesota Court of Appeals' non-precedential decision.

The questions presented are:

1. Whether the Minnesota Court of Appeals correctly rejected Petitioners' *per se* takings claim where there was no evidence that Respondents physically damaged or physically occupied Petitioners' properties or that Respondents authorized any third parties to physically damage or physically occupy Petitioners' properties.
2. Whether the Minnesota Court of Appeals correctly weighed the factors under *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), in rejecting Petitioners' regulatory takings claim.

3. Whether the Minnesota Court of Appeals correctly applied its own precedent on Petitioners' state-law right-of-access claim.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES	vi
STATEMENT OF THE CASE	1
I. Factual Background	1
A. City officials placed barricades at the intersection of 38th Street and Chicago Avenue	1
B. City officials limited deployment of Police Resources in the Area.....	3
C. Petitioners’ Businesses Continued to Operate with Substantial Revenues	4
II. Procedural History.....	4
A. <i>Cup Foods I</i> , Prior Action	4
B. <i>Cup Foods II</i> , the Present Action	5
III. Petitioners never raised a federal question concerning their right-of-access claim in the trial court or the appellate courts	6

Table of Contents

	<i>Page</i>
REASONS FOR DENYING WRIT	7
I. The Petition identifies no compelling reason for this Court's review	7
A. The Petition identifies no basis for certiorari under Rule 10.....	7
B. The decision of the court below on Petitioners' <i>per se</i> takings claim rests merely on the application of settled law to the facts of the case	8
C. Petitioners only ask this Court to reweigh the <i>Penn Central</i> factors for their regulatory takings claim	9
D. This Court lacks jurisdiction to consider the right-of-access claim because it turns on state law	9
II. This case does not involve the broader questions invoked by Petitioners and is a poor vehicle for those questions	11
A. The court below did not adopt a categorical police-power exception to the Takings Clause	11

Table of Contents

	<i>Page</i>
B. The court below did not hold that a formal enactment is required to authorize a third-party occupation of property	12
C. Petitioners rely on misstatements of fact not supported by the record	13
III. The court below correctly rejected Petitioners' arguments, which rely on misstatements of the law and record	14
A. The court below correctly rejected Petitioners' misapplication of <i>Cedar Point Nursery</i>	14
B. The court below correctly applied and weighed the <i>Penn Central</i> factors	16
C. The court below correctly applied the summary judgment standard to Petitioners' right-of-access claim	19
IV. This matter does not assert damage to property caused by police action	19
CONCLUSION	21

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Cedar Point Nursery v. Hassid</i> , 594 U.S. 139 (2021).....	12, 14, 15, 16
<i>Cnty. of Anoka v. Esmailzadeh</i> , 498 N.W.2d 58 (Minn. Ct. App. 1993).....	10
<i>Cruz v. Arizona</i> , 598 U.S. 17 (2023).....	10
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	11
<i>DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.</i> , 489 U.S. 189 (1989).....	12
<i>Devine v. Zimmerman</i> , 133 F.2d 850 (8th Cir. 1943).....	17
<i>Johnson v. City of Plymouth</i> , 263 N.W.2d 603 (Minn. 1978)	11
<i>L. v. United States</i> , 266 U.S. 494 (1925).....	17
<i>Mercelis v. Wilson</i> , 235 U.S. 579 (1915).....	17
<i>Murr v. Wisconsin</i> , 582 U.S. 383 (2017).....	18

Cited Authorities

	<i>Page</i>
<i>Oliver v. State ex rel. Com'r of Transp.</i> , 760 N.W.2d 912 (Minn. Ct. App. 2009)	10
<i>Penn Central Transportation Co. v. New York</i> , 438 U.S. 104 (1978)	5, 6, 9, 11, 12, 16, 18
<i>Town of Castle Rock, Colorado v. Gonzales</i> , 545 U.S. 748 (2005)	12
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	11, 12
<i>Wegner v. Milwaukee Mut. Ins. Co.</i> , 479 N.W.2d 38 (Minn. 1991)	20

Statutes and Other Authorities

28 U.S.C. § 1257(a)	10, 19
Minn. R. Civ. P. 12.02	19
Sup. Ct. R. 10	7, 8, 9, 16

STATEMENT OF THE CASE

I. Factual Background

A. City officials placed barricades at the intersection of 38th Street and Chicago Avenue.

On May 25, 2020, Derek Chauvin, then a Minneapolis Police Department (“MPD”) officer, murdered George Floyd outside of Cup Foods near the intersection of 38th Street and Chicago Avenue. Index #1 ¶ 10.¹ The murder sparked a week of civil unrest, and the establishment of a memorial by community members at the intersection. *Id.* ¶¶ 13-14. After a week, the City of Minneapolis placed barricades at the north, south, east, and west entry points of the intersection. Index #14 at 13; *see also* Index #1 ¶¶ 13-14. The roadblocks were comprised of concrete barriers and movable signage and remained for one year:

1. “Index” refers to the docket of *Cup Foods, Inc., et al., v. City of Minneapolis and Mayor Jacob Frey*, Court File No. 27-CV-24-16716. “Petition for Writ of Mandamus” or “pleading” refers to the pleading filed in district court, Index #1. “Petition” and “Pet.” refer to the petition for writ of certiorari filed with this Court. “App.” refers to the appendix filed with this Court.



Index #14 at 8; Index #1 ¶¶ 14, 18.²

The barriers created a so-called “zone” around the intersection bounded by 37th and 39th Streets to the north and south and Elliot and Columbus Avenues to the east and west—each one block away. Index #14 at 13; Index #1 ¶ 26. Traffic flowed unimpeded on all four streets surrounding the “zone”—effectively rerouting traffic flow from 38th Street and Chicago Avenue one block in any direction. Index #1 ¶ 24. Emergency service vehicles could bypass the roadblocks and access the “zone”:

2. Third parties also placed items on the road, including “Czech hedgehogs” and other barriers and signage. Index #14 at 8.



Index #14 at 9 (showing a firetruck at the intersection of 38th Street and Chicago Avenue).

B. City officials limited deployment of Police Resources in the Area.

City officials decided to limit but not eliminate police presence around 38th Street and Chicago Avenue, balancing safety and resources, in light of the ongoing unrest throughout the city. Index #1 ¶ 40. A news article cited in Petitioners' pleading quoted a police spokesperson explaining that officers were responding to incidents in the area using a hierarchy of priorities and deployment of officers depended on the number of available personnel. App. 32a (citing Index #1 ¶ 40 n.6). Despite Petitioners' claims otherwise, the pleading and its referenced documents contain no record evidence that police protection was ever totally withdrawn. *See* Index #1.

C. Petitioners' Businesses Continued to Operate with Substantial Revenues.

Petitioners' businesses remained open while the roadblocks were set from June 2, 2020, to June 3, 2021. Index #20-#21. In 2020, Cup Foods reported gross sales of \$620,997; Menthol Tobacco reported gross sales of \$339,500; and Southside Electronics reported gross sales of \$1,065,759. Index #20 ¶¶ 5b, 6b, 7b; Index #21 at 11, 16, 23. In 2021, Cup Foods reported gross sales of \$598,181; Menthol Tobacco reported gross sales of \$227,316; and Southside Electronics reported gross sales of \$899,642. Index #20 ¶¶ 5c, 6c, 7c; Index #21 at 12, 18, 24.

II. Procedural History

A. *Cup Foods I*, Prior Action

Petitioners first sued Respondents in Minnesota state district court in *Cup Foods et al. v. City of Minneapolis*, Court File No. 27-CV-23-17760 ("Prior Action"). Index #16 (Prior Action Complaint); Index #1 ¶ 87. Petitioners asserted a takings claim under three separate theories (*per se*, regulatory, and right-of-access), and claims for negligence, nuisance, and violations of the Minneapolis City Charter, all based on similar allegations to those now asserted here. Index #16 ¶¶ 12, 66-95. On Respondents' dispositive motion, the district court dismissed (i) the takings claim because Petitioners did not file a petition for writ of mandamus to compel inverse condemnation; (ii) the negligence and nuisance claims because they were barred by statutory and official immunity; and (iii) the City Charter claim because there was no cognizable cause of action. Index #17 (Prior Action Dismissal Order).

B. *Cup Foods II*, the Present Action

Petitioners then filed their Petition for Writ of Mandamus. *See* Index #1. In that pleading, Petitioners re-asserted the theories and allegations of the Prior Action but brought them as mandamus claims. *Compare*, Index #1, *with*, Index #16; *see also* Index #1 ¶ 87 (referencing the Prior Action); App. 71a-72a. Respondents brought a dispositive motion once again. Index #6-#17. Petitioners submitted evidence in opposition to the motion, including their tax returns. Index #20-#21.

The district court granted Respondents' motion. App. 76a. The court dismissed Petitioners' takings claim (Count I), rejecting each of Petitioners' theories. The court rejected Petitioners' *per-se* takings theory, finding that (i) "Petitioners retained full physical possession and use of their properties throughout the relevant period," (ii) "[t]here is no evidence that the City physically occupied Petitioners' property or required others to do so," and (iii) Petitioners "fail[] to allege that Petitioners lost the right to possess or exclude others from their properties." App. 41a, 44a. The court rejected Petitioners' regulatory takings theory after weighing the *Penn Central* factors. *Id.* 53a-59a. And the court rejected Petitioners' right-of-access theory based on Minnesota precedent. *Id.* 59a-66a. The court also dismissed Petitioners' remaining claims, including their police-protection claim (Count II), in part, because it was barred by collateral estoppel due to the Prior Action. *Id.* 67a-73a.

Petitioners appealed the dismissal of their takings claim to the Minnesota Court of Appeals. App. 2a-3a. At oral argument, Petitioners conceded that the

summary judgment standard applied because the record included evidence outside the pleadings, for example, the tax returns they submitted. *Id.* 5a-6a; *see also* Index #20-#21. The appellate court affirmed the dismissal, rejecting each of Petitioners' theories. The court rejected their *per-se* takings theory, holding that "there [was] no evidence showing that [R]espondents allowed a third party to physically enter [Petitioners'] property" nor was "there any evidence showing that [R]espondents physically entered [Petitioners'] properties or authorized third parties to do so." App. 8a-9a. The court rejected Petitioners' regulatory takings theory after weighing the *Penn Central* factors, holding that "all three *Penn Central* factors weigh against [Petitioners]." *Id.* 15a-20a. And the court rejected Petitioners' right-of-access claim, holding that "the record fails to show that appellants suffered a special injury, or that [R]espondents' actions resulted in a loss of reasonable and convenient access to their properties." *Id.* 27a.

The Minnesota Supreme Court denied Petitioners' request for further review. App. 1a. Petitioners now petition this Court for a writ of certiorari.

III. Petitioners never raised a federal question concerning their right-of-access claim in the trial court or the appellate courts.

Petitioners' right-of-access claim has always been litigated on state-law precedent. In the pleading, they cited only a Minnesota state case in support of their claim. Index #1 ¶ 81. In the dispositive motion and appellate briefing regarding this claim, they did the same. Index #18 at 16-18 (Petitioners' Opposition Brief); Petitioners'

Pr. Br. 25-31; Petitioners Reply. Br. 10-14.³ The Minnesota Court of Appeals affirmed the dismissal of the claim on strictly state law grounds. And, before this Court, Petitioners only assert the purported misapplication of Minnesota state law. Pet. 20-22.

REASONS FOR DENYING WRIT

I. The Petition identifies no compelling reason for this Court’s review.

A. The Petition identifies no basis for certiorari under Rule 10.

Petitioners ask this Court to revisit how Minnesota courts applied settled takings principles to the evidence and circumstances of this case. The Petition, in other words, presents fact-bound requests for asserted error correction. That is not the function of certiorari under Rule 10.

Certiorari is “not a matter of right” and is granted “only for compelling reasons.” Sup. Ct. R. 10. The Petition identifies none of the considerations that Rule 10 lists as tending to favor review: It identifies no conflict

3. “Petitioners’ Pr. Br.” and “Petitioners’ Reply Br.” refer to Petitioners’ principal and reply appellate briefs, filed with the Minnesota Court of Appeals on August 25, 2025, and October 9, 2025, respectively. Citations to these briefs are based on the internal pagination. As of September 28, 2026, these briefs are publicly available in the Minnesota Appellate Courts Case Management System at the following link: <https://macsnc.courts.state.mn.us/ctrack/view/publicCaseMaintenance.do?csNameID=107041&csInstanceID=124278>.

among lower courts on an important federal question; no important, unsettled questions of federal law; and no way in which the decision below conflicts with this Court’s precedent. *See id.* Instead, Petitioners invoke the national attention to the events related to this case. Pet. 13. But the prominence of events cannot transform a case into one presenting certiorari-worthy federal questions.

In fact, the errors asserted by Petitioners consist, at best, of no more than “erroneous factual findings” or the “the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. This is most obvious in their Questions Presented, which each ask whether Respondents’ conduct resulted in a particular type of taking: a *per se* taking, a regulatory taking, or a right-of-access taking. Pet. i. The arguments offered in support of those Questions Presented, as described in the following sections, ask this Court to reweigh the evidence or do not even present a federal question at all. Such requests for asserted error-correction are “rarely granted” by this Court and should not be granted in this case. Sup. Ct. R. 10.

B. The decision of the court below on Petitioners’ *per se* takings claim rests merely on the application of settled law to the facts of the case.

In their first Question Presented, Petitioners seek review of their rejected *per se* takings claim. Petitioners recast the decision below as holding that government conduct cannot cause a physical taking unless the government formally “enact[s] a law.” Pet. 17. But the court below announced no such rule. Applying settled law, it rejected Petitioners’ claim on this record because

there was “no evidence” that Respondents occupied the properties, deprived Petitioners of possession or the right to exclude, or adopted a policy or regulation authorizing third parties to occupy the properties. App. 8a11a. The Court should not grant certiorari to review these conclusions resulting from the application of settled law to the facts of this case.

C. Petitioners only ask this Court to reweigh the *Penn Central* factors for their regulatory takings claim.

In their second Question Presented, Petitioners seek review of their rejected regulatory takings claim. They accept *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), as providing the relevant framework for evaluating regulatory takings and propose no different test. They instead argue that the court below misapplied the *Penn Central* factors when weighing Petitioners’ appraisal, weighing the effects on Petitioners’ investment-backed expectations, and judging the governmental nature and community impact of Respondents’ actions. Pet. 1920. The Court should not grant certiorari on this purported “misapplication of a properly stated rule of law.” *See* Sup. Ct. R. 10.

D. This Court lacks jurisdiction to consider the right-of-access claim because it turns on state law.

In their third Question Presented, Petitioners seek review of their rejected right-of-access claim. This claim turns on the scope of a unique property right under Minnesota law, where “owners of property abutting a

public roadway have a right to ‘reasonably convenient and suitable access’ to the roadway.” *Oliver v. State ex rel. Com’r of Transp.*, 760 N.W.2d 912, 916 (Minn. Ct. App. 2009). This is a property right “in the nature of an easement.” *Id.* (quotation omitted).

At each stage of this case, Petitioners’ right-of-access claim has been correctly litigated based on state law alone. *See, e.g.*, Index #1¶ 81; Index #12 at 15-23 (internal pagination); Index #18 at 16-18; Index #25 at 10 (internal pagination); Petitioners’ Pr. Br. 25-31; Petitioners Reply. Br. 10-14. This culminated in a decision from the Minnesota Court of Appeals on purely state law grounds. App. 21a-28a. And even now, before this Court, Petitioners do not cite *any* federal authority and instead rely exclusively on Minnesota cases applying state law. Pet. 20-22. The Petition argues only that the court below misapplied its own precedent in defining the scope of the right-of-access property right *under state law*. Pet. 21 (citing *Cnty. of Anoka v. Esmailzadeh*, 498 N.W.2d 58 (Minn. Ct. App. 1993)).

Setting aside that Petitioners’ request for review is no more than a request for purported error correction, this Court has no jurisdiction under 28 U.S.C. § 1257(a) to consider how a state defines property rights. Put another way, “this Court is powerless to revise a state court’s interpretation of its own law.” *Cruz v. Arizona*, 598 U.S. 17, 32 (2023) (Barrett, J., dissenting). The Court should not—and cannot—grant certiorari on the third question presented.

II. This case does not involve the broader questions invoked by Petitioners and is a poor vehicle for those questions.

Petitioners contend the case-specific decision below presents broader questions about whether exercises of police powers can constitute takings and whether placing the barriers can be considered an act authorizing third-party trespassing on their property. Neither question was decided below, and this Court ordinarily does not grant certiorari “when ‘the question presented was not pressed or passed upon below.’” *United States v. Williams*, 504 U.S. 36, 41 (1992). This is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

A. The court below did not adopt a categorical police-power exception to the Takings Clause.

Petitioners assert that this case presents whether a government’s exercise of its police powers is excepted from takings liability. Pet. 14. But the court below adopted no such exception. In its analysis of Petitioners’ right-of-access claim, the court expressly noted that exercises of police power can, under the appropriate circumstances, become takings under Minnesota law. App. 21a (citing *Johnson v. City of Plymouth*, 263 N.W.2d 603, 606 (Minn. 1978)). As to Petitioners’ regulatory takings claim, in evaluating the *Penn Central* character-of-governmental-action factor, the court stated only that placing the concrete barriers in the public right-of-way was a reasonable use of Respondents’ police powers that did not unduly interfere with Petitioners’ property use. It adopted no categorical rule, concluding only that Respondents’ reasonable use of their police powers weighed in favor of Respondents under

Penn Central. And the court below made no mention of police powers in its *per se* taking analysis.

This case also would be a poor vehicle for deciding whether there is a police powers exception to the Takings Clause. Respondents did not damage or even trespass on Petitioners' properties. Rather, the police actions here involved placing concrete barriers in the public right-of-way and, at worst, the "inaction and passive acquiescence" of police. App. 11a. This case would thus likely require this Court to reconsider its no-right-to-state-protection precedents. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989); *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005). These precedents were not raised or considered in this case by the courts below, further counseling against certiorari here. *See Williams*, 504 U.S. at 41.

B. The court below did not hold that a formal enactment is required to authorize a third-party occupation of property.

Petitioners contend that the court below rejected their *per se* takings claim because Respondents "did not enact a law" authorizing the alleged occupation of their properties. Pet. 1314, 17. But the court below imposed no formal-enactment requirement. Applying *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), it found *no* governmental authorization—formal or informal—of any occupation or trespass. The court found no evidence that Respondents allowed third parties to enter Petitioners' properties, entered the properties themselves, authorized third-party entry, or even appropriated Petitioners' right to exclude. App. 8a9a. The court below further

found no evidence that Respondents instituted policies or regulations allowing third parties to occupy Petitioners' properties. *Id.* 11a.

These record-based findings do not establish a rule that governmental action short of formal enactments can never authorize an occupation. Even if authorization need not take the form of a formal enactment, the judgment would remain supported by the finding that Respondents authorized no occupation, formally or otherwise. Petitioners therefore seek review of a question that would not resolve this case.

C. Petitioners rely on misstatements of fact not supported by the record.

Petitioners misstate critical facts. First, in their questions presented, they ask whether “permanently withdrawing police from the intersection constitutes a” taking. Pet i. However, neither their pleading nor the record below supports a permanent withdrawal of police protection. *See, e.g.*, Index #1 ¶ 40 (“police refused to respond to calls, sometimes only responding to the most serious calls”). To the contrary, the very same paragraph in their pleading cited a news article in which a police spokesperson explained that officers were responding to incidents in the area based on a hierarchy of priorities and the availability of officers. App. 32a (citing *Id.* ¶ 40 n.6).

Second, as they did in their appellate briefing below, Petitioners incorrectly claim that Respondents placed barriers “surround[ing] Petitioners [p]roperties.” Pet. 2,4. This implies, inaccurately, that the barriers directly surrounded Petitioners' businesses. Rather, as described

in paragraph 14 of the pleading below, Respondents “placed large concrete barriers around the intersection... to block through traffic.” Index #1 ¶ 14. That description is reflected in the map showing barriers having been placed roughly a block away from the intersection, but not blocking alley or pedestrian access. Index #14 at 13. The record shows that Respondents’ placement of barriers did not surround Petitioners’ properties.

III. The court below correctly rejected Petitioners’ arguments, which rely on misstatements of the law and record.

A. The court below correctly rejected Petitioners’ misapplication of *Cedar Point Nursery*.

Petitioners did not demonstrate a *per se* taking, as the Minnesota Court of Appeals correctly held below. A *per se*, or physical, taking occurs when private property is “physically acquire[d]” or “invade[d]” by the government. *Cedar Point Nursery*, 594 U.S. at 147, 149. As the court below noted, “the record reflects that [Petitioners] **retained full physical possession and use of their properties** throughout the relevant time period.” App. 9a (emphasis added). Petitioners also concede Respondents did not enact any laws allowing third parties to “physically enter and occupy” their properties. Pet. 17. And they do not allege that any third party actually invaded their properties nor do they allege that Respondents authorized third parties to invade their properties. *See id*; *see also* Index #1. As the Minnesota Court of Appeals held, “nothing in this record demonstrate[d] that [the City’s] actions appropriated [Petitioners’] rights to exclude third parties from their properties.” App. 9a.

Petitioners nonetheless try to claim a *per se* taking by conflating such physical takings with language in *Cedar Point Nursery* about regulatory takings. Quoting *Cedar Point Nursery* but omitting key language, Petitioners argue as follows:

A *per se* taking occurs in two scenarios: (1) when the government physically acquires private property for a public use, or (2) “[w]hen the government . . . imposes regulations that restrict an owner’s ability to use his own property.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–48 (2021). ***The latter scenario is at issue here.***

Pet. 14 (emphasis added). As quoted, Petitioners state that this Court held in *Cedar Point Nursery* that mere use restrictions can constitute *per se* takings. *Id.* But the omitted language from that case, once restored, changes the quote’s meaning altogether:

When the government, ***rather than appropriating private property for itself or a third party, instead*** imposes regulations that restrict an owner’s ability to use his own property, ***a different standard applies.***

Cedar Point Nursery, 594 U.S. at 148 (Petitioners’ omissions in bolded italics).

Cedar Point Nursery did not change well-established *per-se* takings law to include use restrictions; rather, the opinion distinguished *per se* from regulatory takings. *See id.* The context confirms this. In the same paragraph,

the Court explains the “different standard” through the development of its regulatory takings jurisprudence culminating in the *Penn Central* test. *Id.* (citing *Penn Central*, 438 U.S. 104).

The court below did not err in concluding that *Cedar Point Nursery* did not support Petitioners’ arguments and did not err in concluding, based on the record, that no *per se* taking occurred. App. 7a11a.

B. The court below correctly applied and weighed the *Penn Central* factors.

As stated above, Petitioners concede that the Minnesota Court of Appeals applied the right test, the *Penn Central* test. *See* Pet. 19-20; *see also* App. 11a-12a, 15a-20a. But they argue that the Court of Appeals (i) “ignored Petitioners’ appraisal report” with respect to the economic-impact factor of the *Penn Central* test; (ii) “incorrectly focused on the fact that Petitioners’ businesses continued to operate while the barricades remained in place” with respect to that same factor; and (iii) erroneously concluded that Petitioners suffered the same harm as the public and that Respondents “reasonably exercised” their police powers. Pet. 19-20. In other words, Petitioners are seeking review of the supposed “misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

In any event, the court below correctly weighed the *Penn Central* factors. First, as to the appraisal report, Petitioners misstate the record: The court below *did* consider Petitioners’ appraisal. The court expressly noted the appraisal’s conclusion that Petitioners’ properties

declined \$660,000 in value. App. 16a. But the court determined that “the existence of the barriers was just one factor that caused the decline in property values and the sales related to their businesses” and held that the economic-impact factor did not favor Petitioners. *Id.* 17a. Petitioners cannot plausibly argue that the court below ignored the appraisal.

Second, as to consideration of their continued business operations, Petitioners invited any supposed error they urge this Court to review: *Petitioners* provided allegations and evidence of their continued business operations for the court’s consideration. Even if such consideration were an error by the court below (it is not), an error induced by a party “cannot be urged” by that party on appeal. *Devine v. Zimmerman*, 133 F.2d 850, 852 (8th Cir. 1943) (citing *L. v. United States*, 266 U.S. 494 (1925) and *Mercelis v. Wilson*, 235 U.S. 579 (1915)). Since the outset of this litigation, Petitioners alleged that Respondents’ actions restricted the commercial use of their properties, as shown through revenue losses. Index #1 ¶¶ 15 (“devastating economic effects”) 58 (“loss of business income”), 73 (“loss of business revenues”), 85 (“loss of business revenue”). And, in response to the dispositive motion below, Petitioners submitted evidence of the purported impact on the continued operation of their businesses through tax returns and an affidavit detailing gross sales revenue. Index #20-#22. It should be no surprise to Petitioners that the courts below considered the allegations and evidence they offered. They cannot now cry foul.

The Petition also does not show how the court below erred in considering Petitioners’ continued business

operations. Petitioners assert that the continued operation of their businesses is irrelevant. But the *Penn Central* test is “designed to allow careful examination and weighing of all the relevant circumstances” in evaluating whether a government’s use restriction went “too far.” *See Murr v. Wisconsin*, 582 U.S. 383, 392–93 (2017). And Petitioners placed the extent to which they continued to operate at issue for this very factor. *See* App. 16a. Petitioners also argue that the court below conflated the *Penn Central* and categorical takings tests. Pet. 19. But there is no question that the court below applied the *Penn Central* test. App. 15a-20a. Petitioners’ argument is undeveloped and unsupported and does not present an issue worthy of this Court’s attention.

Finally, as to the assessment of the harms shared by the broader public and Respondents’ exercise of police powers, there was no error. The court below did not err in noting that Petitioners’ properties were not singled out and that Petitioners “offered no evidence indicating that [R]espondents’ actions imposed a unique or disproportionate burden on [Petitioners]” as compared to those similarly situated. App. 19a. Nor did the court below err in considering the nature, character, and reasonableness of Respondents’ use of their police powers. That is precisely what *Penn Central* requires and what the court below considered. 438 U.S. at 12528. And, as explained above, the court below did not adopt a categorical rule that police powers are excepted from takings liability.

C. The court below correctly applied the summary judgment standard to Petitioners' right-of-access claim.

Petitioners argue the court below erred by not accepting their allegations as true under Minnesota's motion to dismiss standard in affirming the dismissal of their right-of-access claim. Pet. 22 (citing Minn. R. Civ. P. 12.02(e)). Petitioners, however, submitted their own evidence in response to Respondents' dispositive motion—evidence they now ask this Court to reweigh—and agreed at oral argument that the summary-judgment standard applied. App. 5a; *see also* Index #20-#23. Petitioners urged application of the summary judgment standard through their actions and representations and have no basis to claim that application as error now. Even if this Court had jurisdiction to review application of state civil procedure standards, *see* 28 U.S.C. § 1257(a), the court below did not err in applying the state summary judgment standard here.

IV. This matter does not assert damage to property caused by police action.

It is important to note what this case is not. It is not a case concerning damage or destruction of property by the City of Minneapolis, its police department, or employees. It is not a matter concerning damage to real estate by police action. The pleading and the record are devoid of any allegation or evidence that Minneapolis, its employees, or agents, ever entered into or caused any physical damage to Petitioners' properties. There is no dispute that the City erected barriers that blocked the major right-of-way for 366 days. Likewise, the parties do

not dispute that the City's action was within its authority under its police powers.

Under Minnesota law, were this a matter of police action causing damage to the property of an innocent landowner, Petitioners would be entitled to compensation. In *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991), the Minnesota Supreme Court recognized that “where an innocent third party’s property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of the [Minnesota] constitution.” *Id.* at 41-42. In reaching that ruling, the Minnesota Court rejected a defense that public necessity precluded recovery. *Id.* at 42.

If Petitioners had facts to support damage to their property by police action, they most certainly would have brought a *Wegner*-style damaged property takings claim. Petitioners do not make that claim, and the record is devoid of any facts or allegations that might support such a claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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