No. 23-1363

In the
Supreme Court of the United States

VICKI BAKER,

Petitioner,

v.

CITY OF MCKINNEY, TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER VICKI BAKER

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INTEREST OF AMICUS CURIAE [1]

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all fifty state capitals, the interests of its members.

NFIB Legal Center participates as an amicus in this case because small businesses are disproportionately affected when state or local government actors damage or destroy property in the pursuit of law enforcement or safety goals for the benefit of the public at large. Innocent small business owners have suffered crippling losses due to police damaging property for the purpose of protecting members of the public, and regularly, these business owners have gone without compensation. *See, e.g., Pena v. City of Los Angeles*, No. 23-cv-5821-JFW(MAAX), 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024), *appeal pending*, No. 24-2422 (docketed Apr. 17, 2024). Such damage or destruction can substantially harm or even close a small business if it alone has to bear the full cost. NFIB Legal Center

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[1] No counsel for a party authored this brief in whole or in part, and no person other than NFIB and its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties were provided timely notice of NFIB's intention to file this brief.

files this amicus brief to ensure that property owners, including small businesses, are compensated under the Fifth Amendment in such instances.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a targeted issue that arises frequently across the country. Police officers, firefighters, and other government actors at times have to damage or destroy private property to further a public goal—in this case, to apprehend a dangerous criminal. Often the damage is not substantial from the government's perspective—here, it was just under $60,000—but such damages can be crippling to an individual or a small-business owner to shoulder alone. When the property owner is innocent and did not create the circumstances leading to the property's destruction, who bears such "public burdens"? *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Should they be borne by just the affected individual or business, or "in all fairness and justice, should [they] be borne by the public as a whole"? *Id.*

When a government engages in a physical taking of private property pursuant to an express exercise of its eminent domain power, the answer to the above question is undisputed: The government, on behalf of (and as the representative of) "the public as a whole," has to pay the property owner just compensation. The same standard should apply in appropriate circumstances to a physical taking of private property under the police power. Various courts of appeals and State supreme courts, however, have refused to recognize this obvious connection. They have, instead, created a special Takings Clause carveout that permits physical takings by a government when acting pursuant to

its police power, either in all circumstances or at least when government actors are responding to emergency situations.

The decisions of this Court simply do not allow a blanket police power exception to the Takings Clause: "When the government physically acquires private property for a public use, the Takings Clause imposes a *clear and categorical obligation* to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 143 (2021) (emphasis added). This case presents a perfect opportunity for the Court to reaffirm this bedrock principle and resolve a lingering conflict among the federal circuits.

ARGUMENT

I. FEDERAL AND STATE COURTS ARE IN CLEAR CONFLICT OVER WHETHER A GOVERNMENT'S POLICE POWER FREES IT FROM HAVING TO PAY JUST COMPENSATION FOR A PHYSICAL TAKING

Courts are in disarray over whether a government can engage in a physical taking of an innocent owner's property with little or no obligation to compensate the owner so long as its agents operated lawfully and the government can portray its actions as an exercise of its undefinably broad police power. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless."). And this is so despite this Court's admonition that if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the

qualification more and more until at last private property disappear[ed].'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

A. The conflict among the United States courts of appeals.

At the federal level, at least a three-way split exists among the courts of appeals. Several have held that the Takings Clause is *per se* inapplicable when government actors act pursuant to a State's police power. *Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019); *Ostipow v. Federspiel*, 824 F. App'x 336, 342 (6th Cir. 2020); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008).[2]

Here, the Fifth Circuit rejected this *per se* approach because it was unmoored from "history, tradition, or historical precedent." App. 12a. In its stead, however, the Fifth Circuit adopted an alternative rule that gives innocent property owners only limited protection in the event of a police-power taking: An owner is entitled to just compensation as the result of such a taking unless it occurred while the government agents were responding to an active emergency or similar

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[2] The Federal Circuit has not spoken with one voice on this issue. Five years after *AmeriSource* was decided, and without citing *AmeriSource*, the Federal Circuit rejected "the assertion that any action taken for the purpose of fire prevention" – a classic exercise of police power – is shielded from Takings Clause liability. *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1379 (Fed. Cir. 2013). Rather, a government would be "absolve[d] … of a duty to compensate a party for lost property" only if its fire prevention actions that led it to destroy private property were a necessary response to an imminent danger. *Id.*

event requiring a necessary response from the government. App. 2a, 15a, 24a.

Finally, the third branch of the split exists in the Fourth Circuit. Like the Fifth Circuit, the Fourth Circuit rejected the *per se* rule of *Lech*, *Johnson*, *Ostipow*, and *AmeriSource* (albeit without citing any of those cases). "That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause," the Fourth Circuit held, "is axiomatic in the Supreme Court's jurisprudence." *Yawn v. Dorchester Cnty.*, 1 F.4th 191, 195 (4th Cir. 2021). Unlike the Fifth Circuit, however, the *Yawn* court did not graft onto the Takings Clause an emergency-response exception. Rather, the court more narrowly held that a destruction or seizure of private property pursuant to the police power is not subject to the Takings Clause's "just compensation" mandate only if the destruction or seizure is "neither intended nor foreseeable." *Id.* at 196.

B. The conflict extends to the highest courts of the States.

At the time the States ratified the Fifth Amendment, most States and territories did not bestow constitutional protection to their citizens against takings without just compensation—only the Constitutions of Massachusetts and Vermont, and the Northwest Ordinance of 1787, protected against uncompensated takings. *See* Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790–91 (1995). Now, nearly all States provide such protection to their citizens, and their Takings Clauses are largely modeled after the Fifth Amendment's Takings Clause. *See* Dickinson, *Federalism, Convergence, and Divergence in*

Constitutional Property, 73 U. MIAMI L. REV. 139, 156–57 (2018). Consequently, these States frequently borrow from federal takings jurisprudence in construing and applying their own Takings Clauses. *See Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 240–41 (Tenn. 2014) (collecting cases).

Like the federal circuits, State supreme courts are divided over the question of the interplay between a State's police power and citizens' rights to just compensation when that power leads to a physical taking. Most States that have tackled the issue are in line with the majority view of the courts of appeals: Such a police-power taking is, *per se*, exempt from a constitutional obligation to pay just compensation. *See, e.g.*, *Hamen v. Hamlin Cnty.*, 955 N.W.2d 336, 348 (S.D. 2021); *Eggleston v. Pierce Cnty.*, 64 P.3d 618, 623 (Wash. 2003); *Sullivant v. City of Okla. City*, 940 P.2d 220, 224 (Okla. 1997); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 901 (Cal. 1995).

At least two prominent State supreme courts, however, have disagreed. In *Steele v. City of Houston*, the Texas Supreme Court rejected the "notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of police powers." 603 S.W.2d 786, 789 (Tex. 1980). Rather, it held that the plaintiffs there could recover just compensation under the Texas Constitution's Takings Clause (Article I, Section 17) upon proof that the Houston police, in an effort "to recapture three escaped convicts who had taken refuge in the[ir] house," "intentionally set the[ir] house on fire or … prevented the

fire's extinguishment after it was set." *Id.* at 788, 791–92.[3]

The Minnesota Supreme Court is in accord. Following *Steele*, it held in *Wegner v. Milwaukee Mutual Insurance Co.*:

> We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. ... At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.

479 N.W.2d 38, 42 (Minn. 1991).[4]

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[3] The Texas Supreme Court further held that the City of Houston could "defend its actions by proof of a great public necessity," such as "by reason of war, riot, pestilence or other great public calamity" or where a building was "destined to destruction anyway" from a raging fire. *Id.* at 792.

[4] The Alaska Supreme Court has also rejected the majority *per se* police-power takings exception. *See Brewer v. State*, 341 P.3d 1107, 1118 (Alaska 2014) ("But a taking of private property does not escape application of the Takings Clause simply because it occurs in the course of the State's firefighting activities; to be noncompensable, the taking must be justified by the doctrine of necessity."). The Alaska Takings Clause, however, "protects more broadly than the federal Takings Clause." *Id.* at 1111 (citation and internal quotation marks omitted).

In short, courts across the country—both at the federal and state levels—have been unable to reach agreement on when, if ever, an innocent private party can obtain "just compensation" from the government when his or her property is taken or destroyed for a public purpose through exercise of the police power. Both private parties and governments need the Court to resolve this conflict and provide clarity on this recurring issue.

II. THE MAJORITY VIEW AMONG THE COURTS OF APPEALS, AND THE FIFTH CIRCUIT'S VIEW, CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT REQUIRING JUST COMPENSATION FOR PHYSICAL TAKINGS, EVEN WHEN THE GOVERNMENT IS ACTING UNDER ITS POLICE POWER

The need for the Court to resolve the existing conflict is heightened by the simple fact that the majority view, as well as the view of the Fifth Circuit, are erroneous under this Court's unambiguous precedent.

A. The Court has squarely rejected the misconception that a police-power taking is exempt from the Takings Clause.

Just three years ago, the Court put to rest any argument that a government exercising its police power is freed of the obligation under the Takings Clause to pay just compensation.

At issue in *Cedar Point* was a California regulation allowing labor organizers to "take access" to an agricultural business's property to solicit union support. 594 U.S. at 143. The regulation was a classic exercise of the State's police power rather than its

eminent-domain power (to the extent the latter is not merely a species of the former): The regulation did not shift ownership of the business's property or even diminish the market value of the property. Instead, it sought to regulate conduct between an employer and a union. Nevertheless, the Court had little difficulty in concluding that this exercise of California's police power amounted to a physical taking:

> When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. … The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes.

Id. at 147–48 (citations and internal quotation marks omitted).

The *Cedar Point* Court also directly addressed the folly of limiting the Takings Clause only to those situations where a government exercises its eminent-domain power:

> We have recognized that the government can commit a physical taking either by

> appropriating property through a condemnation proceeding or by simply entering into physical possession of property without authority of a court order. In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. Yet we recognize a physical taking all the same. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome.

Id. at 155–56 (citations and internal quotation marks omitted); *see also id.* at 149 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred …"); *id.* at 152 ("The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.").[5]

Cedar Point was not, and is not, a novel decision. It is backed by the Court's precedent dating back nearly a century. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation

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[5] The *Cedar Point* Court discussed three narrow circumstances of government control over private property that do rise to the level of a taking, but none of those circumstances is present here. *See* 594 U.S. at 159–61 (temporary trespasses that do no permanent damage to private property, temporary access to private property that likewise does not permanently damage the property, and longer-term access to private property as a condition to the owner receiving a government benefit).

authorized by government is a taking without regard to the public interests that it may serve."); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) ("[T]he Government's attempt to create a public right of access to the improved pond" pursuant to its Commerce Clause power "goes far beyond ordinary regulation or improvement for navigation as to amount to a taking."); *United States v. Causby*, 328 U.S. 256, 267 (1946) (low-level flights approved by predecessor to FAA created a "servitude … imposed upon the land" amounting to a taking); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (Secretary of Interior temporarily taking over mines where strike or stoppage occurred or was threatened "was a 'taking' requiring the Government to pay [the company]."). The majority view of the courts of appeals and the States, as described above, cannot be reconciled with *Cedar Point*, and this Court should grant the petition for certiorari here to reject this misguided view.

B. The Fifth Circuit's position also cannot be squared with this Court's precedent.

While the Fifth Circuit was correct to reject the majority, *per se* rule that property taken pursuant to the police power is not subject to the Takings Clause, its replacement rule also is unacceptable under this Court's precedent. The Fifth Circuit conflated the law on trespass, causation, and takings to derive a new rule that a government has no Takings Clause liability if, in response to an active emergency, one of its officers destroys private property that would not otherwise be destroyed.

Over 150 years ago, this Court addressed the distinction between a government officer's liability for trespass versus a government's obligation to pay just

compensation when the officer takes property in response to an "extreme and imperative" emergency: "[T]he rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, *and that the government is bound to make full compensation to the owner*." *United States v. Russell*, 80 U.S. 623, 628 (1871) (emphasis added) (citing *Mitchell v. Harmony*, 54 U.S. 115 (1851)). As the Court further explained:

> Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, *and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service*. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, *but the government must make full restitution for the sacrifice*.

Id. at 629 (emphasis added).

This distinction between trespass and takings liability was lost on or missed by the Fifth Circuit, which most significantly relied on a trespass case (*Respublica v. Sparhawk*, 1 U.S. 357 (1788)) in fashioning its new emergency-response exception to Takings Clause liability. App.17a–18a; *see Respublica*, 1 U.S. at 362 (discussing the "rights of necessity" as a justification

excusing actions that "[o]therwise … would clearly have been a trespass").[6]

The Fifth Circuit also erroneously found support for its new exception from a series of cases that involve what this Court has described as "settled principles of … causation." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012). More specifically, the Court has recognized that a private property owner is not entitled to compensation when a government actor damages or destroys her property during an emergency to prevent a danger, such as a fire, that would otherwise destroy both the owner's property and her neighbors' properties. The owner, of course, may be unhappy that the government actor chose her property, versus her neighbor's, to destroy, but she has no right to compensation because she is in no worse of a position than if the government actor did nothing and let the fire ravage both the owner's property and her neighbors' properties. *See Lucas*, 505 U.S. at 1029 n.16 ("[The State may be absolved] of liability for the destruction of real and personal property, in cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others." (citation and internal quotation marks omitted)), *quoted* at App.23a.[7]

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[6] The portion of *Respublica* upon which the Fifth Circuit relied was also clearly dicta because the Court held that, since the Pennsylvania Comptroller General was not empowered to award damages, the Court could not force him to do so even if the appellant were otherwise entitled to damages. 1 U.S. at 363.

[7] *See also, e.g.*, *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 94–95 (1969) (Harlan, J., concurring) ("For it appears to me that, in riot control situations, the Just Compensation Clause may only be properly invoked when the military had reason to believe

All told, the Fifth Circuit's new, broad emergency-response exception to the Takings Clause stems from a misreading of this Court's precedents. A government officer can commandeer or damage the private property of an owner in an emergency without exposing herself to liability for trespassing. That, however, does not broadly release the government from thereafter compensating the owner for the value lost from such a taking.[8]

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that its action placed the property in question in greater peril than if no form of protection had been provided at all."); *United States v. Caltex*, 344 U.S. 149, 154 (1952) (no taking where army destroyed property "to prevent the enemy from realizing any strategic value from an area which he was soon to capture," explaining that "[h]ad the Army hesitated, had the facilities only been destroyed after retreat, respondents would certainly have no claims to compensation"), cited in App.23a; *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) ("At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner."), quoted in App.21a.

[8] As the Fourth Circuit recognized, the government's unintended or unforeseen damage to private property may not constitute a taking. *See Yawn*, 1 F.4th at 196. Emergency-response situations are more likely to result in unintended or unforeseen damage because of the need for government agents to act quickly, with little or no time for reflection. But this does not create a categorical "emergency" or "necessity" exception to the Takings Clause; it simply involves application of existing Takings Clause jurisprudence to the specific facts of a given emergency-response situation. *See Cedar Point*, 294 U.S. at 160; *Ark. Game*, 568 U.S. at 39.

III. THIS CASE IS A PERFECT VEHICLE FOR THE COURT TO RESOLVE THE CONFLICT ACROSS FEDERAL AND STATE COURTS

This case presents an excellent vehicle for this Court to resolve the confusion among courts over whether and when a government's taking of property (through destruction of that property), pursuant to its police power, constitutes a compensable taking.

First, the only issue decided by the Fifth Circuit was that petitioner is not entitled to a remedy under the Takings Clause for the police damaging and destroying her property. App.24a. There were no alternative grounds for the Fifth Circuit's reversal of the District Court's grant of summary judgment to petitioner on liability and the jury's subsequent damages verdict.

Second, there are no procedural questions of waiver or forfeiture in this case. The Takings Clause issue was properly raised and resolved in the District Court and squarely addressed by the Fifth Circuit.

Third, there are no confounding or conflating factors at issue in this case. There is no dispute that petitioner is the innocent owner of the property at issue in this case; she had no role in the illegal conduct that prompted law enforcement's emergency response. The property damage was also squarely for a public purpose—since the homeowner was not at home at the time of the police action, she obtained no *private* benefit, such as police saving her life, that could justify the damage to the property or function as a price any homeowner would willingly pay. There is no dispute that the property damage petitioner suffered was real and costly, as evidenced by the jury's damages verdict

in her favor. And there is no dispute that the property damage that was the basis for the jury's award was caused by the law enforcement action in this case and would not otherwise have occurred in the absence of law enforcement's actions.[9]

The Court need only consider the facts as they present themselves in this case: a situation where police knowingly caused damage to the private property of an absent owner in a reasonable effort to achieve a public purpose, i.e., the apprehension of a dangerous criminal. Under such circumstances, just compensation is due under the Fifth Amendment. This case thus provides the Court the perfect vehicle for resolving an exceedingly broad circuit split on a well-defined, undisputed set of facts.

Courts across the country have struggled with applying the Takings Clause to cases where government actors damage or destroy private property in the exercise of the government's police power. The Court can provide needed clarity on this issue by granting certiorari here.

CONCLUSION

For the reasons stated in the Petition and this amicus brief, the Court should grant certiorari.

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[9] To be clear, there is also no claim or contention here that the law enforcement officers acted recklessly or outside the scope of their authority. No one is seeking to hold any such officer responsible for the damage to petitioner's home; the question is only whether the City of McKinney or petitioner alone should bear the cost for the damage done in the interest of public safety to attempt to apprehend a dangerous criminal.

Respectfully submitted,

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JULY 26, 2024