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 United States Court of Appeals for the Fifth Circuit

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RESPONDENT CITY OF MCKINNEY'S BRIEF IN OPPOSITION

EDWIN ARMSTRONG PRICE VOSS, JR.
BROWN & HOFMEISTER, L.L.P.
740 East Campbell Road
Suite 800
Richardson, TX 75081
(214) 747-6100
evoss@bhlaw.net

JESSE WADELL WAINWRIGHT
Counsel of Record
ELIZABETH G. BLOCH
NICOLE LEONARD CORDOBA
GREENBERG TRAURIG, LLP
300 W. 6th Street
Suite 2050
Austin, TX 78701
(512) 320-7226
Dale.Wainwright@gtlaw.com
Heidi.Bloch@gtlaw.com
Cordoban@gtlaw.com

Counsel for Respondent City of McKinney, Texas

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QUESTION PRESENTED

The jurisprudence of the Fifth Amendment Takings Clause has consistently distinguished the exercise of police power, in the context of emergency law enforcement action to save lives, from takings based on eminent domain and regulatory actions. Petitioner's phrasing of the question presented—"whether the Takings Clause applies even when the government takes property for a particularly compelling public use"—is an overbroad and imprecise characterization of the holding below and raises a question the U.S. Court of Appeals for the Fifth Circuit did not address. The question presented is narrower—whether the Takings Clause requires compensation for damage to a residence when Petitioner Baker admitted it was objectively necessary for police officers to damage the property in an active emergency to prevent imminent harm to persons.

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of McKinney, Texas ("Respondent" or "City"), files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Petition), and to the Briefs of Julia D. Mahoney, Ilya Somin, the Cato Institute; the National Federation of Independent Business Small Business Legal Center, Inc.; the Pacific Legal Foundation; and Professors James W. Ely, Jr., Shelley Ross Saxer, and David L. Callies as *Amici Curiae* in Support of Petitioner (Briefs of *Amici*), and respectfully requests that the Court deny the Petition.

STATEMENT OF THE CASE

In this case, Petitioner Vicki Baker ("Petitioner" or "Ms. Baker") seeks recovery under the Fifth Amendment Takings Clause for damages caused by police officers who used admittedly reasonable and necessary efforts to apprehend a hostile and heavily armed suspect with a 15-year-old female hostage barricaded in Petitioner's home.

I. Factual Background

Petitioner, a long-time resident of the City, decided to retire, sell her house, and move to Montana. Petition Appendix (Pet. App.) 2a-3a. On the date of the incident giving rise to this case, July 25, 2020, Petitioner had already moved to Montana, and her adult daughter, Deanna Cook, was staying at the house helping prepare the house for sale. Pet. App. 3a.

On the morning of July 25, Ms. Cook saw a Facebook post that Mr. Wesley Little was on the run with a 15-year-old female hostage. Pet. App. 3a, 27a. Ms. Cook recognized Mr. Little because he had done some work at Petitioner's home more than a year prior. Pet. App. 3a,

27a. Petitioner had fired Mr. Little because some of his comments made Ms. Cook uncomfortable. Pet. App. 3a.

Earlier that day the City of McKinney Police Department (MPD) officers spotted Mr. Little, with the 15-year-old female, driving a stolen Corvette. Pet. App. 3a. The MPD gave chase, but Mr. Little eluded the officers. Pet. App. 3a. Mr. Little went to Petitioner's house with the 15-year-old hostage, knocked on the door, and when Ms. Cook answered, he asked to hide out in the house. Pet. App. 3a, 27a. Intending to create an opportunity to call for help, Ms. Cook agreed, then left for the supermarket. Pet. App. 3a, 27a. In the supermarket parking lot, Ms. Cook called Petitioner, and together they called MPD for assistance. Pet. App. 3a, 27a.

On arrival at the Baker residence, MPD officers set up a perimeter around the home. Pet. App. 3a, 27a. The officers' purpose was to secure the home, negotiate with Mr. Little, obtain the release of the 15-year-old female hostage, and arrest him. Pet. App. 3a-4a, 27a. The officers deployed their BearCat armored vehicle to the front of the house and communicated with Mr. Little on an intercom system since there was no telephone available to easily communicate with him. Pet. App. 4a, 27a. The officers procured the release of the girl, and she exited the house. Pet. App. 4a, 27a. The girl reported to the police that Mr. Little was hiding in the attic, had a lot of long guns and some pistols, and was high on methamphetamine. Pet. App. 4a, 27a.

Mr. Little communicated to the police that he "had terminal cancer, knew he was going to die, wasn't going back to prison, was going to shoot it out with the police." Pet. App. 4a. MPD then proceeded with attempts to coerce Mr. Little from the house using explosive devices, the BearCat at the front of the house, and

another armored vehicle at the back of the house, and toxic gas grenades and canisters. Pet. App. 4a, 28a. Despite those efforts, Mr. Little refused to exit the house. Pet. App. 4a, 28a. The MPD then deployed a drone to enter the home in an attempt to locate Mr. Little. Using the drone, the officers located Mr. Little in an upstairs bedroom where he had taken his own life with a gunshot wound to the head. Pet. App. 4a, 28a.

The Fifth Circuit Court of Appeals' opinion noted the actions of the City's police officers were undisputedly reasonable and necessary, as admitted at trial by Petitioner's counsel and in briefing in the Fifth Circuit:

> It is undisputed that police acted unimpeachably that day, and no party in this case has ever suggested otherwise. At trial, Baker's attorney made it a point on direct examination to underline that "there was some really good police work here," it "was a successful operation," "[e]veryone followed procedure," and "[e]veryone did what they were supposed to do," along with other affirmations that the officers acted irreproachably. Her attorney reiterated that the severe damage done to Baker's home "was necessary. No issue there." And in briefing, Baker makes clear she does not dispute that "it was necessary to destroy her house."

Pet. App. 4a-5a.

The officers' attempts to coerce Mr. Little to come out and surrender caused damage to Petitioner's home. Pet. App. 5a, 28a. Although her insurance claim was denied, Petitioner received numerous donations of money and materials, repaired her home, and sold it. Pet. App. 5a-6a, 29a, 35a.

II. Procedural History

Petitioner sued Respondent under the takings clauses of both the United States Constitution and Texas Constitution. Pet. App. 6a. Petitioner alleged liability under the Fifth Amendment directly, asserting that it is "self-executing," and under 42 U.S.C. § 1983. Pet. App. 6a. Respondent filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, asserting Petitioner did not plead a cause of action under the Fifth Amendment, insufficiently alleged municipal liability under § 1983, failed to establish supplemental jurisdiction over the Texas Constitution claim, and failed to state a valid claim under the Texas Constitution. Pet. App. 6a. The district court denied Respondent's dismissal motion. Pet. App. 7a.

Petitioner moved for partial summary judgment on her takings claims under the Fifth Amendment and Texas Constitution. Pet. App. 7a. The district court granted her motion, leaving the amount of damages and Respondent's liability under § 1983 for jury determination at trial. Pet. App. 7a, 26a-71a. At the pre-trial conference, Respondent objected to the § 1983 claim going forward, which objection the district court overruled. Pet. App. 7a-8a. Also at the pre-trial conference, the district court noted that Respondent had made an offer to Petitioner for the full amount of damages to settle the case. Pet. App. 8a. Petitioner's counsel stated that she refused because "she wanted a change in policy or some assurance that people in her position in the future wouldn't be subjected to similar denial of compensation, and Respondent wasn't willing to offer that so that was why she proceeded." Pet. App. 8a.

Trial was held from June 20 through 22, 2022. Pet. App. 8a. The jury awarded Petitioner $44,555.76 for damages to her home and $15,100.83 for damages to

her personal property. Pet. App. 8a-9a, 72a-73a. Judgment was entered under § 1983. Pet. App. 9a, 72a-73a. The district court denied all of Respondent's trial and post-trial motions. Pet. App. 8a-9a, 74a-125a.

Respondent appealed to the Fifth Circuit Court of Appeals, which reversed the district court's summary judgment order, which had ruled that the damage or destruction to Petitioner's house and personal property was a compensable taking under the Fifth Amendment. Accordingly, the Fifth Circuit vacated the § 1983 judgment in Petitioner's favor, did not reach whether Petitioner succeeds under the Texas Constitution, and remanded the case to the district court to resolve Petitioner's state takings claim. Pet. App. 25a.

The Fifth Circuit's analysis of Petitioner's Fifth Amendment takings claim included a review of this Court's, and its own, history and precedent regarding Fifth Amendment takings claims in the context of a municipality's exercise of its police power. Pet. App. 10a-24a. That analysis confirmed the existence of a necessity exception to the Takings Clause in the context of the facts of this case. Pet. App. 24a. The Fifth Circuit expressly confined its holding to the factual context present in this case:

> We hold only that in this case, the Takings Clause does not require compensation for Baker's damaged or destroyed property because, as Baker herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons.

Pet. App. 24a.

Petitioner sought rehearing *en banc*, which was denied by a vote of 11 to 6, with a dissent by Judge

Jennifer Elrod joined by Judge Andrew Oldham. Pet. App. 126a-127a; Pet. App. 127a-144a.

REASONS FOR DENYING THE PETITION

Petitioner's motivation for this action is not to be compensated for her damage—she rejected Respondent's offer of full payment—but rather to change governmental policy and the law of Takings. Pet. App. 8a. This case is not an appropriate vehicle for doing so for many reasons, including:

1. The undisputed critical facts are unique. It was both reasonable and necessary under the circumstances for officers to damage Petitioner's property in an active emergency to prevent imminent harm to the public.

2. The Fifth Circuit did not base its judgment on the broad issue Petitioner asks this Court to address—whether a compensable taking occurs when property is damaged or destroyed pursuant to the exercise of a city's generic police powers. The Fifth Circuit declined to follow that broad rule and instead recognized a narrower exception based on the unique and undisputed facts above.

3. There is no circuit split on the precise holding of the Fifth Circuit.

4. The Fifth Circuit's holding is consistent with this Court's and every federal circuit's precedents addressing the issue presented.

5. The broader rule of no compensable taking when a city exercises its police powers, which is also consistent with this Court's precedent, provides an alternative ground for affirming the Fifth Circuit's judgment.

6. Finally, Petitioner still has a claim under the Texas Constitution, which will be adjudicated on remand.

The Fifth Circuit correctly determined, consistent with every other federal circuit court that has addressed the issue, that consequential damages resulting from reasonable police activity in pursuing dangerous criminals during an active emergency do not give rise to a takings claim under the Fifth Amendment. Contrary to Petitioner's contention, the Fifth Circuit considered and relied upon well-settled Supreme Court and other circuit court precedent in determining that Petitioner has no Fifth Amendment takings remedy.

Petitioner's suggestion that there is a growing trend of federal court decisions contravening this Court's precedent is belied by a review of both the Fifth Circuit's decision in this case and decisions from other circuits. Every circuit opinion addressing the specific issue presented here—property damage resulting from police action taken to enforce criminal law—has held the Takings Clause does not apply. The "trend" is one of consistency, not "hopeless confusion."[1] The facts and circumstances of this case, coupled with not only the analysis provided by the Fifth Circuit but also prior analyses by this Court and other circuit courts providing clear guidance, render this case unsuitable for review. There is, therefore, no basis to grant certiorari review.

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[1] If the Court finds a need to address the Takings Clause's applicability to property damage caused by lawful and proper police actions enforcing criminal law, one of the cases currently pending in the lower courts may present a better vehicle. *See, e.g.*, *Slaybaugh v. Rutherford Cty.*, No. 23-5765, _ F.4th _, 2024 WL 4020769 (6th Cir. Sep. 3, 2024); *Hadley v. City of S. Bend*, No. 3:24-cv-29 DRL-MGG, 2024 WL 3495017 (N.D. Ind., Jul. 18, 2024), *appeal docketed*, No. 24-2448 (7th Cir. Aug. 21, 2024); *Pena v. City of Los Angeles*, No. CV23-5821-JFW (MAAX), 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024), *appeal docketed*, No. 24-2422 (9th Cir. Apr. 17, 2024).

I. Petitioner Focuses Primarily On An Argument The Fifth Circuit Declined To Follow.

Petitioner asks this Court to "grant review to put a stop to a trend that threatens to make the Takings Clause a dead letter." Pet. at 7. In support of the purported trend Petitioner seeks to stop, Petitioner cites to decisions from the Third, Sixth, Seventh, Tenth, and Federal Circuits holding that when property is destroyed or damaged pursuant to the exercise of a city's police powers,[2] there has been no compensable taking under the Fifth Amendment. Pet. at 8-12.[3] But the Fifth Circuit declined to follow that broad rule in this case, making it a poor choice for review of those decisions.

Indeed, Petitioner recognizes that the Fifth Circuit took a "middle road" that does not dovetail with the "trend" Petitioner challenges. [Pet. at 13]. Although entirely consistent with this Court's precedent, the Fifth Circuit's narrower holding does not create or fuel a circuit split on the broader issue.

And the Fifth Circuit's narrow holding makes this case an inappropriate vehicle to review the broader rule that state government police powers do not implicate the Takings Clause.

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[2] A state or city's police power encompasses "regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago, Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906). A city's enforcement of criminal law through police is a distinct category within the police power.

[3] The case law does not clearly delineate whether this is so because there is no "taking" or because any such taking is not compensable. If there is a difference between finding no taking occurred and finding any taking is not compensable under the Fifth Amendment, it is one without a difference because either way, the damage to Ms. Baker's home is not compensable under Fifth Amendment jurisprudence as discussed herein.

II. The Fifth Circuit Correctly Rejected Petitioner's Fifth Amendment Takings Claim Because Property Damage Caused By Law Enforcement's Reasonable Response To An Emergency Does Not Constitute A Compensable Taking.

Petitioner asserts that the Fifth Circuit's opinion is "wrong" and represents a "growing trend" of courts denying Fifth Amendment takings claims for damages caused by necessary and proper police activity. Pet. 15-21. Petitioner's assertions are without merit.

The Fifth Circuit correctly followed this Court's and other circuit courts' precedent under the facts presented, *i.e.*, a Fifth Amendment takings claim to recover consequential damages caused by reasonable, necessary, and "unimpeachable" police actions to enforce criminal law. Pet. App. 10a-24a. The Fifth Circuit reached the same conclusion as all other cases decided prior to the decision here—the Fifth Amendment does not provide a takings remedy when it is objectively necessary for law enforcement to damage or destroy property in an active emergency to prevent imminent harm to persons.

A. This Court and other courts have consistently rejected takings claims arising out of law enforcement actions to prevent imminent harm to persons.

This Court's precedent and the circuit courts applying it have consistently distinguished the exercise of the police power to protect the public safety and welfare from the exercise of the power of eminent domain in deciding whether just compensation under the Fifth Amendment is constitutionally required. More to the point as it relates to this case, the Court's precedent confirms the Fifth Circuit's decision here that the Fifth

Amendment Takings Clause does not apply to property damage caused by police when reasonably performing law enforcement tasks to prevent public harm. *See Bennis v. Michigan*, 516 U.S. 442, 443-44, 452-53, (1996); *cf. Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92 (1969) (government not liable to property owners "every time policemen break down the doors of buildings to foil burglars thought to be inside.").

For example, this Court in *Bennis* rejected a Fifth Amendment takings claim related to the forfeiture of a vehicle due to the violation of criminal law. 516 U.S. at 443-44, 453. The Court held that when a state acquires property "under the exercise of governmental authority other than the power of eminent domain," no just compensation is due. *Id*. at 452. And even more pertinent to the context of police actions, this Court recognized the necessity privilege, discussed by the Fifth Circuit in this case, and found that "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 159-61 (2021). The Court reiterated that the common law authorizes police to enter private property to avert public or private harm, arrest a suspect, or enforce criminal law without compensation. *Id.* at 160-61 (citing Restatement (Second) of Torts §§ 196-197 and 204-205 (1964)). The Court further reiterated the long-standing foundation of this rule:

> Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, *see, e.g.*, *Sandford v. Nichols*, 13 Mass. 286, 288 (1816), government searches that are consistent with the Fourth

> Amendment and state law cannot be said to take any property right from landowners.

Id. at 161 (citing *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 538 (1967)).

Consistent with *Bennis*, every decision from other circuits that has reviewed the question presented has applied this Court's principles in cases involving property damage caused by intentional police activity and held the Fifth Amendment Takings Clause inapplicable. *See Lech v. Jackson,* 791 Fed. App'x. 711, 717 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020) (city not liable for law enforcement breaching front door, punching holes in walls, and firing tear gas into property when apprehending armed suspect); *Zitter v. Petruccelli*, 744 F. App'x 90, 96 (3d Cir. 2018) (department not liable for seizing illegally farmed oysters pursuant to lawful search warrant); *Bachmann v. United States*, 134 Fed. Cl. 694, 697 (2017) (government not liable for law enforcement firing weapons, smoke bombs, and tear gas into property when apprehending fugitive); *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 333, 336 (7th Cir. 2011), *cert. denied*, 565 U.S. 824 (2011) (county not liable for law enforcement damage to wall paneling, furniture, and garage floor when executing search warrant: "Here, the actions were taken under the state's police power. The Takings Clause claim is a non-starter."); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008), *cert. denied*, 556 U.S. 1126 (2009) (when police seized a distributor's pharmaceuticals during a criminal investigation and returned the pharmaceuticals after the expiration date, thus making them unusable, no taking occurred).

Petitioner herself lists numerous decisions that have uniformly and consistently held the Fifth Amendment's Takings Clause does not apply to damages caused by

lawful and proper police activity. Pet. 8-12 & n. 3. Other recent decisions likewise follow this Court's precedent to find the Takings Clause is not applicable to property damage caused by law enforcement. *See Slaybaugh*, 2024 WL 4020769, at *8 (law enforcement damage to plaintiff's home during apprehension and arrest of plaintiff's son held not a Fifth Amendment taking); *Ostipow v. Federspiel*, 824 F. App'x 336, 342 (6th Cir. 2020) (law enforcement's seizure of personal and real property owned by innocent parent as part of criminal investigation and prosecution of son who manufactured drugs, and non-return of non-forfeited property, held not a Fifth Amendment taking); *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575, 582 (2019) ("When properly exercised, the police power provides the government with the authority, under limited circumstances, to take or require the destruction of property without compensation, as the Takings Clause is not implicated in such limited circumstances."), *aff'd*, No. 20-1107, 2021 WL 4486419 (Fed. Cir. 2021); *Hadley*, 2024 WL 3495017, at *3 (law enforcement damage to plaintiff's home during execution of a search warrant held not a Fifth Amendment taking); *Pena*, 2024 WL 1600319, at *4 (law enforcement's efforts to remove fugitive from plaintiff's business, using chemical munitions that caused damage to the business and building, held not a Fifth Amendment taking).

Notwithstanding Petitioner's criticism of the rationale of these decisions, each case has faithfully followed this Court's precedent in finding that the Takings Clause does not apply to consequential damages caused by necessary and proper police actions.

B. This Court's distinction between takings involving eminent domain power and actions taken pursuant to state police power further supports the Fifth Circuit's holding.

The Fifth Circuit expressly cabined its holding to the unique circumstances of this case: necessary and reasonable law enforcement actions taken in response to an emergency to prevent imminent harm. Nonetheless, the ruling is grounded in long-standing precedent from this Court establishing that government action taken pursuant to the police power in response to an emergency does not give rise to a takings claim under the Fifth Amendment.[4]

Petitioner begins her argument citing *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871), and other similar takings cases. Neither *Pumpelly* nor the other cases cited by Petitioner addressed the issue of police power in enforcing criminal law. In *Pumpelly*, this Court concluded that where land is "actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking," yet cautioned that "[b]eyond this we do not go, and this case calls us to go no further." *Id.* at 181. Petitioner's argument that *Pumpelly* and other cases conflict with the Fifth Circuit's decision is without merit, not only because of their material factual differences and different legal theories, but also because this Court's

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[4] As noted above, this case does not directly present the propriety of the broader police power exception, but the exception does provide an alternative ground for affirming the judgment below.

subsequent decisions confirm there is no actual conflict. And, as in *Pumpelly*, the instant case calls the Court to "go no further."

In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court rejected an argument that *Pumpelly* required just compensation under the Fifth Amendment in a case involving the exercise of police power. *Id*. at 667-68. After Kansas banned the manufacture and sale of liquor, a brewery owner sought compensation for the reduced value of their property. *Id.* at 656-57. *Mugler* distinguished *Pumpelly* as a case arising under the state's eminent domain power rather than the police power. *Id*. at 668. The Court held that when a state acts to preserve the "safety of the public," the state "is not, and consistently with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain …. The exercise of the police power by the destruction of property … is very different from taking property for public use…." *Id*. at 669. Although the Court acknowledged the purposes of the Takings Clause, the Court nonetheless held that "[t]hese principles have no application to the case under consideration" because the state's action was "exerted for the protection of the health, morals, and safety of the people." *Id*. at 668.[5]

Maintaining this line of reasoning, the Court in *Chicago, Burlington & Quincy Railway* stated that the

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[5] *Mugler* is still followed today to distinguish exercises of the police power to enforce criminal law from the general power of eminent domain. *See, e.g., Bachmann*, 134 Fed. Cl. at 696 (citing *Mugler* for the statement that "the Supreme Court of the United States has drawn a distinction on the one hand between the exercise of the police power to enforce the law … and, on the other hand the government 'taking property for public use.'").

police power "has always been exercised by municipal corporations, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss ...." 200 U.S. at 593 (internal quotations omitted). The Court explained:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. ... There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.

Id. at 593-94 (internal citations and quotations omitted).

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

Petitioner asserts that lower courts are "hopelessly confused" about whether the Takings Clause applies to damages caused by necessary law enforcement actions, which actions Petitioner paints with a broad brush as "police power." Pet. 7-12. Petitioner further

asserts that the Fifth Circuit's decision "explicitly broke away" from decisions in other circuits that have addressed the takings issue in necessary law enforcement context. Pet. 13-14.

Instead, the opinion is consistent with every other circuit addressing the Takings Clause's application to claims arising out of police actions enforcing criminal laws. The Fifth Circuit ruled that "the Takings Clause does not require compensation for [a property owner's] damages or destroyed property" when "it was objectively necessary for [police] officers to damage or destroy her property in an active emergency to prevent imminent harm to persons." Pet. App. 24a. Although narrower than the broader police power exception, the Fifth Circuit's holding is consistent with the police power exception articulated by the other circuits noted above, and no other circuit has expressly rejected the Fifth Circuit's holding. *Compare Lech*, *Bachmann*, *Johnson*, *AmeriSource*, *Hadley*, *Pena*, *Slaybaugh*, *Ostipow*, and *Modern Sportsman*, discussed above, *with* Pet. App. 10a-24a. Reaching the same result as other decisions is not "breaking away" from the other decisions.

Petitioner's purported circuit split arises from her fatally over-broad characterization of the holding below as rejecting all takings claims that arise from a state's exercise of its police power. Pet. 13. Petitioner cites *Yawn v. Dorchester County*, 1 F.4th 191, 192 (4th Cir. 2021), as a case that "stands alone in following this Court's takings precedents" and allegedly conflicts with all other lower court decisions regarding law enforcement damage caused when acting pursuant to police power. Pet. 12-13. Petitioner's argument is incorrect, and *Yawn* creates no conflict of decisions that requires this Court's resolution through accepting review of this case.

First, *Yawn* is not inconsistent with the opinion below. *Yawn* is not a case in which police were enforcing criminal law in response to an emergency on private property and caused property damage. *Yawn* concerned the effort by Dorchester County to use aerial spraying to kill mosquitos in an effort to halt the spread of the Zika virus. *Id.* at 192-93. The County's Mosquito Abatement Division conducted the aerial spraying of pesticide in targeted areas, and took precautions to warn beekeepers, such as the Yawn family, of the spraying, and the pilot turned off the spray when over areas where bees were known to be kept. *Id*. Despite such efforts, the Yawns' bees were tragically killed by the pesticide. *Id*.

Second, in analyzing the Yawns' takings claim, the Fourth Circuit applied the Court's takings precedent, such as *Chicago, Burlington & Quincy Railway* (cited above), and others, and found that there was no taking of the Yawns' property under the Fifth Amendment because the damage was neither foreseeable nor intentional. *Id.* at 196. Thus, *Yawn* is distinguishable, both factually and legally, from this case, and from all others that have addressed claims under the Fifth Amendment for damages resulting from enforcement of criminal law.

Yawn therefore does not conflict with the Fifth Circuit's holding or reasoning. Even a cursory review of the Fifth Circuit's decision reveals that it also, like *Yawn*, was the result of a "case-specific analysis." Here, because Petitioner agreed that the police emergency response was reasonable and necessary, the Fifth Circuit concluded Petitioner's claims fell within the necessity exception. Pet. App. 10a-24a.

Nor does the opinion below conflict with the circuits that have applied the broader police power exception. The Fifth Circuit's decision applied a case-specific, thoughtful analysis of history and precedent—an analysis not found in other circuit decisions addressing this issue—to reach a result consistent with, though narrower than, those other circuit decisions, *i.e.*, that no Fifth Amendment takings claim exists for consequential damages caused by law enforcement when it is objectively necessary for police officers to damage property in an active emergency to prevent imminent harm to the public. Pet. App. 10a-24a.

IV. The Question Presented Has Well-Reasoned, Consistent, And Clear Answers In Many Precedents And Does Not Require Review By The Court.

Petitioner asserts that important issues justify the grant of certiorari in this case. Pet. 22-24. Petitioner's arguments do not justify the expenditure of the Court's resources here. First, Petitioner cites the dissenters' complaint in the Fifth Circuit—the dissent by two judges to the denial of rehearing en banc—that criticized the Fifth Circuit's decision as diminishing the value of private property ownership. Pet. 22. The dissent did not demonstrate any need for this Court to grant certiorari. Besides being the minority view, the dissent only desired more briefing on the "necessity exception to the Takings Clause," and would not necessarily hand Petitioner a victory. Pet. App. 144a. Since the Fifth Circuit's decision did not create any new law, and instead applied well-established precedent from this Court, *see, e.g.*, *Cedar Point Nursery*, 594 U.S. at 160-61 (recognizing necessity privilege as a traditional common law privilege), to the facts of this case, the opinion does

not raise an issue of national importance that warrants this Court's review.

Of note, the Fifth Circuit stopped short of defining the boundaries and specifics of the necessity exception, confining its ruling to the facts of this case:

> In sum, history, tradition, and historical precedent reaching back to the Founding supports the existence of a necessity exception to the Takings Clause. Today, we make no attempt to define the bounds of this exception. *We hold only that in this case*, the Takings Clause does not require compensation for Baker's damaged or destroyed property because, as Baker herself claims, it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons. We need not determine whether the necessity exception extends further than this.

Pet. App. 23a-24a (emphasis added).

Contrary to Petitioner's stated fears, the Fifth Circuit's rationale and decision does not create an ersatz "blank check" for government to overstep constitutional boundaries. Pet. 14-15. By its terms, the Fifth Circuit's decision is expressly limited to the facts of this case and the undisputable positions taken by both Petitioner and Respondent that MPD's actions were reasonable and necessary in response to the emergency created by Mr. Little. Pet. App. 2a, 4a-5a, 23a-24a. Second, the situations asserted by Petitioner concerning an affordable housing crisis, a housing emergency, and international emergencies created by the Soviet Union, as being the kind of emergencies for which the Fifth Circuit's decision invites or encourages government to take potentially unconstitutional action,

bear no resemblance to anything raised in this case, and should be read as mere hyperbole. Last, Petitioner cites no subsequent case that has improperly extended the Fifth Circuit's rationale beyond the Fifth Circuit's stated limits. The sky is not falling. This case does not warrant review by the Court.

The rationale for Petitioner's "importance" argument is premised upon the suggestion that cases addressing property damage caused by specific, necessary police actions in the furtherance of criminal law enforcement should be considered as part of the bigger legal umbrella of government "police power" generally. Pet. 22-23. As already discussed, neither this Court, nor the Fifth Circuit, nor any other circuit court has agreed to that characterization. *See supra* Part III. Petitioner fails to recognize that she advocates for a change in the law that would reverse over 200 years of precedent applicable to cases concerning damage to property caused by necessary and proper police actions.

Petitioner's concern about private property rights somehow becoming "second-class rights" is unfounded. As this Court has held, it is already the case that property rights must sometimes succumb to the state's police power—the power to promote public health, safety, and morals. *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Contrary to Petitioner's argument, this Court has held that the Takings Clause does not apply when the government merely asserts a "pre-existing limitation upon the landowner's title." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992). "These background limitations also encompass traditional common law privileges" such as "a privilege to

enter property to effect an arrest or enforce the criminal law under certain circumstances." *Cedar Point Nursery*, 594 U.S. at 160-61.

Particularly in this case, where the police acted "irreproachably" (Pet. App. 4a), "government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners." *Id.* at 161; *see also Bennis*, 516 U.S. at 452 (holding that a forfeiture proceeding that was valid under the Fourth Amendment could not be a taking because the government had "already lawfully acquired [the property] under the exercise of governmental authority other than the power of eminent domain"). The Fifth Circuit's decision complies with these principles, and has not created an issue of "national importance" that requires review by the Court.

Petitioner's argument that it is important for this Court to re-write national precedent, including its own precedent, next proceeds to make the point that there should be a remedy in place to fill the gap where homeowner's insurance contracts fail the homeowner by allegedly refusing to cover all damages caused by lawful and proper police actions to enforce criminal law. Pet. 23. Petitioner fails to cite any case authority for this position, either from this Court or from other federal courts, and instead points to state law cases where insurance coverage was only available when an officer acted egregiously. Pet. 23. The judiciary does not step into such insurance contract matters to "remedy" an alleged deficiency in private contractual arrangements and should not do so through the vehicle of this case, where no claims were made by Petitioner that her homeowner's insurance company acted improperly.

Petitioner asserts concern for lower-income people and businesses who may be more likely to encounter

police, whose property may be "taken without compensation," and who may be unable to absorb the costs. Pet. 24. That concern stems from the incorrect belief that necessary and proper law enforcement actions that damage property amount to a compensable taking of property, where no court has ever so held. To the contrary, as discussed above, it has long been held that lawful policing activities are not Fifth Amendment takings. *See* Derek T. Muller, *As Much Upon Tradition as Upon Principle*, 82 NOTRE DAME L. REV. 481, 518 (2006) ("consensus among contemporary legal scholars" on the police power exception despite varying rationales).

This Court has denied the petitions for writ of certiorari in the following cases addressing the very issue Petitioner asks this Court to address here: *Lech v. Jackson*, 141 S. Ct. 160 (2020); *Johnson v. Manitowoc Cty.*, 565 U.S. 824 (2011); *AmeriSource Corp. v. United States*, 556 U.S. 1126 (2009). The petition here should likewise be denied.

V. Assertions By The Briefs Of *Amici* That This Case Requires The Court To Rewrite Fifth Amendment Takings Clause Jurisprudence In The Law Enforcement Context Are Without Merit.

The briefs of *Amici* each argue the following: (1) the Fifth Circuit's decision conflicts with this Court's precedent; (2) there is a circuit split on this Fifth Amendment takings issue that requires this Court's resolution; and (3) the question presented is important. The basis for these arguments is *Amici's* assertion that damage caused by lawful and proper police actions deserves no separate treatment or review under the Takings Clause, and that all such damages should be held, for the first time in history, to fall squarely within the elements of eminent domain takings jurisprudence

so that all such damages should be paid by the government.

Respondent already has established that: (1) the Fifth Circuit's decision is consistent with this Court's precedent under these facts (*see supra* Part II); (2) there is no circuit split of authorities on these issues (*see supra* Part III); and (3) the question presented in this case is not the kind of nationally important issue requiring the commitment of this Court's judicial resources (*see supra* Part IV). The briefs of *Amici* do not provide additional helpful analysis to these issues.

The briefs of *Amici* overlook that law enforcement personnel engage in pursuit of criminals and enforcement of crime every day, and the facts giving rise to this case underscore that daily reality. Sometimes, consequential damages to property necessarily result from those efforts, even when, as here, the police officers' actions were undisputedly proper and necessary. No case has ever expanded the Takings Clause, as urged by Petitioner and *Amici Curiae* in this case, to hold that a government entity is required to compensate the property owner in those circumstances. The absence of any caselaw so holding supports the conclusion that such damages were never considered a compensable taking for public use, both historically and traditionally. To reiterate, every federal circuit to consider the issue has rejected Petitioner's and *Amici Curiae's* position and has excluded recovery for such consequential damages as being outside the scope of the Takings Clause. This Court should deny review of this case because damage to property caused by lawful, reasonable, and necessary efforts to enforce criminal laws—here, the attempt to arrest and detain a violent and dangerous criminal—

is beyond the scope of the Fifth Amendment's Takings Clause.

One issue presented in the Brief of National Federation of Independent Business Small Business Legal Center, Inc. as *Amicus Curiae* Supporting Petitioner Vicki Baker (NFIB Brief), that does not appear in the other briefs of *Amici*, is that this case presents the opportunity for the Court to not only resolve an alleged conflict among federal courts on this takings issue, but also resolve an alleged conflict among state courts on takings issues nationally. It does not. While the district court here granted summary judgment to Petitioner on her takings claim under the Texas Constitution (Pet. App. 67a-71a), the Fifth Circuit expressly did not rule on Petitioner's state takings claim. Pet. App. 25a. Instead, Petitioner's state takings claim was remanded to the district court. Pet. App. 25a. Further, Petitioner herself has not raised any issue or claim in her Petition concerning her state takings claim. Thus, consideration by the Court of nationwide state takings claims issues, as sought by the NFIB Brief, is neither ripe nor appropriate because it has not been presented as an issue in this proceeding. *Id*. Respondent, therefore, objects to such issue being raised at this time. Sup. Ct. R. 15.2.

The briefs of *Amici* thus fail to justify the grant of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JESSE WADELL WAINWRIGHT
Counsel of Record
ELIZABETH G. BLOCH
NICOLE LEONARD CORDOBA
GREENBERG TRAURIG, LLP
300 W. 6th Street
Suite 2050
Austin, TX 78701
(512) 320-7226
Dale.Wainwright@gtlaw.com
Heidi.Bloch@gtlaw.com
Cordoban@gtlaw.com

EDWIN ARMSTRONG PRICE VOSS, JR.
BROWN & HOFMEISTER, L.L.P.
740 East Campbell Road
Suite 800
Richardson, TX 75081
(214) 747-6100
evoss@bhlaw.net

Counsel for Respondent City of McKinney, Texas

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