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

REPLY BRIEF FOR THE PETITIONER

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The petition established that lower courts are fractured in applying the Just Compensation Clause to destructive acts of law enforcement; that the panel below erred by denying compensation; and that this is an exceedingly important issue warranting review.

In its brief in opposition, the City does not deny that there is a split—but it supposes that the split does not matter. It supposes that, regardless of the precise rationale, the result in this case was correct. And it asserts that this case is not an appropriate vehicle for addressing the issue.

The City is wrong on all counts. Below, Ms. Baker explains that (I) this is an ideal vehicle for resolving an important four-way split on this issue; and (II) cases rejecting compensation for SWAT damage are contrary to both history and this Court's precedent.

I. This case is an ideal vehicle for resolving an acknowledged split of authority.

In her Petition, Ms. Baker outlined an acknowledged, 3-way split of authority on how the police power interacts with the Takings Clause. Since she filed the Petition, the split has gotten worse. Just a few weeks ago, the Sixth Circuit adopted yet a fourth approach—rejecting a categorical police power exception and declining to follow the Fifth Circuit's "public necessity" exception, yet discovering a new "law enforcement" exception to the Takings Clause. *Slaybaugh* v. *Rutherford County*, 114 F.4th 593, 603 (6th Cir. 2024) ("We acknowledge that some historical evidence suggests that, in certain circumstances, persons could be compensated for the taking of property

out of necessity."). This case presents an ideal vehicle for settling the split and bringing the lower courts' takings jurisprudence back in line with this Court's teachings.

The City repeatedly states that the present case is a poor vehicle for resolving the split because this case involved "unique" facts. BIO 6, 13. Yet the City acknowledges that materially identical cases are happening around the country on a regular basis. BIO 7 n.1. Nothing in the Fifth Circuit's opinion would distinguish this case factually from *Slaybaugh* or *Lech* v. *Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), or *Pena* v. *City of Los Angeles*, 2024 WL 1600319 (C.D. Cal. Mar. 25, 2024). In all of these cases the police intentionally destroyed private property, owned by innocent individuals, in order to apprehend dangerous fugitives. Those facts alone were sufficient to decide all of those cases, just as they were sufficient to decide this one.

To be sure, the Fifth Circuit is the only court to have decided one of these SWAT destruction cases by invoking "public necessity" as an exception to the Takings Clause, but cases are not insulated from this Court's review simply because they address the exact same claim using different reasoning. See *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015) ("This Court * * * does not review lower courts' opinions, but their *judgments*."). To the contrary, the fact that lower courts have adopted widely varying doctrinal approaches to the same question is all the more reason for this Court to intervene.

Similarly, the Sixth Circuit's newly minted "law enforcement" exception to the Takings Clause is also fairly encompassed by the question presented, and it would be properly before this Court if it were to grant the petition. There are no material factual differences between *Slaybaugh* and *Baker*. The Sixth Circuit looked at the Fifth Circuit's reasoning, declined to follow it (while noting that it is inconsistent with the historical record), and then created a separate, brand-new defense against takings liability. 114 F.4th at 603. The cases are similar, however, in that each imports a different common-law tort defense against trespass into takings doctrine. See *Baker* v. *City of McKinney*, 84 F.4th 378, 388 (5th Cir. 2023); *Slaybaugh*, 114 F.4th at 604 (no Takings claims where officer has "a defense to trespass claims."). Either way, the error is the same: In these cases, "the government is bound to make full compensation to the owner; but the officer is not a trespasser." *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 134 (1851).

Perhaps the clearest evidence that this 4-way split should be resolved in this single case is the City's brief, which largely abandons the Fifth Circuit's reasoning, relying instead on the reasoning of the Sixth and Tenth Circuits. BIO 9–15. The City is of course "entitled * * * to defend the judgment on any ground supported by the record," *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997), but that means it is impossible to address each side of the split piecemeal, as the City suggests.

This 4-way split of authority matters. In jurisdictions where the government's full police power is outside of the Takings Clause, courts have relied on that

categorical exception to dismiss every conceivable type of inverse-condemnation claim, from police destruction, to COVID-19 closure orders, to cutting down private trees, to depositing snow on private property. See *Lech* v. *Jackson*, 791 Fed. Appx. 711, 717 (10th Cir. 2019; *AmeriSource Corp.* v. *United States*, 525 F.3d 1149, 1155 (Fed. Cir. 2008)[1]; *Carrasco* v. *City of Udall,* 2022 WL 522959 (D. Kan. Feb. 2, 2022); *David* v. *Midway City*, 2021 WL 6927739 (D. Utah Dec. 14, 2021), appeal dismissed, 2022 WL 3350513 (10th Cir. Aug. 3, 2022); *1600 Walnut Corp.* v. *Cole Haan Co. Store*, 530 F. Supp. 3d 555 (E.D. Pa. 2021). And while it is too early to know the full scope of the Fifth and Sixth Circuit's exceptions, there is every reason to expect that they will be applied broadly. Pet. 14–15.[2]

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[1] In opposing certiorari in *Amerisource*, the United States acknowledged that the police power ***is not*** exempt from the Takings Clause but argued that the Federal Circuit's "ultimate holding was more limited." U.S. Br. at 7, *AmeriSource Corp.* v. *United States*, 525 F.3d 1149 (Fed. Cir. 2008), 2009 WL 390029, at *7 (No. 08-497). The dozens of courts that have followed *Amerisource* in the years since did not find it so limited.

[2] The City also suggests that this case is a poor vehicle because Ms. Baker still has a live claim under the Texas Constitution, which may have to be adjudicated on remand if this petition is denied. BIO 6. The City does not explain, however, why that has any bearing on this petition. (This is not a case, for instance, where Ms. Baker lost on the basis of an adequate and independent state ground.) If Ms. Baker prevails in this Court under the Fifth Amendment, then she wins her case, and there will be no need to consider the Texas Constitution on remand. That makes the question-presented outcome determinative and squarely presented.

II. Cases rejecting compensation for SWAT damage are contrary to history and this Court's precedent.

There is a simple reason why courts have struggled to articulate a coherent exception to Just Compensation for these cases: There is no such exception. Below, Ms. Baker explains that (A) the Just Compensation Clause applies to property damage—even where the officer was not a trespasser, and (B) there is no "police power" exception to the Clause.

A. The Just Compensation Clause applies to property damage—even where the officer was not a trespasser.

The City asserts that the decision below is correct, yet the City's argument ignores both our nation's history and much of this Court's modern takings precedents. Instead, the City relies on misreadings of a handful of cases that never confronted the actual question presented.

i. An action can be a taking, notwithstanding that the officer was not a trespasser.

At the founding, it was not yet settled that government is directly liable for Just Compensation claims brought in court (*i.e.,* inverse-condemnation claims). Accordingly, claimants would often sue individual officers in trespass. See *Knick* v. *Township of Scott*, 588 U.S. 180, 199 (2019). In some cases, courts found that no trespass occurred—without ruling out the possibility that a taking had occurred. See, *e.g.*, *City of New York* v. *Lord*, 18 Wend. 126, 131 (N.Y. 1837) (property

destruction carried out to stop a fire is not a trespass, though it can be a taking). Over the course of the nineteenth century, however, courts accepted that inverse-condemnation claims are not the same as common-law trespass claims, but "are grounded in the Constitution itself." *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 315 (1987); see also *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[I]t beggars reason to suppose that * * * compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.").

The historical cases on which both the Fifth and Sixth Circuits relied are of this type—seeking tort damages against individuals in trespass. The panels offered no historical evidence suggesting that individual privileges against liability also could defeat takings claims against the government. Cf. *Baker* v. *City of McKinney*, 93 F.4th 251, 254 (5th Cir. 2024) (Elrod and Oldham, JJ., dissental) (noting the irrelevance of cases that "did not interpret the Takings Clause at all").

Indeed, the historical evidence overwhelmingly points the other way. Numerous nineteenth-century courts rejected the contention that a private trespass privilege had any relevance to takings principles. If such a privilege applied, then the individuals who trespassed "are protected from individual liability, [but] the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss." *Bishop* v. *Mayor & City Council of Macon*, 7 Ga. 200, 202 (1849) (firefighting case); Pet. 20 n.6 (collecting cases). The privilege is to cause

property damage for the public good—not to do so without the public paying for the damage. See *Lingle* v. *Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005).

To be sure, the historical cases concerned the "necessity" privilege rather than the "search-and-arrest" privilege that the Sixth Circuit recently applied in *Slaybaugh*, but there is no reason for the Just Compensation Clause to distinguish among privileges. The Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49, (1960). Whether a house is destroyed by police officers apprehending a fugitive or by firefighters combating a nearby blaze, these are public burdens that present precisely the same property loss on innocent, unlucky individuals: a demolished house. "It would make little sense to say that the second owner has suffered a taking while the first has not." *Lingle*, 544 U.S. at 543.

ii. *Cedar Point* dicta (noting that owners have no right to exclude officers engaged in a reasonable search) does not apply to cases of property damage.

Ignoring the historical evidence, the City points to a few sentences of dicta from this Court's recent decision in *Cedar Point*. BIO 10 (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 159–161 (2021)). The City misunderstands *Cedar Point*—which concerned only the owner's right to exclude. In any event, dicta is not sufficient to overcome the overwhelming historical record.

In *Cedar Point*, this Court clarified from the outset that the case concerned a particular property right—the right to exclude. 594 U.S. at 149 ("The right to exclude is 'one of the most treasured' rights of property ownership."). This Court was divided over how to treat government-authorized, sporadic invasions on private property. The majority held for the claimants, finding that "appropriations of a right to invade are *per se* physical takings." *Id.* at 158. At the same time, the majority clarified in dicta that traditional common-law privileges (including necessity and the search-and-arrest privilege) do not deprive owners of their right to exclude. *Id*. at 160.

That dicta does not establish a sweeping exception to Just Compensation for property damage. First, *Cedar Point*'s facts concerned temporary invasions that caused no damage. All nine justices appeared to accept that property damage is akin to physical appropriation (and therefore a per se taking)—separately from any right to exclude people from the property. See *United States* v. *Causby*, 328 U.S. 256 (1946) (damage to chicken farm from overhead government aircraft constituted a taking, notwithstanding that government has the privilege to fly over property); cf. *Cedar Point*, 594 U.S. at 153 (citing *Causby* approvingly); *id*. at 172 (Breyer, J., dissenting) (acknowledging that *Causby* establishes a per se takings approach for "economic damage" caused by physical invasions).

Second, a few lines of dicta cannot negate the historical record, which is essential when addressing constitutional questions of first impression. Crucially, it is the government's burden to demonstrate any historical exception to the plain text of the Bill of Rights.

See *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 24 (2022); *Baker*, 93 F.4th at 252–253 (Elrod and Oldham, JJ., dissental).

B. There is no "police power" exception to the Just Compensation Clause.

In the alternative, the City asserts that this Court's precedent distinguishes between compensable exercises of the "eminent domain" power and non-compensable exercises of the "police power." BIO 13. That is incorrect. It has been black-letter law since *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), that the police power is not exempt from the Takings Clause. See also *Sheetz* v. *County of El Dorado*, 601 U.S. 267, 276 (2024) (The Takings Clause "constrains the power of each 'State' as an undivided whole."). Thus, it is a "separate question" whether an "otherwise valid" exercise of the police power nevertheless requires compensation for affected property owners. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

The City has no answer to this Court's unambiguous holdings on that point, over the last 100 years, so it ignores them. Instead, the City pivots to a misreading of several of this Court's cases, but without exception these cases either predate *Mahon* or else they do not even mention the police power.

YMCA. The City cites *YMCA* v. *United States*, 395 U.S. 85, 92 (1969), for the notion that "government [is] not liable to property owners 'every time policemen break down the doors of buildings to foil burglars thought to be inside.'" BIO 10. However, just because government is not liable "every time" its officers

damage property, it does not follow that it is *never* liable. Instead, the usual test for destructive takings applies. See*, e.g.*, *Yawn* v. *Dorchester County*, 1 F.4th 191 (4th Cir. 2021) (asking whether property damage was foreseeably caused by government for the public use).

YMCA itself demonstrates this. In that case, U.S. troops intervened to protect the YMCA's buildings, which were being firebombed by rioters. *YMCA*, 395 U.S. at 89–91. The Court denied compensation not because of any categorical "police power" exception, but because the troops did not cause the damage (and, in fact, the action was "particular[ly] intended" to save the YMCA from further damage). *Id.* at 92. All nine justices appeared to agree that if the military had *not* been acting to protect the property at issue, then the government would have been liable.

Bennis. The City cites *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996), for the proposition that "when a state acquires property 'under the exercise of governmental authority other than the power of eminent domain,' no just compensation is due." BIO 10. That is a misreading. As Ms. Baker previously explained, *Bennis* is properly read as a forfeiture case—and it is axiomatic that a proper exercise of forfeiture does not require Just Compensation. The entire premise of forfeiture (it's right in the name!) is that you "forfeit" your property and don't get paid. *Bennis*'s recognition of this anodyne principle does not create a categorical exception to Just Compensation outside of forfeiture.

Mugler. The City supposes that *Mugler* v. *Kansas*, 123 U.S. 623 (1887), supports the position that exercises of the "police power" are immune to Just

Compensation claims. BIO 14. Once again, the City misses the mark.

Mugler stands for the uncontroversial notion that ordering someone to stop effecting a public nuisance does not work a taking merely because it affects his property values. In *Mugler*, brewery owners challenged an alcohol prohibition statute on the ground that their property would be "materially diminished in value" if it could not be "employed in the manufacture of beer." *Mugler*, 123 U.S. at 664. The Court denied their claim, on the basis that their "business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people." *Id.* at 667.

Mugler would today be recognized as a kind of "regulatory takings" claim—a claim based entirely on a regulation's effect on property values, which was not recognized as a claim until *Mahon*, 260 U.S. 393.[3] Ms. Baker, however, seeks compensation not for any regulation's mere incidental effect on her property's value but, instead, for the physical damage and destruction of her property—a kind of physical appropriation. An act of physical appropriation "is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426.

[3] For this same reason, the City's invocation of dicta in *Chicago, Burlington, & Quincy Railway Company* v. *Illinois*, 200 U.S. 561 (1906) is also incorrect. Dicta suggesting a categorical police-power exception to Just Compensation cannot survive *Mahon* (and, in any event, *Chicago Burlington* addressed a state's control over its own navigable waters).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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