No. 24-755

In The
Supreme Court of the United States

MOLLIE AND MICHAEL SLAYBAUGH,

Petitioners,

v.

RUTHERFORD COUNTY, TENNESSEE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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The petition explained that the decision below exacerbates the split of authority regarding how the Takings Clause should apply to damage caused by lawful police action. The decision also, unfortunately, failed to engage with either the history of the Takings Clause or with the recent approach adopted by the Fifth Circuit. Accordingly, Petitioners presented a narrow question that would allow this Court to remand for a more thorough analysis.

In their brief in opposition, Respondents argue that there is no split on the *precise* question presented and that the broader issues should percolate before this court takes them up. Yet Respondents fail to understand that the Sixth Circuit's novel and ahistorical approach prevents the kind of percolation that would actually bring clarity to the broader constitutional issue. Respondents' other objections—that the Sixth Circuit got this one right, that this case is a poor vehicle, or that the issue is not important—are just wrong.

I. The decision below is neither narrow nor fact-bound.

Respondents assert that the holding below is unsuitable for review because it was narrow and fact-bound. BIO 7–8, 11–12. That is incorrect, on both counts. The case was dismissed on the pleadings, and the Sixth Circuit affirmed by invoking a novel, categorical exception to the Fifth Amendment. The only relevant facts, as pleaded, were that the police

lawfully damaged an innocent person's property while pursuing a fugitive.

According to the Sixth Circuit, property damage pursuant to "a lawful search or arrest" can *never* amount to a taking of property requiring governmental compensation. *Slaybaugh* v. *Rutherford County*, 114 F.4th 593, 603–604 (6th Cir. 2024). If so, law enforcement may intentionally destroy property belonging to innocent third parties, who are then left with no recourse—so long as the destruction was "reasonable." *Id*. at 604.

That holding renders the Fifth Amendment's Just Compensation Clause superfluous whenever law enforcement causes property damage. If a search is unreasonable, then it violates the Fourth Amendment. *Id*. at 601 n.2. The Fifth Amendment, however, recognizes that a governmental action can be "otherwise valid" yet nevertheless demand compensation for an affected property owner. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). Accord *Asinor* v. *District of Columbia*, 111 F.4th 1249, 1259 (D.C. Cir. 2024) (explaining that the Fourth and Fifth Amendments "do not preempt one another"). By holding that the Just Compensation Clause applies only to "unreasonable" searches and seizures, the panel effectively held that Americans' only constitutional protection in this area is the Fourth Amendment. *Slaybaugh*, 114 F.4th at 604.

Thus, the holding below in no way turns on any fact specific to this case. As Respondents acknowledge, the panel's decision—on a motion to dismiss, no less—applies to any search or seizure that is

"reasonable," *i.e.*, lawful. BIO 11. Respondents point to no unique fact about this case other than that the police assault was lawful. See *ibid.* That is not a "unique" fact. Contra *id.* at 13. It is the premise of all of these cases.

Respondents also claim that the Sixth Circuit's "search and arrest" exception to the Fifth Amendment is narrower than the "necessity" exception recognized by the Fifth Circuit. Not so. In *Baker*, the Fifth Circuit found no taking when it was "objectively necessary for officers to damage or destroy * * * property in an active emergency to prevent imminent harm to persons." *Baker* v. *City of McKinney*, 84 F.4th 378, 388 (5th Cir. 2023). Although the "necessity" privilege covers subject matter beyond law enforcement (such as firefighting), it is a far higher bar than the search-and-arrest privilege, which kicks in whenever police actions are merely "reasonable." *Slaybaugh*, 114 F.4th at 599. Most police action is "reasonable," whereas the kind of emergencies that justify the "necessity" privilege are quite rare.

To be sure, both *Baker* and the panel below committed the same fundamental error in reasoning—confusing a private privilege to take (or access) property as excusing the government from its duty to pay for property it destroys.[1] However, *Baker* at least left

[1] Although the panel acknowledged history showing that the necessity privilege does not absolve government of its just-compensation duty, it did not explain why the analysis should be any different for the search-and-arrest privilege. See *Slaybaugh*, 114 F.4th at 603. Notably, Respondents likewise do not suggest any reason why the Just Compensation Clause should distinguish between these privileges.

ample room for searches or seizures that would satisfy the Fourth Amendment yet require compensation pursuant to the Fifth Amendment. *See Baker*, 84 F.4th at 388 ("[W]e make no attempt to define the bounds of this [necessity] exception."). The holding below explicitly forecloses that possibility. *See Slaybaugh*, 114 F.4th at 601 n.2.

II. The decision below depends entirely on a serious misapplication of *Cedar Point*'s dicta.

Petitioners explained that the decision below hinges entirely on a misunderstanding of dicta in this Court's recent *Cedar Point* decision. Respondents counter that the language at issue is not dicta, BIO 8–9, and that the panel relied not only on *Cedar Point*, but also on a "host of historical precedent * * * [establishing] that the search-and-arrest privilege extends to damaging property during a reasonable search and seizure." *Id*. at 10. Respondents are wrong.

There has never been a dispute in this case that the search-and-arrest privilege (1) exists and (2) protects Respondents' individual officers from tort liability in this case. Therefore, the panel's "host of historical precedent" establishing those two facts, *Slaybaugh*, 114 F.4th at 598–602, are beside the point.

Instead, the question here is whether such an individual tort privilege categorically absolves *the government* of its duty to provide just compensation for property damage. This Court has repeatedly explained that the Just Compensation Clause applies where government intentionally or foreseeably causes

physical property damage. *E.g., Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 39 (2012). This Court has also explained that the Clause applies even in situations where the taking of property did not amount to trespass. *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 134 (1851) ("Unquestionably * * * the government is bound to make full compensation to the owner; but the officer is not a trespasser."); see also *Loretto*, 458 U.S. at 425 (the Clause applies even to acts that are "otherwise valid"). The fact that the destructive act was itself lawful—whether pursuant to the search-and-arrest privilege or any other privilege—cannot be dispositive.

In finding otherwise, the panel relied entirely on *Cedar Point*, which stated that "government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners." *Slaybaugh*, 114 F.4th at 598 (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 160–161 (2021)). But the only "property right" at issue in *Cedar Point* was the "right to exclude," as Respondents acknowledge. *Cedar Point*, 594 U.S. at 149 ("[T]he regulation appropriates for the enjoyment of third parties the owners' right to exclude."). The Slaybaughs seek compensation not for the momentary frustration of any ***right to exclude*** officers from their home, but for the physical destruction of their home itself—that is, the permanent loss of their ***right to use and enjoy*** their property—a distinct stick in the bundle. *Cedar Point*'s brief discussion of momentary, non-destructive searches is far afield from this case.

Moreover, *Cedar Point*'s discussion of the search-and-arrest privilege was plainly dicta because it was

not the rule of law applied in that case, nor was it necessary to the decision. The question in *Cedar Point* was whether California had appropriated property by granting labor union organizers the right to access private farmland. This Court said "yes," in part because this limitation on the property owner's right to exclude did not reflect longstanding background limitations on property. *Id.* at 160–162. Then, in the course of responding to concerns raised by the dissent, the majority opined that searches supported by valid warrants would not constitute takings under the decision. *Id.* at 161.

In other words, this Court (1) announced a test, (2) applied it to the facts of the case, (3) *held* that the challenged California law failed the test, and (4) opined about other government actions that would likely satisfy the test. Opining about how other hypothetical cases would turn out is quintessential dicta. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

The present case illustrates the importance of reading dicta in context: The *Cedar Point* majority was certainly correct in observing that a one-time search, conducted pursuant to a valid warrant, does not appropriate a property owner's right to exclude. But this Court was not presented with historical evidence concerning the interplay between common law trespass defenses and the Takings Clause, for the

straightforward reason that that was just not at issue in *Cedar Point*.

As this Court has recognized, when confronted with novel constitutional questions, it is important to look carefully at the constitutional history that the parties present. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 25 n.6 (2022) (noting the importance of adversarial briefing, particularly in cases involving constitutional history). The Slaybaughs presented ample historical evidence to the Sixth Circuit, and the panel sidestepped all of that material simply by relying on the *Cedar Point* dicta.[2]

III. Granting certiorari on the narrow question presented would promote percolation.

Respondents correctly note that there is currently no circuit split on the precise question presented by the petition. BIO 13. Although the circuits have adopted widely differing analytic approaches in similar cases, the Sixth Circuit is the only court to squarely address whether the search-and-arrest privilege is an exception to the Fifth Amendment. That should not preclude review, however, for at least two reasons.

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[2] To be sure, as Respondents point out, this Court has long held that the "property" protected by the Fifth Amendment is defined by background principles of state law. BIO 10. But that vague principle tells us nothing about whether individual tort immunities are imputed to the government in takings cases. *That* is the specific question in this case, and the only support for the Sixth Circuit's answer to that question is *Cedar Point*.

First, This Court has previously granted certiorari in materially identical circumstances—in *Arkansas Game & Fish Commission* v. *United States*, 568 U.S. 23 (2012). There, as here, there was no split. In *Arkansas Game & Fish*, the Federal Circuit had held that government-induced flooding could constitute a taking of private property only if the flooding were permanent; temporary flooding was categorically exempt from the Takings Clause. *Id.* at 30–31. No other court of appeals had addressed the issue. See Petition for Certiorari, No. 11-597 (filed Nov. 9, 2011), 2011 WL 5593237, at *13 (arguing "[t]hat the Federal Circuit is sharply divided over this case," but identifying no circuit split). The Federal Circuit made the exact same error in reasoning as the Sixth Circuit in the present case: (1) It seized on a few lines of dicta from one of this Court's decisions about permanent flooding, (2) applied that dicta to a radically different factual situation, and (3) created a brand-new, categorical exemption from the Fifth Amendment—an exemption that had no grounding in history or precedent. *Ark. Game & Fish Comm'n*, 568 U.S. at 35 ("The Government would have us extract from this statement a definitive rule that there can be no temporary taking caused by floods. * * * We resist reading a single sentence unnecessary to the decision as having done so much work.").

This Court reversed, cautioning that courts should not find "blanket exemptions" to takings doctrine based on "general expressions * * * [where] the very point [was not] presented for decision." *Id.* at 35, 37. The panel below has done just that, by expanding *Cedar Point*'s anodyne dicta (owners have no right to exclude law enforcement) to support the preposterous

notion that people experience no property loss when governmental agents literally destroy their home.

Notably, this Court rejected the Federal Circuit's reasoning in *Arkansas Game & Fish* without deciding the ultimate question itself—whether there had been a compensable taking. Instead, this Court merely remanded for a more thorough and complete takings analysis. *Id.* at 38, 40 ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection * * * . [P]reserved issues remain open for consideration on remand."). The decision was narrow, but unanimous. This Court can do the same here.

The other reason that this Court should not wait for a split of authority on the precise question presented is that, as Respondents acknowledge, six courts of appeals have already adopted at least three different approaches to these cases: (1) An incredibly broad "police power" exception, *Lech* v. *Jackson*, 791 F. App'x 711 (10th Cir. 2019); *McKenna* v. *Portman*, 538 F. App'x 221 (3d Cir. 2013); *Johnson* v. *Manitowoc County*, 635 F.3d 331 (7th Cir. 2011), *AmeriSource Corp.* v. *United States*, 525 F.3d 1149 (Fed. Cir. 2008); (2) a fairly broad "search-and-arrest" exception, *Slaybaugh* v. *Rutherford County*, 114 F. 4th 593 (6th Cir. 2024); and (3) a narrower "necessity" exception, *Baker* v. *City of McKinney*, 84 F.4th 378 (5th Cir. 2023). Additionally, Judges Elrod and Oldham have suggested an even narrower fourth approach—that "necessity" should apply only when the property at issue would have been destroyed regardless of government action. *Baker* v. *City of McKinney*, 93 F.4th 251, 257 (5th Cir.

2024) (Elrod & Oldham, JJ., dissenting from denial of rehearing en banc) ("All the Supreme Court's cases countenancing the public necessity exception share this characteristic of inevitable loss."). Justices Sotomayor and Gorsuch have hinted that the latter approach may be correct. *Baker* v. *City of McKinney*, 145 S. Ct. 11, 12–13 (2024) (Sotomayor & Gorsuch, JJ., respecting denial of certiorari).

These cases raise an "important and complex question," meriting serious consideration. *Id.* at 13. The decision below, however, does not confront the Fifth Circuit's reasoning and, more importantly, it does not engage with the history of the Takings Clause. A narrow reversal under these circumstances would be far more than simple error-correction; it would compel the Sixth Circuit to squarely address the historical record and the reasoning in *Baker* (both in the panel opinion, and in the dissent from denial of rehearing en banc). That is the kind of percolation that would ultimately aid this Court in providing a more comprehensive treatment of the issues in these cases.

IV. The question presented is important.

Respondents finally argue that property damage caused by law enforcement simply isn't that big of a deal because "the majority of the circuit courts of appeals * * * have not yet squarely addressed" this issue.[3] BIO 17. But the quantity of litigation is not a reliable indicator of what is happening on the ground. Obtaining representation in these cases is extremely

[3] Respondents state that the Third Circuit has not weighed in yet, but that is incorrect. See *McKenna* v. *Portman,* 538 F. App'x 221 (3d Cir. 2013).

difficult. Few attorneys would be willing to take on a case in a complex and unsettled area of law, where the best-case outcome is that they take home some fraction of $60,000 (the approximate damages in this case and in *Baker*). It is no coincidence that most of these cases nationwide are being litigated by the undersigned, on a pro bono basis.

In any event, SWAT raids take place in this country well over 100 times *per day*, Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 Policing 501, 506 (2007), and the news is full of stories about innocent homeowners going uncompensated.[4] Indeed, this Court will be hearing another case about a SWAT raid gone wrong in just a few weeks. See *Martin* v. *United States*, No. 24-362 (argument set for April 29, 2025). And while some jurisdictions have done the right thing and voluntarily offered compensation to affected property owners,[5] many will continue to face the prospect of financial ruin from which they cannot protect themselves.

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[4] *E.g.,* Jeremy Jojola, *SWAT damages property, owners stuck with $20k bill*, 9NEWS (Nov. 14, 2024), https://perma.cc/V3F3-HT6H; Bridget Grumet, *Police tore through the wrong house. Now Austin won't pay for the damage.*, Austin Am.-Statesman (Sept. 10, 2023), https://perma.cc/98MY-JMYW.

[5] *E.g.*, Andy Sheehan, *City council looks to make homeowners impacted by Garfield shootout financially whole*, CBS Pittsburgh (Feb. 19, 2024), https://perma.cc/9NCL-T9JB; Brad Devereaux, *Kalamazoo offers $150k to tenant, landlord after tearing down home during police standoff*, mlive.com (Mar. 7, 2022), https://perma.cc/77PX-7QM9; Vic Micolucci, *Police working with city to fix damage SWAT team left behind*, News4Jax (Aug. 18, 2021), https://perma.cc/AES9-W4FR.

CONCLUSION

Petitioners respect this Court's decision to deny certiorari in *Baker*. The courts of appeals have, so far, given scant consideration to the historical record concerning the Takings Clause—even when property owners have offered the relevant material. The decision below, however, does not advance the ball. This Court should grant the petition and consider summary reversal with instructions to carefully consider the history of the Takings Clause on remand.

Respectfully submitted,

Dated: April 2, 2025

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