No. 19-1123

In the
Supreme Court of the United States

LEO LECH, et al.,

Petitioners,

v.

CITY OF GREENWOOD VILLAGE, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Using explosives and a battering ram attached to an armored personnel carrier, the Greenwood Village Police Department intentionally destroyed Petitioners' house. Afterwards, they offered the family $5,000 "to help with temporary living expenses." The family sued, arguing that they were entitled to Just Compensation under the Fifth Amendment for the intentional destruction of their house. The Tenth Circuit, however, held that no compensation was due because the home was destroyed pursuant to the police power rather than the power of eminent domain.

The question presented is whether there is a categorical exception to the Just Compensation Clause when the government takes property while acting pursuant to its police power.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation submits this brief amicus curiae in support of Petitioners Leo Lech, Alfonsia Lech, and John Lech (collectively, Lech).[1]

Pacific Legal Foundation (PLF) was founded more than 45 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and participated as amicus curiae in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005),

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Lech's petition.

SUMMARY OF ARGUMENT

Lech's petition for a writ of certiorari raises an important question concerning the protections provided by the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution. Specifically, the petition asks whether a police department's seizure and deliberate destruction of a private home in pursuit of a trespassing fugitive entitles the homeowner to just compensation for such a taking in the public interest of crime control.

In *Arkansas Game & Fish*, 568 U.S. 23, this Court rejected a categorical exemption from the Just Compensation Clause for temporary floods, reasoning instead that whether a taking occurs for purposes of the Fifth Amendment is determined on a case-by-case basis. *Id.* at 36 ("It is of course incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by our decisions."). It likewise expressed disfavor for categorical exclusions in its decision of *First English Evangelical Lutheran Church v. County of Los Angeles*, where it held that temporary takings are not categorically exempted from the constitutional mandate of just compensation. 482 U.S. 304, 318 (1987). This case-by-case approach is a longstanding and well-settled practice. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) ("[This Court] has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries[.]"); *see also*

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("Ordinarily, the Court must engage in 'essentially ad hoc, factual inquiries.'") (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Instead, this Court has instructed lower courts to consider factors in determining whether a compensable taking has occurred (1) the duration of physical or regulatory interference with private property, (2) the degree of foreseeability of or authorization for such interference, and (3) the character of the land, including the owner's investment-backed expectations. *Arkansas Game & Fish*, 568 U.S. at 38-39.

Notwithstanding *Arkansas Game & Fish*, *First English*, and this Court's long tradition of case-by-case analysis, the court below carved out a new categorical exception from the Takings Clause for state action falling under an amorphous "police power" doctrine. *See Lech v. Jackson*, 791 F. App'x 711, 717 (10th Cir. 2019) ("[W]hen the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause"). Carving out that exception brought the lower court's decision into conflict with this Court's precedents.

The Tenth Circuit's decision is particularly proper for review because of police departments' increasing use of military equipment to carry out even routine searches and seizures. Law enforcement increasingly relies upon battering rams, flashbang grenades, military assault rifles, tear gas, and armored vehicles like the BearCat used by the Greenwood Village police in the instant case, and not

surprisingly with that increased use comes a corresponding increase in the destruction of private property. *See generally* Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (2013) (Balko). Innocent victims of these militarized devices in some parts of the country will be deprived of just compensation for their losses unless this Court reasserts that intentional government action that occupies and destroys private property for a public purpose triggers the Just Compensation Clause. There is no "police power" exception to the Fifth Amendment.

To deny *certiorari* here would permit this unconstitutional exception to survive and inject greater moral hazard into the decisions of law enforcement. In considering whether to use more destructive military weapons where less destructive tactics would equally suffice, much of the disincentive to ruin private property while enforcing the criminal laws would vanish. Instead, in many instances, it may be overbalanced by the desire of police departments to use their new weaponry.

ARGUMENT

I

THE COURT BELOW FAILED TO APPLY BINDING PRECEDENT FROM THIS COURT

A. This Court's Jurisprudence Eschews Categorical Bars Against Just Compensation

The *Armstrong* principle has long been the guiding light of this Court's Just Compensation Clause jurisprudence: "It is axiomatic that the Fifth Amendment's just compensation provision is

'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.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Thus, the central question presented to the court below was whether the Lechs, as innocent property owners, were forced to bear a disproportionate share of the cost in the public undertaking of crime control. But the Tenth Circuit Court of Appeals abdicated this responsibility by passing on the question and instead disposing of the controversy under an amorphous "police power" exception. *Lech v. Jackson*, 791 F. App'x at 717.

The ruling below falls in direct conflict with this Court's Just Compensation Clause precedents, which, following the *Armstrong* principle, eschew categorical bars against compensation. While some questions, such as whether a taking occurred for a "public use," *restrain* the police power to take property, *see Kelo v. City of New London*, 545 U.S. 469 (2005) (interpreting the bounds of "public use"), this Court has never identified such a qualification to work as a *shield* for the government against claims for compensation, particularly when a physical invasion is involved.

If government "compel[s] the property owner to suffer a physical 'invasion' of his property,'. . . no matter how weighty the public purpose behind it," this Court has "required compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The decision below therefore upset this Court's controlling precedents when it held that the destruction of a private home was not a compensable taking because it was executed under the "police power" rather than "the power of eminent domain."

Lech, 791 F. App'x at 716-17. Throughout its history, this Court has had several opportunities to erect such an exemption for "police power," and it has declined to do so. Unlike the multifactor test for regulatory takings, *see Penn Central*, 438 U.S. at 127-28, which the court below also ignored, *see Lech*, 791 F. App'x at 716 (treating the finding of "police power" as dispositive of the takings question), physical invasions are takings *per se*. *See Lucas*, 505 U.S. at 1015; *Loretto*, 458 U.S. at 426-34.

Whether state action is a valid exercise of the police power is the beginning of the takings inquiry, not its end, as this Court recognized in *Loretto*, 458 U.S. 419, which included substantive analysis of the extent to which government-sponsored action constituted a physical invasion and occupation of property. *Id.* at 426-34. This Court even found that the statute permitting installation of telecommunications cables on private property by corporations without landowner consent was "within the State's police power." *Id.* at 425. But this Court had "no reason to question that determination. It is a separate question [...] whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Id.* (citing *Penn Central*, 438 U.S. at 127-128).

Indeed, "as the Court has frequently noted, [the Just Compensation Clause] does *not* prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314.

For example, *Arkansas Game & Fish* set out that a physical occupation, even of temporary duration, which destroys property is cognizable under the Just Compensation Clause. 568 U.S. at 38. This

Court there rejected a categorical bar against compensation in such a case. *Id.* at 31-32. Instead, whether state action effects a compensable taking is a product of factors such as (1) the duration of physical or regulatory interference with private property, (2) the degree of foreseeability of or authorization for such interference, and (3) the character of the land, including the owner's investment-backed expectations. *Id.* at 38-39. The test was not "eminent domain" or "police power", but whether the *effect* of the state action rose to the level of a taking.

National Board of Young Men's Christian Associations v. United States provides another example of the proper framework for a takings analysis. There, this Court considered whether the damage inflicted on a private building occupied by Army troops during a riot constituted a compensable taking. 395 U.S. 85 (1969). No compensation was required because the Army did not cause any damage to the building; the riot caused the damage. *Id.* at 89-92. If an exercise of "the police power" was exempted from qualifying as a compensable taking, *National Board* would never have reached the question of *who* caused the damage to the building. The Court instead, would simply have held that deployment of the troops was within the police power and therefore exempt from the Fifth Amendment's Just Compensation Clause. Instead, the Court considered who caused the damage, and recognized that private actors caused the damage. Here, the police caused the damage to the Lech home.

The police physically punched large holes in the Lechs' home and caused substantial damage in the process. *Lech*, 791 F. App'x at 715-17. Whether the

conduct at issue constituted a taking therefore turns upon the character and extent of the government's conduct with reference to its interference with the Lechs' property, *not* whether the "police" or "eminent domain" label is a closer descriptor for driving authorization. That this Court recognizes a cause of action for inverse condemnation alone should have instructed the court below that "police power" is not a government escape valve for disposing of Just Compensation claims. Rather, it is a starting point. By ignoring this Court's Just Compensation Clause precedents outlining the factors for consideration in various types of takings, the ruling below brought the Tenth Circuit into conflict with this Court's binding authority.

B. There Is No "Police Power" Exception to the Fifth Amendment's Just Compensation Clause

There is no question that broad police powers are reserved to the States through the federal structure of the United States Constitution. *See* U.S. Const. amends. X, XI.

> That there is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, *within certain limits*, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases.

New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U.S. 650, 661 (1885) (citing *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824)) (emphasis added). The power of eminent domain is in fact rightly considered a "police power," despite the Tenth Circuit's attempt to distinguish the two concepts.

> The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and […] requires no constitutional recognition. The provision found in the fifth amendment to the federal constitution, and in the constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power.

United States v. Jones, 109 U.S. 513, 518 (1883) (internal citation omitted). Most of this Court's jurisprudence over the last century has in fact been devoted to determining *when* the police power effects a taking. *See, e.g., Arkansas Game & Fish*, 568 U.S. at 38-39 (when temporary invasions work takings); *Lucas*, 505 U.S. at 1015 (when physical invasions work takings); *Nollan*, 483 U.S. at 836-37 (when unconstitutional conditions work takings); *Penn Central*, 438 U.S. at 127-28 (when regulations work takings); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 394 (1922) (statute prohibiting subsurface mining effected a taking). But the court below applied *none* of those tests, instead casting the physical invasion aside because it was not an exercise of one

particular police power—eminent domain. *See Lech*, 791 F. App'x at 715-17.

No one disputes that the government acted under its police power when it destroyed the Lechs' home. Yet, the police power, like any power granted to the government, is only delegated to government by the people (through the Constitution) insofar as its exercise adheres to the qualifications contained in that document, as future Supreme Court Justice James Iredell explained during the debates preceding the adoption of the Constitution: "[The Constitution] may be considered a great power of attorney, under which no power can be exercised but what is expressly given." Gary Lawson and Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* 3 (Kansas Press 2017) (quoting *The Debate in the State Conventions on the Adoption of the Federal Constitution* 148-49 (2nd ed., Jonathan Elliot, ed., 1907); *see also* James Otis, Jr., *The Rights of the British Colonies Asserted and Proved*, 1 The Founders' Constitution 52 (Liberty Fund 1987) (explaining that delegation of authority to government is in the manner of "trust" and subject to certain imposed conditions). As noted above, the Constitution defends the fundamental right to receive compensation when the state takes private property:

> As thus defined, we may, not improperly, refer to that [police] power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public high ways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of

> swamps. Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, *for any purpose whatever*, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

New Orleans Gas-Light Co., 115 U.S. at 661 (emphasis added) (alteration in original). The Fifth Amendment's Just Compensation Clause, as a component of the United States Constitution, is "the supreme law of the land," applying to the states through the Due Process Clause of the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). Indeed,

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). And this Court should likewise shield them from destructive policies, procedures, and actions adopted and carried out by executive agencies, including police departments. To remove constitutional accountability for the destruction of private property by *officers in the field*

would provide far poorer protection to Americans' rights than subjecting the same destruction of property to a vote of the majority.

> If, instead, 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]." [...] These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Lucas, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. at 394 (internal citations omitted) (alteration in original, except ellipses).

The question is not whether government conduct is legitimate, or even constitutional on its face. Such questions are often litigated in the context of suits alleging violations of due process, equal protection, free speech, and other rights that impose actual substantive limits on government action. The "basic understanding of the [Just Compensation Clause]", however, "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis in original).

"Because of 'the self-executing character' of the Takings Clause 'with respect to compensation,' a

property owner has a constitutional claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315. Thus, the Tenth Circuit's distinction between police power and eminent domain, *see Lech*, 791 F. App'x at 715-17, has no legal justification in this Court's precedents. The Tenth Circuit's distinction is an unconstitutional aberration, and one that other courts have likewise adopted. *See Johnson v. Maitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 908 (Cal. 1995); *Kelley v. Story County Sheriff*, 611 N.W.2d 475, 480 (Iowa 2000); *Eggleston v. Pierce County*, 64 P.3d 618, 621 (Wash. 2003).

II

WHETHER THE TAKING AND DESTRUCTION OF INNOCENT PERSONS' PROPERTY FOR THE PUBLIC PURPOSE OF CRIME CONTROL IS A COMPENSABLE TAKING IS AN IMPORTANT QUESTION GIVEN THE PROLIFERATION OF MILITARY EQUIPMENT AND TACTICS AMONG LOCAL POLICE DEPARTMENTS

The invasion and destruction of private homes, businesses, and other property under states' police powers, and particularly in the furtherance of criminal law enforcement, presents an important federal question with respect to the compensation mandated by the Fifth Amendment's Just Compensation Clause. Because of the increased availability and use of military-grade equipment to conduct even routine enforcement against citizens suspected of nonviolent crimes, the destruction of

private property from these actions—which sometimes fall disproportionately on innocent third persons such as the Lechs—presents a serious problem for the Court's consideration.

A. Federal Programs Have Placed Billions of Dollars of Military-Grade Equipment into the Hands of Local Law Enforcement Authorities

Federal grant programs in existence since 1988 have placed increasingly more military-grade equipment into the hands of local police departments and the tactics of those departments have likewise changed during the same period. *See* Balko at 211-12 (discussing the use of military tactics and equipment to conduct routine patrols and serve warrants on low-level offenders); *see also id.* at xi-xii ("Police departments across the country now sport armored personnel carriers […], helicopters, tanks, and Humvees. They carry military-grade weapons."). They have increasingly relied on so-called "dynamic-entry", which entails the use of SWAT teams, battering rams, assault rifles, armored personnel carriers, and flash-bang grenades. *Id.* at 194-95; *Cops or Soldiers? America's Police Have Become Too Militarised*, The Economist (Mar. 22, 2014);[2] Sgt. Glenn French, *Dynamic Entry versus Deliberate Entry*, PoliceOne.com (Aug. 3, 2010).[3] Whether or not these destructive tactics and devices are ill-advised, their use has proliferated over recent years. *See* Balko at 307-08; *Armed and Dangerous: No-knock Raids,*

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[2] https://www.economist.com/news/united-states/21599349-americas-police-have-become-too-militarised-cops-or-soldiers.

[3] https://www.policeone.com/swat/articles/dynamic-entry-versus-deliberate-entry-s86BB28VVWLfwJXW/.

Assault Weapons and Armoured Cars: America's Police Use Paramilitary Tactics Too Often, The Economist (Mar. 22, 2014).[4] Therefore, it is increasingly important for this Court to answer the extent to which compensation is owed to private homeowners whose property is destroyed in the course of criminal law enforcement, which can include busted doorframes, collapsed walls, and even conflagration.

The transfer of military equipment to local police departments began in the late 1980s with the Byrne grant program, which sent billions of dollars to police departments over the ensuing 25 years. Balko at 167 (citing *Edward Byrne Memorial State and Local Law Enforcement Assistance Program*, Program Brief, Bureau of Justice Assistance (2002).[5] Such transfers accelerated throughout the 1990s and 2000s through the controversial "1033 Program" (from the National Defense Authorization Act of 1997, which sent surplus military equipment to local law enforcement agencies) and Department of Homeland Security grants. Balko at 209-10. Between the years 1997 and 1999 alone, the Pentagon sent $727 million of gear to local and state law enforcement authorities, including UH-60 Blackhawk and UH-1 Huey helicopters, M-16 assault rifles, and grenade launchers. *Id.* (citing Megan Twohey, *SWATS Under Fire*, National Journal (Jan. 1, 2000)). Even many small towns have benefitted from the program by acquiring M-79 grenade launchers. *See* Donovan

[4] https://www.economist.com/leaders/2014/03/22/armed-and-dangerous.
[5] https://www.ncjrs.gov/pdffiles1/bja/195907.pdf.

Slack, *Even small localities got big guns*, Boston Globe (June 15, 2009).[6]

The BearCat used by the Greenwood Village police in the case at hand has in particular become a favorite tool of local law enforcement departments across the country. *See* Justin Hyde, *Why do America's police need an armored tank?*, NBC News (Mar. 4, 2011) ("America's most in-demand police vehicle [BearCat] is a 10-officer 16,000-pound armored tank that takes bullets like Superman and drives 80 mph.").[7] It is an armored personnel carrier designed for law enforcement and military use, to which a long battering ram and machine gun may be attached—in common terms, it is a tank. *Lenco BearCat Armoured Vehicles*, Homeland Security Technology.[8]

B. Destructive Military Tactics and Equipment Are Not Being Reserved Only for Hostage-Takings, Armed Suspects, and Terrorism

If police departments were sitting on military-grade equipment for the rare hostage crisis, barricaded person, school shooting, or terrorist attack, this Court would not face such a pressing need to answer the Just Compensation Clause question presented by Lech's petition. However, the ready availability of military equipment has led to its

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[6] http://archive.boston.com/news/ local/massachusetts/articles/2009/06/15/details_emerge_on_distribution_of_military_weapons_in_mass/.

[7] http://www.nbcnews.com/id/41912754/ns/technology_and_science-tech_and_gadgets/t/why-do-americas-police-need-armored-tank/#.XpCCcMhKiHt.

[8] https://www.homelandsecurity-technology.com/ projects/lenco-bearcat-armoured-vehicles-ballistic-us/.

increased use. *Cf.* Casey Delehanty, et al., *Militarization and police violence: The case of the 1033 program*, Research and Politics (April-June 2017)[9] (finding increased transfers of military equipment to law enforcement agencies resulted in a significant increase in the use of deadly force); A. Rizer & J. Hartman, *How the War on Terror Has Militarized the Police*, The Atlantic (Nov. 7, 2011)[10] ("[P]olice departments have employed their newly acquired military weaponry not only to combat terrorism but also for everyday patrolling.").

And the use of military equipment has not been limited to armed-and-dangerous-suspect scenarios. Instead, this equipment has increasingly been used to execute search and arrest warrants for nonviolent offenses, such as drug possession, enforcement of regulatory offenses, and other low-stakes conduct. Balko at 284-89; *see also id.* at 332 ("[D]omestic police officers are driving tanks and armored personnel carriers on American streets, breaking into homes and killing dogs over *pot*.") (emphasis in original). When action film star Steven Seagal, deputized by Arizona Sheriff Joe Arpaio, drove an armored tank through a suspect's wall and into his living room, he was serving a warrant for cockfighting, not storming a terrorist compound. Eyder Peralta, *Arizona Sheriff Uses A Tank And Steven Seagal To Arrest Cockfighting Suspect*, NPR (Mar. 23, 2011).[11] What our Founding Fathers would think of a B-movie action star using the

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[9] https://journals.sagepub.com/doi/10.1177/2053168017712885.
[10] https://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/.
[11] https://www.npr.org/sections/thetwo-way/2011/03/23/134803230/arizona-sheriff-uses-a-tank-to-arrest-cockfighting-suspect.

police power to destroy private property is perhaps a question this Court has never previously considered, but the answer should be self-evident.

It appears that for the foreseeable future, the deployment of military-grade equipment to enforce local laws is here to stay, as is the damage caused by them. Destructive flashbang grenades in particular have caused substantial losses and injuries. The United States Court of Appeals for the Eighth Circuit heard a case last year involving a flashbang grenade that exploded next to a two-year-old child during a SWAT raid. *See Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672 (8th Cir. 2019). A 19-month-old infant was likewise critically injured by a flashbang grenade that landed in his crib in 2014. Tim Stelloh, *Ex-Georgia Deputy Acquitted After Flash Bang Grenade Hurts Toddler*, NBC News (Dec. 13, 2015).[12]

Before the Court waves off these damages as if they were the "cost of committing the crime" (don't do the crime if you can't do the time), it should be remembered that the Lechs—like the two-year-old child in Z.J. and the 19-month-old infant in Georgia, who were both victims of local law enforcement grenades—did nothing wrong. The Lechs' home was invaded twice. First by an armed criminal and then again by a battering ram and explosives. And in the case of homeowners who themselves are suspected of criminal offenses when their doors burst forth in the middle of the night at the business end of a SWAT battering ram, those people are not convicted

[12] https://www.nbcnews.com/news/us-news/ex-georgia-deputy-acquitted-after-flash-bang-grenade-hurts-toddler-n479361.

criminals, either. They are presumed innocent. *Coffin v. United States*, 156 U.S. 432 (1895).

C. The Costs of Law Enforcement Tactics Do Not Fall Only on the Guilty

While there is a public purpose and benefit to enforcement of the criminal laws, the *costs* and externalities it sometimes imposes on individuals can be disproportionately burdensome. Such is the case for those who suffer wrong-door raids,[13] fires caused by flashbang grenades, storeowners whose merchandise is destroyed by tear gas, *see Customer Co.*, 895 P.2d 900 (en banc), or the Lechs, whose house had several large holes punched in it by police explosives and an armored BearCat vehicle. *See Lech*, 791 F. App'x at 713.

At bottom, the Lech petition asks whether the Just Compensation Clause mandates payment to innocent third persons whose property is taken and destroyed by the government to further the public purpose of criminal law enforcement. After all, "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

[13] There are over 20,000 no-knock raids every year across the country. Dara Lind, *Cops do 20,000 no-knock raids a year. Civilians often pay the price when they go wrong*, Vox (May 15, 2015), https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs. In New York City during the late 1990s, wrong-door SWAT raids became so common that "the NYPD circulated a memo among the city's police officers instructing them on how to contact locksmiths and door repair services should they break into the wrong home." Balko at 265.

should be borne by the public as a whole.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong*, 364 U.S. at 49). Given the proliferation of military equipment across police departments around the country and the destruction often wreaked by its use, whether the *Armstrong* principle applies to police conduct is a question of great importance to police departments and private property owners alike.

CONCLUSION

The Tenth Circuit's carve-out of a "police power" exception brings its ruling below into conflict with this Court's Just Compensation Clause jurisprudence, which requires consideration of the character of the government act and the extent to which it interferes with property. Additionally, whether police conduct may be categorically exempted from the Fifth Amendment's Just Compensation Clause presents a question of great national importance, given the rise in police departments' use of destructive military tactics and equipment. The Court should grant the petition.

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Respectfully submitted,

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