No. 22-40644

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VICKI BAKER,
Plaintiff - Appellee.

v.

CITY OF MCKINNEY, TEXAS,
Defendant - Appellant,

Appeal from the United States District Court
for the Eastern District of Texas
No. 4:21-CV-176 (Hon. Amos L. Mazzant)

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION, IN SUPPORT OF PLAINTIFF-APPELLEE

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No. 22-40644; *Baker v. City of McKinney*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Since 1973, PLF has worked to advance the principles of individual rights and limited government at all levels of state and federal courts, representing the views of thousands of supporters nationwide. In particular, PLF is known for its defense of private property rights, including in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019), *U.S. Army Corps of Engineers v. Hawkes Co.,* 578 U.S. 590 (2016); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), *Sackett v. E.P.A.*, 566 U.S. 120 (2012), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

PLF has experience in cases concerning the constitutionality of government searches and invasions of private property. *See Vondra v. City of Billings*, No. 1:22-CV-00030 (D. Mont., filed Apr. 6, 2022); *Stavrianoudakis v. United States Fish & Wildlife Service*, No. 1:18-cv-

[1] In accordance with Fed. R. App. P. 29(a)(4)(E), counsel for all parties were timely notified and have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *Amicus*, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

01505 (E.D. Cal., filed Oct. 30, 2018); *Caniglia v. Strom*, 141 S.Ct. 1596 (2021) (*amicus curiae*); *Lech v. City of Greenwood Vill.*, 791 Fed.App'x. 711 (10th Cir. 2020), *cert. denied*, 141 S.Ct. 160 (2020) (*amicus curiae*); *LMP Services, Inc. v. City of Chicago*, No. 123123, 2019 WL 2218923 (Ill., 2019) (*amicus curiae*); *United States v. Spivey*, 870 F.3d 1297 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 2620 (2018) (*amicus curiae*). PLF believes that this experience and its unique point of view will assist this Court in resolving the questions presented.

ISSUES ADDRESSED BY *AMICUS*

1. Whether there is a categorical exception to the Just Compensation Clause when the government validly exercises its police power.

2. Whether an owner's insurance covering property damage resulting from valid police-power actions, if available, relieves the government of its obligation to provide just compensation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm on all grounds the district court's denial of the City's motion to dismiss and its entry of summary judgment for

Ms. Baker on takings liability, and the jury's award of just compensation. Where an otherwise legitimate exercise of a state's police power (or a local government's exercise of the delegated police power) results in a private owner being forced to suffer a taking of property for a public use or benefit—and surely, the apprehension of criminal suspects is a public benefit—the Takings Clause of the Fifth Amendment requires the government provide just compensation for the property taken. After all, the overarching purpose of the Takings Clause is 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).

This brief makes two main points:

1. The district court correctly rejected the City's assertion that it is absolved of all obligation to provide compensation for destroying Ms. Baker's home, solely because it did so for a valid public safety purpose. But contrary to the City's argument, a valid public purpose is not dispositive in its favor; it is in reality but one among several factors courts (and juries) may consider when an owner asserts an otherwise valid

government action results in a taking of private property. That the government is validly exercising its police power may weigh against compensation. But it is never the sole consideration, nor the determinative one.

2. The property owner's insurance has no bearing on the City's obligation to provide compensation. First, nearly all homeowner's insurance policies, including Ms. Baker's, exclude from coverage any loss caused by an order of a governmental or civil authority. A majority of courts have interpreted this provision to preclude insurance recovery for damage inflicted by the police in executing a search warrant or apprehending a fleeing suspect. Second, even if one's insurance did cover these scenarios, this only means the insurer would have the right to subrogate the property owner's just compensation claim to seek recovery for itself.

Reversal of the verdict and judgment would leave many homeowners without legal recourse after suffering—through no fault of their own—catastrophic damage at the hands of state or local agents.

ARGUMENT

I. THE CHARACTER OF THE GOVERNMENT ACTION IS BUT ONE TAKINGS CONSIDERATION; IT IS NOT DISPOSITIVE

When private property is pressed into public service, the Fifth and Fourteenth Amendments require the government provide the owners just compensation. U.S. Const. amends. V, cl. 5 ("[N]or shall private property be taken for public use, without just compensation.") and XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). While the paradigmatic state action triggering compensation is an affirmative exercise of eminent domain, for over a century the U.S. Supreme Court has expressly recognized that if government acts under its authority to protect the public health, safety, or welfare—*i.e.*, its inherent and sovereign police powers—but that action goes "too far" in intruding on an owner's property rights, the government must provide just compensation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.").

This principle—that an exercise of sovereign power *other* than eminent domain may also require compensation—was hardly novel in 1922. Courts had long acknowledged the public obligation to compensate owners who suffer an invasion or destruction of their property, even if the invasion or damage was in the public's interest. Indeed, while the Just Compensation Clause ensures payment for takings, the Public Use Clause clarifies that there must *always* be a public purpose justifying the property interference. Without this purpose, the act itself is prohibited; it cannot be redeemed via compensation, no matter the amount. If it were otherwise, and "the uses of private property were subject to unbridled, uncompensated qualification under the police power," then "'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pa. Coal*, 260 U.S. at 415).

In 1606, Lord Coke famously noted that a homeowner could not stop King James I's agents from entering private property and damaging a home or barn when searching for saltpeter, a key ingredient in

gunpowder that was essential for the defense of the realm. The agents could enter and remove the saltpeter despite the frequent resulting destruction of property. Yet the sovereign's prerogative to authorize these invasions was limited, with the King's saltpetermen "bound to leave the [i]nheritance of the [s]ubject in so good [a] [p]light as they found it[.]" *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, 14 (1606) ("They ought to make the [p]laces, in which they dig, so well and commodious to the [o]wner as they were before.").

The Supreme Court followed this same principle in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), agreeing that the city's diversion of water could support a takings claim even if the diversion was made pursuant to its police powers. However, the Court clarified that, at the time, the Takings Clause only limited the federal government. It was not until ratification of the Fourteenth Amendment and affirming caselaw that the Court applied the Just Compensation Clause as a limit or condition on state-level actions. *See Chicago Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating the Just Compensation Clause against the states and their sub-jurisdictions).

In short, government invocation of its sovereign powers does not insulate it from takings liability. One scholar surveying the pre- and post-*Pennsylvania Coal* caselaw noted, succinctly, that "just because a use is prohibited by an exercise of the police power does not mean that the use is so noxious as to provide a moral justification for the denial of compensation." D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 503 (2004). *What* is being prohibited, and *why*, are crucial to distinguishing between police-power actions that demand compensation from those that do not.

Since *Pennsylvania Coal*, the Supreme Court has recognized that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]" *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). There is little doubt that the City's destruction of the Baker home by purposely flooding it would effect a taking and obligate the City to pay just compensation. *See, e.g.*, *United States v. Cress*, 243 U.S. 316, 328 (1917) ("Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking

within the scope of the Fifth Amendment."); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (rejecting argument that a public action taken pursuant to the regulatory power cannot be a taking).

Even if a police power action did not turn the Baker home into something resembling a war zone, as it did here, but instead the City merely required her to, say, allow the installation of a cable television box on her roof, then, no matter how *de minimis* the physical invasion, the City would still be obligated to pay just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982). Government also commits a taking when acting pursuant to its police powers if doing so results in a near-total loss of the property's profitable use. *See Lucas*, 505 U.S. at 1030 ("When ... a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate"—*e.g.*, to prevent a nuisant use that has never been within the ambit of ownership—then "compensation must be paid to sustain" the use restriction.) The same goes for regulations that are "so onerous that its effect is tantamount to

a direct appropriation or ouster." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

In short, the Supreme Court has frequently cautioned against creating and applying categorical rules in all but a very narrow class of takings. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 64–65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate."). Nonetheless, based on a misreading of several precedents, the City urges a categorical rule that there can be no taking where government acts pursuant to its police powers. App. Op. Br. at 25. In its telling, the City's destruction of the Baker home must either be a taking or a police-power action; the former compensable, the latter not. But the Supreme Court has never read into the Takings Clause such a crabbed, technical reading of the word "taken," or so expansive a view of the police power. The City advocates for subsuming the just-compensation requirement into the police power, virtually swallowing up the right to compensation no matter the degree of injury inflicted on an owner's property—provided a court deems the

government to have exercised its legitimate powers rationally (and the bar for government to pass this "rational basis" test is notoriously low).

But the Supreme Court, reaffirming *Pumpelly*, has recognized myriad scenarios in which a governmental action could effect a taking without outright condemning the property, all while in the valid exercise of a sovereign power. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal government exercising its commerce power over navigation to require public access to a private marina resulted in a taking requiring compensation); *Loretto*, 458 U.S. at 436 (compensation required when municipality exercised its police power to require apartment owners allow the installation of cable television equipment on their properties) (internal citation omitted). In *Andrus*, the Court noted that "[t]he Takings Clause ... preserves governmental power to regulate," but such regulations are still beholden to the "dictates of 'fairness and justice.'" 444 U.S. at 327, (internal citation omitted). Finally, in *Pennsylvania Coal*, the Court held that the Kohler Act, a statute adopted for the safety of the public which prohibited anthracite mining in residential areas (because of its tendency to collapse surface structures),

went "too far" and was a taking when applied against mining projects that did not cause such harms. 260 U.S. at 415.

Critically, in each of these examples, whatever the ultimate outcome—taking or no taking—the Court never relieved the government of its obligation to provide compensation simply because it was validly exercising a legitimate power through regulation instead of eminent domain. In a given case, the answer to the compensation question does not turn on the label attached to the exercise of government power, but on the cost to the impacted owners. *See Lingle*, 544 U.S. at 537 (regulation may be a taking if it is "so onerous that its effect is tantamount to a direct appropriation"). Whether a governmental action is within the proper scope of the police power is a question of due process, not takings. In the takings context, it is presumed that the action is legitimate. By bringing a takings claim instead of a due process one, the plaintiff essentially concedes that the government has acted *intra vires*.

In *Milton v. United States*, the Federal Circuit noted that "[t]he Supreme Court has rejected the notion that private property is subject to 'unbridled, uncompensated qualification under the police power.'"

36 F.4th 1154, 1162 (Fed. Cir. 2022) (quoting *Lucas*, 505 U.S. at 1014). *See also McCutchen v. United States*, 14 F.4th 1355, 1363–64 (Fed. Cir. 2021) ("If a 'police power' justification for a measure means that there is no taking, what government acts would fall into the category of takings that the Clause permits (because the act is for a 'public use,' *i.e.*, within the 'sovereign's police powers') but only upon payment of just compensation?"); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006) ("[I]t is insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state, regardless of the respective benefits to the public and burdens on the property owner ...").[2]

And while *Milton* noted that "the Supreme Court has recognized that a taking may be non-compensable" (using "taking" in common instead of constitutional parlance), 36 F.4th at 1162, this determination

[2] Before *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019), overruled the state-procedures exhaustion requirement set forth in *Williamson Cnty. v. Hamilton Bank of Johnson City*, 473 U.S 172 (1985), few lawsuits of this kind against state and municipal authorities stood much chance of proceeding past the pleadings in a federal forum. Hence did most decisions showing that police-power actions could also be takings come out of the Court of Federal Claims and the Federal Circuit.

is to be made in all contexts on a case-by-case basis. As the Supreme Court made clear in *Penn Central Transportation Co. v. New York City*, regulatory takings cases are "essentially ad hoc, factual inquiries." 438 U.S. 104, 124 (1978).

It is for a jury of one's peers to determine in a given case the relevant weight of such factors (among others) as the regulation's "economic impact" on the owner, the "extent to which" it has "interfered with distinct investment-backed expectations," and the "character of the governmental action." *Id.* Again, that the public action against private property is taken pursuant to the police power does not automatically free government from liability.

The Takings Clause does not limit government's power to take property for the public good. Instead, it prescribes when the government has "go[ne] too far" in doing so, whether through eminent domain *or* regulation, and thereby owes compensation. *Pa. Coal*, 260 U.S. at 415. The just compensation requirement compels officials to make realistic evaluations of the cost of a public action and to consider whether it is fair to foist the entire economic burden for public benefits on a small group of

owners; or, in this case, on just *one*. *Id.* at 416 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions."). *See Armstrong*, 364 U.S. at 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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.").

Indeed, to pursue a takings claim for compensation, the property owner must admit or at least concede that the government action is for a valid public use or purpose.[3] Thus the usual remedy for a taking is not to prevent or enjoin the action, but to obtain just compensation for the individual losses suffered. *See Lingle*, 544 U.S. at 536–37 (takings doctrine "is designed not to limit the governmental interference with

[3] Challenges to the purpose of a regulation are due process challenges, not takings claims. *See Lingle*, 544 U.S. at 548–59 (Kennedy, J., concurring).

property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking") (citing *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314–15 (1987)).

II. GOVERNMENT MUST COMPENSATE FOR TAKINGS REGARDLESS OF WHETHER INSURANCE IS AVAILABLE

When a home suffers damage, the owner may have two potential sources from which to recover: (1) the person or entity that caused the damage, or (2) the homeowner's insurance. Homeowner insurance is generally not available to cover damage such as Ms. Baker suffered at the hands of the City. Most insurance policies exclude losses caused directly or indirectly by government agents' valid execution of legal orders. *See* Steven Plitt, et al., COUCH ON INSURANCE § 152.22 (2019).

The Massachusetts Supreme Judicial Court, for example, concluded that damage inflicted by police officers executing a search warrant fell under a policy exclusion for "destruction of property by order of governmental authority." *Alton v. Mfrs. & Merch. Mut. Ins. Co.*, 624

N.E.2d 545, 546–47 (Mass. 1993).[4] *Alton* is consistent with other decisions finding that actions by police to apprehend a suspect fall under the exclusion for an order of civil authority. *See, e.g.*, *Port Washington Nat'l Bank & Trust Co. v. Hartford Fire Ins. Co.*, 300 N.Y.S. 874 (N.Y. App. Div. 1937). In *Queens Ins. Co. of Am. v. Perkinson*, 105 S.E. 580 (Va. 1921), the Virginia Supreme Court held that a fire set by two policemen at the direction of the mayor to force a fleeing suspect out of a house fell within an exclusion for "loss caused directly or indirectly … by order of any civil authority." *Id.* at 217. The exclusion can apply even if the police

[4] In *Alton*, the police obtained and executed warrants to search for cocaine, drug paraphernalia, and other evidence of drug distribution in a building owned by the plaintiff. When executing the warrants, the police caused $17,274 in damage. *Id.* at 546. The homeowner argued that a search warrant is not an "order of governmental authority" under the policy. *Id.* The court rejected the argument, however, because the search warrant read, "[y]ou are therefore commanded within a reasonable time … to search for the following property," which read like a court order. *Id.* The owner further argued that, if the search warrant was an order, it ordered the police to search for evidence, not to destroy or inflict damage on the house. *Id.* But the court held that the policy excluded any damage caused either directly or indirectly from the order and any damage was indirectly caused by the issuance of the search warrant. Thus, the court concluded that the damage fell within the order of government authority exclusion and was not covered. *Id.* at 547.

are negligent or excessive in executing the order. *See, e.g., Port Washington Nat'l Bank & Trust Co.*, 300 N.Y.S. at 876.[5]

Further, in *Allen v. Marysville Mut. Ins. Co.*, 404 P.3d 364 (Kan. Ct. App. 2017), a fleeing suspect broke into the plaintiff's home from where he shot at police officers. When the suspect refused to come out of the house, the plaintiffs, who were at the scene, gave the officers their house keys and permission to enter and search the dwelling. The officers, out of an abundance of caution, obtained a warrant to search the house. After the warrant arrived, the officers fired at least 15 tear gas canisters into the plaintiffs' home, which broke windows, damaged the sheetrock walls, and caused from $34,000 to $36,000 in damage. The court held that

[5] In that case, federal agents raided a property that, without the plaintiff's knowledge, contained an illegal still. *Id.* at 875. Federal law required the agents to destroy the still. The agents used acetylene torches and, in doing so, accidentally started a fire that damaged the property. *Id.* The court held that it must presume the officers acted lawfully, so the loss was caused by the statutory mandate to destroy the still. *Id.* Thus, the court reversed the plaintiff's verdict at trial because the damage fell under the exclusion for loss or damage caused directly or indirectly "by order of civil authority." *Id.* The dissent would have found that the agent's actions fell outside the exclusion because the statute only required destruction of the still, but the agents went well beyond that, and exceeded the scope of the order, when they burned down the building. *Id.* at 876–77.

"there's simply no cause-and-effect relationship between the actions officers took to get [the suspect] out of the house and the issuance (or execution) of the search warrant." *Id.* at 368.

There may be limited circumstances in which a homeowner's policy might provide coverage of governmental acts, but none are relevant to this case. For example, a homeowner may recover under its policy if she can show that law enforcement exceeded its authority or that the order itself was invalid. *See Kao v. Markel Insurance Co.*, 708 F.Supp.2d 472 (E.D. Pa. 2010).[6] But that carveout would not help homeowners like Ms.

[6] In *Kao*, the court held that damage caused by the police in executing a search warrant fell outside the exclusion for damage caused by "destruction of property by Order of Governmental Authority" where the search warrant was invalid. *Id.* at 476, 478–79. The plaintiffs owned two buildings that each contained three rental units. *Id.* at 474. Based on a purchase from an undercover informant, the police obtained a search warrant for one of the two buildings, but did not specify which unit in that building. *Id.* at 474–75. When the police executed the warrant, they searched every unit in both buildings and caused extensive damage. *Id.* at 475. The insurer denied the claim under the government acts exclusion in the policy. The court accepted that, if the search warrants were valid, the governmental authority exclusion would preclude plaintiffs' claim. *Id.* at 476. But the court also agreed with the plaintiffs that, if the police acted without proper authority—acted under an invalid warrant or unreasonably executed the warrant—then the order of government authority exclusion would not apply. *Id.* at 477. The court further agreed with plaintiffs that, because the search warrants covered only one building and failed to specify which unit in that building could be

Baker, who suffer losses through no fault of their own[7] when police damage their homes while following department-prescribed procedures for apprehending a criminal suspect. Courts generally accord great deference to law enforcement and will not second-guess the government's exercise of its police power when deciding whether the order-of-government-or-civil-authority-exclusion applies. *See, e.g.*, C*al. Cafe Rest. v. Nationwide Mut. Ins. Co.*, C.A. No. 92-1326, 1994 WL 519449 (C.D. Cal. Sept. 14, 1994). In such jurisdictions, the government-actor exclusion from coverage would apply unless the insured's loss "result[ed] from the behavior of an actor who, in carrying out a government's order, acts so egregiously that his behavior is not properly characterized as having been the act ordered." *Id.* at *2. The exclusion will apply "whether or not the government's decision is susceptible to after-the-fact

searched, the police's action was improper. *Id.* at 478–79. Thus, the exclusion did not apply and the plaintiffs' losses were covered by the policy.

[7] *See Bankers Fire & Marine Ins. Co. v. Bukacek*, 123 So.2d 157, 165 (Ala. 1960). In *Bukacek*, a revenue agent used forty sticks of dynamite to disable a still and the resulting explosion caused extensive damage to the property. The Alabama Supreme Court found that the agent's aggressive actions exceeded the authority granted by statute to merely disable the still. Thus, the exclusion for loss "caused, directly or indirectly, by … order of any civil authority" did not preclude coverage. *Id.* at 158.

characterization by the judiciary as unreasonable or as an abuse of its discretion." *Id.*

And even if homeowner's insurance did cover losses of the sort Ms. Baker suffered, this would not absolve the City of its obligation to pay just compensation—it would simply change to whom compensation would be owed. *See* Brian Angelo Lee, *Uncompensated Takings: Insurance, Efficiency, and Relational Justice*, 97 Tex. L. Rev. 935, 964 (2019) ("To the extent that acquisition of property through takings is analogous" to a "sale, the acquisition will be legitimate only if the entity" acquiring it "also pays compensation ... Justice is not satisfied by leaving the burdened owner to receive 'compensation' only from third parties, whether they be motivated by charity or by" contractual obligation.).

Further, if the insurer pays the insured to cover for losses resulting from a legitimate governmental action, longstanding principles of subrogation and indemnification empower that insurer to seek compensation from the government for its resultant losses (*e.g.*, the payout less the cumulative value of the insured's periodic payments). *Id.* at 960 n.84 ("[E]ven if takings compensation were analogous to casualty

insurance, and thus private insurance could displace the government in its role as insurer against losses from takings, that fact would not itself displace the government's role as perpetrator of the taking, and it therefore would leave the government still liable to pay compensation (this time, however, to the insurance companies).") (citing 25 C.J.S. *Damages* § 190 (2012)). For example, in *Mercury Casualty Co. v. City of Pasadena*, a California court of appeal considered a takings claim brought by an insurance company against a municipality after a storm felled a city-owned tree alongside a parkway, causing $700,000 in damages to an adjacent home. Mercury, the homeowners' insurer, paid the claim then sued the city for just compensation as subrogee. 14 Cal.App.5th 917, 924 (2017).

Even where a trier of fact determines that the benefits the insurer derived through payments from an insured meets or exceeds the insurer's payout to cover the government-induced losses, there is still an imbalance between the public and private ledgers. The insurer and insured transacted for their mutual benefit and this voluntary relationship cannot stand in for the public's obligation to close this

imbalance. If it could, then private actors would still bear an outsized proportion of public costs, which the Supreme Court has long held the Takings Clause is designed to prevent. *Armstrong*, 364 U.S. at 49.

Put simply, if holding that the contractual obligation of an insurer to pay the insured, say, $100,000 for government-caused damages suffices to negate the public's obligation to compensate for the losses incurred, then private actors together have still absorbed excess costs. It does not matter who stands to challenge the private absorption of public costs—only that this imbalance has occurred at all, and thereupon entitles whichever private party ultimately suffers to seek legal redress.

CONCLUSION

The police commandeered and severely damaged Ms. Baker's home to apprehend a dangerous suspect. The City claims it is immune as a matter of law simply because its officers acted pursuant to its police powers. Ms. Baker does not challenge whether the officers' actions were necessary or proper. She seeks only to avoid bearing the ruinous financial costs of actions that benefited the public—a right the Takings Clause plainly affords her.

This Court should affirm on all grounds the district court's denial of the City's motion to dismiss and its entry of summary judgment for Ms. Baker on takings liability, and the jury's award of just compensation.

DATED: January 27, 2023.

Respectfully submitted,

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