

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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THE CITY OF LOS ANGELES, *et al.*,  
*Petitioners,*

v.

LAMYA BREWSTER,  
*Respondent.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

A circuit split has developed over the meaning of “seizure” in the Fourth Amendment and whether it only refers to the actual seizure of personal property, i.e. the taking of possession, or if it also extends to the continued retention of property already lawfully seized. Most of the circuit courts have concluded that the Fourth Amendment, by its own express terms, only applies to the actual seizure of property, and that, once lawfully seized, due process governs the continued possession and the timing and process for the property’s return. The Ninth Circuit has instead extended the definition of “seizure” to refer to the entire period of possession, so that property is effectively being re-seized every moment it is in the continued possession of a public entity, requiring the continued reassertion of Fourth Amendment grounds for each successive “seizure.”

The question presented is:

Assuming that property is lawfully seized by a public entity in compliance with Fourth Amendment requirements, what constitutional standard applies for the continued possession of the property and for the timing and process of returning the property?

**PARTIES TO THE PROCEEDING**

Petitioners include City of Los Angeles, the Los Angeles Police Department (“LAPD”), and Los Angeles Chief of Police Charles Beck, who were defendants below. Respondent includes the natural person Lamya Brewster, plaintiff below.

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## INTRODUCTION

The Fourth Amendment protects “against unreasonable . . . seizures” of property. Based on the previous holdings of this Court and a plain reading of the Fourth Amendment, the majority of circuit courts have limited application of the Fourth Amendment to its express terms, i.e., to the actual seizure of property. The Ninth Circuit is now in conflict with the consensus of circuit courts through its attempt to expand the definition of “seizure” to include the continued possession of property after it has been lawfully seized. *After the completion of a lawful seizure, does the continued retention of property become a new and repeating seizure governed by the Fourth Amendment, or does due process govern the continuing possession and return of the property?* Only this Court can resolve the division between the circuit courts, and reaffirm the plain text of the Fourth Amendment.

By long-standing use, the term “seizure” refers to the specific action of taking custody or control over a person or property, in contrast to the subsequent possession of that property. See *Thompson v. Whitman*, 85 U.S. 457, 469-71 (1873) (“A seizure is a single act, and not a continuous fact”), and *Cal. v. Hodari D.*, 499 U.S. 621, 624 (1991) (seizure refers to “taking possession”). (And see *post* at 10-12). Contrary to this Court’s decisions, the other circuit courts, and even common word usage, the Ninth Circuit seeks to redefine “seizure” to also include the subsequent retention or possession which occurs after a lawful seizure. Using this new definition, a public entity would be repeatedly “re-seizing” any lawfully seized property for as long as it was in custody. This would

effectively rewrite the Fourth Amendment by dramatically changing the well-established meaning of “seizure.”

To deter the disproportionate number of serious accidents caused by drivers without a valid driver’s license, California Vehicle Code § 14602.6 authorizes the police to impound a vehicle for 30 days when the driver has no license, or when the driver’s license had been suspended for unsafe driving. (App. 29). The owner is entitled to a prompt hearing to determine if a statutory exception or mitigating factors exist for the vehicle’s early release, e.g., the car was stolen, a valid license has since issued, or the owner lent the vehicle not knowing that the driver had no valid license. (*Post* at 5-6). Absent such a showing, the vehicle is released after 30 days, subject to towing and storage fees.

Brewster does not dispute that her vehicle was lawfully seized. (App. 6). Instead, Brewster argues that her vehicle should have been released upon demand at the storage hearing, and that retaining her vehicle pursuant to statute constituted a new and different “seizure,” which compelled a separate Fourth Amendment analysis. She regained her vehicle after 30 days.

Brewster brought suit under 42 U.S.C. §1983 and challenged the continued retention of her vehicle as a Fourth Amendment violation. The district court, consistent with the majority of circuits and an unpublished Ninth Circuit decision, dismissed the action on the grounds that the Fourth Amendment did not apply to the continued possession of property after the completion of a lawful seizure. Since Brewster relied entirely on the Fourth Amendment, there was no

occasion to address any due process issues. (App. 5 and 15). The Ninth Circuit reversed, holding that the property was effectively being repeatedly re-seized for as long as it was in the City's control. Thus, the Ninth Circuit held that every period of possession was a new "seizure" which triggered the Fourth Amendment for the duration of possession.

By attempting to extend the Fourth Amendment beyond its terms, the Ninth Circuit disregards the prior decisions of this Court, which have expressly distinguished between a seizure – the act of taking possession – and the subsequent possession of the property, the latter of which is governed by due process under the Fifth and Fourteenth Amendments. Similarly, the Ninth Circuit is in express conflict with the several decisions of its sister circuits, which have rejected the assertion that a seizure of property under the Fourth Amendment extends beyond the actual seizure of the property and continues as long as it is held by the public entity. A Fourth Amendment seizure refers to *taking* possession, not *having* possession. This Petition should be granted to clarify the proper application of the Fourth Amendment and resolve the circuit conflict.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit below is reported as *Brewster v. Beck*, 859 F.3d 1194 (9th. Cir 2017). A copy of that opinion is at Appendix, App. 1-9. The order of the District Court for the Central District of California is cited at *Brewster v. City of Los Angeles*, No. 5:14-cv-02257-JGB-SP (C.D. Cal. Feb. 27, 2015). A copy of that opinion is at App. 11-27.

## **JURISDICTION**

On June 21, 2017, the Ninth Circuit Court of Appeals rendered judgment reversing the District Court's Order dismissing the underlying complaint. Petitioners the City of Los Angeles, et al., filed a Petition for Rehearing En Banc on July 14, 2017, which the Ninth Circuit Court of Appeals denied on August 23, 2017. See, Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Const. amend IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Vehicle Code §14602.6<sup>1</sup> is set forth at App. 29-37.

California Vehicle Code §22852 is set forth at App. 38-40.

The LAPD's Impound Policy, also referred to as Special Order No. 7, is set forth at App. 41-54.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the California Vehicle Code.

## STATEMENT OF THE CASE

### A. California Vehicle Code Section 14602.6.

The California Legislature passed the Safe Streets Act of 1994 in response to its findings that drivers with suspended licenses were four times more likely to be involved in a fatal accident than a properly licensed driver, and that they, along with unlicensed drivers, inflicted serious injuries and damages on California residents. Vehicle Code § 14607.4(b) through (e). The Legislature expressed “a critical interest” in taking all appropriate steps to protect California residents from this danger. *Id.*, at § 14607.4(f). This included the temporary civil impoundment of vehicles driven by unlicensed drivers, or drivers whose licenses were suspended for safety violations. *Id.*, at § 14602.6.

Vehicle Code § 14602.6, subdivision (a)(1) authorizes a peace officer to impound a vehicle for 30 days whenever that officer discovers a specific list of violations, including that the driver’s license had been suspended for certain moving or safety violations, or that the driver never had a valid license. (App. 29). The process of taking custody of the vehicle – i.e., the seizure of the vehicle – must comply with the Fourth Amendment. See *Alviso v. Sonoma County Sheriff’s Dept.*, 186 Cal. App. 4th 198, 214 (2010). Pursuant to section 14602.6, subdivision (a)(2), the impounding agency must notify the legal owner of the impound within two working days. (App. 29-30).

The legal and registered owners “shall be provided the opportunity for a storage hearing to determine the validity of, or consider any mitigating circumstances attendant to, the storage, in accordance with Section 22852.” § 14602.6(b). The statute lists several conditions which will trigger the immediate release of the vehicle, including that the driver has reinstated or acquired a valid driver’s license and insurance. § 14602.6(d)(1). A mitigating circumstance which supports early release includes that the registered owner lacked actual knowledge that the driver did not have a valid license. See *Smith v. Santa Rosa Police Dept.*, 97 Cal. App. 4th 546, 549-550 (2002). Section 22852 sets out the procedure for hearings to “determine the validity of the storage” and provides, among other things, that a “public agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the storage of the vehicle.” § 22852(c). The LAPD’s Impound Policy, also referred to as Special Order No. 7, mirrors § 14602.6. (App. 4, 14 and 41-54).

### **B. Statement of Facts.**

Plaintiff and Respondent, Lamya Brewster loaned her 2010 Chevrolet Impala to her brother-in-law, Yonnie Percy, who had a suspended license. Percy drove himself and two others to a restaurant. LAPD officers conducted a traffic stop of the car, at which time they learned Percy’s driver’s license was suspended. (App. 12-13). The officers ultimately seized and impounded the vehicle under Vehicle Code § 14602.6, subdivision (a)(1), as it was being driven by a person with a suspended license. (App. 3 and 13).

Although the passengers offered to drive the vehicle to a safe location, Brewster concedes, for purposes of this lawsuit, that the seizure of her vehicle was lawful based on the community caretaking doctrine. (App. 6 and 18, n.1). Brewster arrived on the scene after her vehicle had already been towed, and one of the officers explained that her car would be impounded for thirty days, and that she could not reclaim possession until after that time. (App. 13).

Invoking her right to challenge the validity of the impound, Brewster appeared through counsel at the storage hearing three days later. (App. 3-4). Brewster's legal representative demanded the release of Brewster's car on the grounds that Brewster was the registered owner, she had a valid license, and she was willing to pay the charges and fees that had accrued to that point. (App. 3-4 and 13). Brewster made no claim that she met any statutory exceptions for early release or that she offered any evidence of any mitigating circumstances to support early release. (See *id.*). See Vehicle Code § 14602.6(b) and (d)(1). The LAPD denied the request to release the car to Brewster before the statutory 30-day period. (App. 4 and 13). Seven days later, the vehicle was released to its legal owner, Superior Auto (the finance company), who returned it to Brewster at the end of 30 days. (App. 4, n.1). Brewster claims that the failure to return her vehicle upon demand, and its continued possession thereafter, constitutes a new and separate seizure of the vehicle which invokes the Fourth Amendment. Brewster made no attempt to seek judicial relief from the impound decision in state court.

### **C. District Court Proceedings and Court of Appeals Decision.**

Brewster filed a federal complaint against the City of Los Angeles, the LAPD, and Police Chief Charlie Beck (collectively, “the City”) under 42 U.S.C. § 1983, seeking injunctive relief, damages, and a class action regarding the enforcement of Vehicle Code § 14602.6. (App. 15). While not challenging the initial seizure, Brewster alleged that refusing to release her vehicle on demand constituted a separate seizure and was a violation of her Fourth Amendment rights. (App. 6 and 18-19). Brewster did not raise any due process challenge, but relied exclusively on the Fourth Amendment. (App. 5 and 15).

The district court granted the City’s motion to dismiss for failure to state a claim. (App. 12). The district court held that the 30-day impoundment under Vehicle Code § 14602.6 was “analytically separated from the initial seizure” by the storage hearing. As a result, the continued possession, unlike the actual seizure, was not governed by the Fourth Amendment, but was an administrative penalty that was governed by due process restrictions. (App. 24-25). In doing so, the district court accepted the legislative findings that a disproportionate number of accidents were caused by unlicensed drivers or drivers with suspended licenses, and the legislature’s conclusion that the temporary impoundment under the limited circumstances described in § 14602.6 was needed to deter this behavior and protect Californians from the harm caused by such drivers. (App. 25). To support its decision, the district court cited to multiple California decisions and the unpublished Ninth Circuit decision in

*Salazar v. City of Maywood*, 414 Fed. Appx. 73 (9th Cir. 2011). (App. 20-23).

The Ninth Circuit reversed, setting aside the question of whether the 30-day impound was a valid administrative penalty. The Ninth Circuit held that, even if the initial seizure of the vehicle was lawful, the vehicle was effectively being repeatedly re-seized so long as it remained in the possession of the public entity, so that the Fourth Amendment standard for “seizures” had to be continually reapplied and satisfied for the entire time of possession by the public entity. (App. 7). In doing so, the Ninth Circuit expressly rejected the Seventh Circuit holding in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), which held that the Fourth Amendment only applied to the actual seizure of property – i.e., the taking of possession – and that so long as the actual seizure itself was lawful, the Fourth Amendment did not apply to the subsequent possession of the property. (App. 7-8; and see *post* at 16). The Ninth Circuit denied Petitioners’ Petition for Rehearing En Banc on August 23, 2017. (App. 28).

## **REASONS FOR GRANTING CERTIORARI**

Granting certiorari is appropriate when a circuit split exists, as one does here. Sup. Ct. R. 10(a).

Granting certiorari is appropriate when there is a conflict between a court of appeals decision and a decision of this Court. Sup. Ct. R. 10(a).

Granting certiorari is appropriate when the court of appeals has decided an important question of federal law “that has not been, but should be, settled by this Court,” particularly if that decision is inconsistent with previous decisions of this Court. Sup. Ct. R. 10(c).

### **I. The Ninth Circuit Decision Is Inconsistent with the Decisions of this Court.**

While the Court has not explicitly decided whether the Fourth Amendment applies to the continued possession of property following an admittedly lawful seizure, this decision by the Ninth Circuit – equating an unlawful seizure with the continued possession of property after a lawful seizure – is inconsistent with the previous Fourth Amendment decisions of the Court. This Court has previously distinguished the actual seizure of property from its subsequent possession. Consistent with the common meaning of “seizure”, the Court has explained that a seizure is the singular event of taking possession or control, as distinguished from the subsequent possession or control of that property. “From the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession’ 2 N. Webster, *An American Dictionary of the English Language* 67 (1828); 2 J. Bouvier, *A Law Dictionary* 510 (6th ed. 1856); Webster’s *Third New International Dictionary* 2057 (1981).” *California v. Hodari D.*, 499 U.S. 621, 624

(1991). (“seizure” equated with “actually bringing it within physical control.”); and see *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (defining seizure as “an intentional acquisition of physical control”).

While *Hodari D.* and *Brower* each addressed the seizure of a person, *Hodari D.* cited *Thompson v. Whitman*, 85 U.S. 457 (1873), which explained the distinction between the seizure and possession of property. In *Thompson*, a New Jersey sheriff seized a vessel for illegal clam and oyster raking pursuant to a state statute authorizing seizure within his county. *Id.* at 470. However, the sheriff initially seized the vessel in New York waters and then brought it to New Jersey, arguing that the seizure was continuous and thus became a seizure in New Jersey. *Id.* The Supreme Court rejected the argument, holding that “seizure” only applied to the initial act of taking possession: “A seizure is a single act, and not a continuous fact. Possession, which follows seizure, is continuous.” *Id.* at p. 471.

Consistent with the finding that seizure is a specific act, and not a state of being, this Court has evaluated the retention and disposition of lawfully seized property under due process standards, while making no reference to the Fourth Amendment. In *City of West Covina v. Perkins*, 525 U.S. 234 (1999), property had been lawfully seized, but was no longer needed for the criminal investigation or prosecution. *Id.*, at 236. In reviewing the due process standards and requirements for returning the property, including the amount of notice that was required regarding procedures for securing the return of the property, the Court never suggested that the continued possession of the property

beyond the moment it was needed as evidence had become a Fourth Amendment violation. See, *id.*, at 240-243. Similarly, Federal Rule of Criminal Procedure, Rule 41(g), authorizes a motion to return lawfully seized property. It makes no mention of Fourth Amendment standards in evaluating the continued possession, or the process of return, but relies on equitable principles and a balancing of interests – i.e., due process.

The Ninth Circuit ignored these decisions, and instead cited *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), *United States v. Place*, 462 U.S. 696 (1983), and *Manuel v. City of Joliet*, 137 S. Ct. 911, 914, 920 (2017) to support its proposition that the “Fourth Amendment doesn’t become irrelevant once an initial seizure has run its course.” (App. 5-7). In fact, this proposition is more accurately described as whether the Fourth Amendment has any further application after an admittedly lawful and constitutional seizure has run its course. The Ninth Circuit mistakenly suggests that *Jacobsen*, *Place*, and *Manuel* each apply the Fourth Amendment to circumstances regarding the possession of property after a lawful seizure. In fact, these decisions only address the propriety of the actual seizure, i.e., the taking of possession, and offer no discussion regarding the standard for the retention or return of property following a lawful seizure.

In *Jacobsen*, the Court held the Fourth Amendment was not implicated when a federal agent looked for and observed what had already been seen and reported by a private citizen, or by performing a field drug test to identify the material found. *Jacobsen, supra*, 466 U.S. at 119-120 and 123-124. While it applied a Fourth

Amendment analysis to the *de minimis* amount of material destroyed by the drug test, the Supreme Court found this procedure was reasonable and therefore a lawful seizure. *Id.*, at 124-125. There was no discussion about the standard governing the continuing possession, or the potential return, of property after it was lawfully seized.

In *Manuel*, the plaintiff alleged that his arrest and pre-trial detention were based solely on false evidence, leaving no basis for probable cause. *Manuel, supra*, at 137 S. Ct. at 914-915. Under these circumstance, the Court held that the start of legal process (i.e., the judge's probable cause hearing) did not sever the defendant's Fourth Amendment claim by marking the end of the lawful arrest process, because there was never any probable cause to support the arrest. *Id.*, at 918-919. As a result, as alleged, there was never a lawful arrest and the damages for the unlawful arrest would include any resulting damages, including plaintiff's subsequent pretrial custody. *Id.*, at 919.

In *Place*, the Court held that a purported investigative detention, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), exceeded the acceptable limited scope of that procedure, because it lasted 90 minutes and involved taking the plaintiff's luggage to a different airport without his knowledge. *Place, supra*, 462 U.S. at 698-700. Moreover, because the object detained was airport luggage while in transit, this also resulted in the *de facto* detention of its owner. *Id.* at 708-709. As a result, the officers could not justify their actions as an investigative detention, and they were required to demonstrate probable cause to justify their actions in seizing the luggage. *Id.*, at 709-710. Lacking such a

showing, or any other accepted justification, the seizure was unreasonable under the Fourth Amendment. *Id.* at 710. As in *Manual*, the Court in *Place* found that there had been no lawful seizure at all, and so had no occasion to discuss the issue of possession after a lawful seizure.

The Ninth Circuit also attempts to overextend *Soldal v. Cook County*, 506 U.S. 56 (1992), for the proposition that the 30-day impound after an admittedly lawful seizure constitutes a separate “seizure.” (App. 5 and 6-7). In fact, *Soldal* only addressed whether removing a plaintiff’s mobile home and residence from its location constituted a seizure (i.e. a “meaningful interference with an individual’s possessory interests”), and concluded that it was. 506 U.S. at 61-62. As with *Jacobsen*, *Place*, and *Manuel*, *Soldal* addressed whether the act of taking possession under the circumstances presented constituted a seizure under the Fourth Amendment which required probable cause.

None of these holdings discussed the subsequent possession of property after a lawful seizure was completed, and none of them suggested that the Fourth Amendment governs the continued possession of property after an admittedly lawful seizure. As discussed below, the other circuits agree that due process, and not the Fourth Amendment, governs the possession and return of lawfully seized property.

## **II. The Ninth Circuit Decision Presents a Direct Circuit Conflict.**

The Ninth Circuit decision itself recognized its split with the Seventh Circuit in *Lee* over the meaning of the word “seizure” in the Fourth Amendment. (App. 7-8). The Ninth Circuit failed to acknowledge that its decision is also a split with the clear majority of circuits, which almost all agree with the Seventh Circuit. Only this Court can resolve such a conflict on this fundamental constitutional issue.

### **A. A majority of circuit courts employ a plain reading of the Fourth Amendment.**

All of the circuit courts which have addressed the issue of continuing seizure have agreed that a seizure under the Fourth Amendment is limited to the taking of possession – the actual seizure of person or property – and does not extend to the continued possession or custody after a lawful seizure is complete. A majority of circuit courts have rejected the assertion proposed by the Ninth Circuit that the continued possession of property after a lawful seizure constitutes a series of reoccurring and separate seizures.

While the Third Circuit has apparently not addressed the property seizure issue, *Schneyder v. Smith*, 653 F.3d 313 (3rd Cir. 2011) did adopt a “continuing seizure” model in an unusual case regarding the involuntary custody of a material witness pending trial. However, in that case the prosecutor was charged with keeping the court regularly apprised of the underlying criminal case “so that [the judge] could monitor the continued reasonableness of Schneyder’s detention.” *Id.*, at 328. Thus, this holding provides little

support for the Ninth Circuit decision here, given the significant difference between incarcerating a person who is not even a suspect for any longer than necessary and holding a vehicle that was lawfully seized.

**1. Six circuits support the *Lee* decision in addressing property seizures.**

A majority of circuits support the Seventh Circuit and its *Lee* decision. Of all the opposing opinions, the Ninth Circuit only acknowledged *Lee, supra*, 330 F.3d at 461-66 (7th Cir. 2003). In *Lee*, the plaintiff's car was properly seized by the police as evidence for a criminal proceeding, but was eventually no longer needed. That plaintiff, as here, argued "the City's refusal to return his car . . . constituted an additional 'seizure' within the meaning of the Fourth Amendment." *Id.*, 330 F.3d at 460. The Seventh Circuit held that "[o]nce an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable. The [Fourth] amendment then cannot be invoked by the dispossessed owner to regain his property." *Id.*, at 466; see also *Gonzalez v. Village of West Milwaukee*, 671 F.3d 649, 660 (7th Cir. 2012) ("seizure" occurred when the property was taken; the government's *continued* possession is not a separate Fourth Amendment violation). *Lee* and its brethren agree that due process provides the constitutional protections for the appropriate retention and return of property. *Lee, supra*, 330 F.3d at 462-463 (citing both *Hodari D.* and *Thompson*), and see immediately below.

A survey of opinions in the circuits supporting *Lee* confirms the consensus on this issue. Five circuits have addressed this issue in the specific context of property seizure.

**First Circuit:** In *DeNault v. Ahern*, 857 F.3d 76 (1st Cir. 2017), police officers impounded a suspect's vehicle as part of their investigation and obtained a warrant to search it. After failing to find any relevant evidence, they returned the vehicle to the towing company, but no one informed the suspect or his wife. By the time they discovered the location of their vehicle, the towing and impound fees exceeded the value of the vehicle. *Id.*, 79-80. The suspect and his wife sued on several theories. The First Circuit held that "to the extent a plaintiff may challenge on federal constitutional grounds the government's retention of personal property after a lawful initial seizure . . . that challenge sounds in the Fifth Amendment rather than in the Fourth Amendment." *Id.*, at 84.

**Second Circuit:** The criminal suspect in *Shaul v. Cherry Valley-Springfield Central School District*, 363 F.3d 177 (2d Cir. 2004) had some personal possessions lawfully seized as part of the investigation. While some of these items were eventually returned, he claimed that certain items were never returned. In the following suit, among other claims, he argued the failure to return those items constituted a separate unlawful seizure. *Id.*, at 180-181. The Second Circuit held that where "an initial seizure of property was reasonable, defendants' failure to return the items does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure." *Id.*, at 187. "To the extent the Constitution affords Shaul any right with

respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process." *Id.*; followed by *Ahlers v. Rabinowitz*, 684 F.3d 53, 62 (2d Cir. 2012).

**Sixth Circuit:** In *Fox v. Van Oosterum*, 176 F.3d 342 (6th Cir. 1999), Fox's wallet was seized in an admittedly lawful search, and was later returned without his driver's license. *Id.*, at 346 and 351. Among other claims, Fox claimed the failure to return the license was a Fourth Amendment violation. The Sixth Circuit held that "the Fourth Amendment protects an individual's interest *in retaining* possession of property but not the interest *in regaining* possession of property." *Id.*, at 351, emphasis added. "Once that act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.* The court expressed concern that expanding the Fourth Amendment in such a fashion "would replace for many cases the well-developed procedural due process analysis that provides the states with the first chance to prevent possible constitutional wrongs with a new, uncertain Fourth Amendment analysis that allows litigants to jump straight to federal court every time a state official refuses to return property that was, at least at one point, lawfully seized or lawfully in the state's possession." *Id.*, at 352.

**Eighth Circuit:** It appears that the Eighth Circuit "has not squarely decided the question . . . whether the City's continued retention of [property] after its initial, constitutionally valid seizure, is separately actionable as a Fourth Amendment violation." *Hopkins v. City of Bloomington*, 2013 U.S. Dist. LEXIS 137392, \*33-34 (D. Minn. 2013). However, the Eighth Circuit has

expressed skepticism about such a claim on at least two occasions. *Ali v. Ramsdell*, 423 F.3d 810, 814 (8th Cir. 2005) (“We have considerable doubt whether an allegation that property appropriately seized in executing a valid search warrant but not inventoried and stored in the manner required by state law even states a claim under the Fourth Amendment.”); *Gilmore v. City of Minneapolis*, 837 F.3d 827, 838 (8th Cir. 2016) (“Moreover, if the seizure was valid, we doubt Gilmore can assert a Fourth Amendment claim over the sign’s destruction.”). At least one district court in the Eighth Circuit has concluded that the Eighth Circuit’s rulings were consistent with the other circuit courts in limiting a Fourth Amendment claim to the actual seizure of property. See *Hopkins, supra*, 2013 U.S. Dist. LEXIS 137392, at \*33-34. *Hopkins* held that since the seizure of the property was lawful “the City’s prolonged retention of the Vehicle does not raise a cognizable Fourth Amendment claim”. *Id.*, at \*34.

**Eleventh Circuit:** In *Case v. Eslinger*, 555 F.3d 1317 (11th Cir. 2009) the undisputed evidence showed that the seizure of plaintiff’s property was lawful, but he also claimed that the property’s continued retention separately violated the Fourth Amendment. *Id.*, at 1330. The Eleventh Circuit held that a “complaint of continued retention of legally seized property raises an issue of procedural due process” and not a cause of action under the Fourth Amendment. *Id.*, at 1330-1331. Similarly, *Byrd v. Stewart*, 811 F.2d 554, 554-555 (11th Cir. 1987) distinguished between a claim of unlawful seizure, sounding under the Fourth Amendment, and a claim of for “the unlawful retention of his personal property” after that seizure, which was a due process claim.

**2. Three additional circuits have rejected a proposed “continuing seizure”.**

An additional three circuits have addressed and rejected the related issue of a “continuing seizure,” as applied to the detention of individuals. In each of these cases, the court held that after a lawful seizure/arrest was completed, the ongoing detention of individuals was governed by due process, not the Fourth Amendment. While cases involving the seizure of individuals adds the complication of defining when the arrest process is completed (i.e., initial custody, delivery by the arresting officers to holding cell, arraignment, etc.), the process of seizing property is typically less complicated, and the issue has no application here since it is undisputed that the completed seizure of Brewster’s vehicle was lawful. (App. 6 and 18, n.1).

In any case, at some point the lawful seizure is complete, and the public entity then has custody of the person or property seized. Since the Fourth Amendment prohibition against “unreasonable searches and seizures” is applied simultaneously to “persons or things to be seized” its restrictions apply in parallel to both. See, U.S. Const., Amend. IV; *United States v. Watson*, 423 U.S. 411,446. As a practical matter, the liberty interests of individuals are given at least as much protection, and presumably even more, than is provided to mere property, so each of these cases show a further consensus against the Ninth Circuit’s decision regarding the seizure of property. See, *Id.*, at 446-447.

**Fourth Circuit:** *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc)<sup>2</sup> addressed an excessive force claim by a defendant who was already in custody and awaiting trial. After a “review of the Supreme Court’s basic jurisprudence” regarding the scope and nature of a “seizure,” *Riley* concluded that “[d]ecades of Fourth Amendment precedent have focused on the initial deprivation of liberty” and not the subsequent custody of that person or property by the public entity. *Id.*, at 1162-63. “In sum, we agree with the Fifth, Seventh, and Eleventh Circuits that the Fourth Amendment does not embrace a theory of ‘continuing seizure’ . . .” *Id.*, at 1164. The Fourth Circuit held that the conditions of custody were instead restricted by due process under the Fourteenth Amendment. *Id.*, at 1166-7.

**Fifth Circuit:** The decedent in *Brothers v. Klevenhagen*, 28 F.3d 452, 454 (5th Cir. 1994) was shot while trying to escape after he had already been transferred to jail. The Fifth Circuit rejected plaintiffs’ unlawful seizure claim, holding that “the Fourth Amendment applies more appropriately to the actual incident of arrest.” *Id.*, at 456. “Once an individual has been arrested and is placed into police custody,” ...a detainee is “protected against excessive force by the Due Process Clause.” *Id.*, at 457. See also *Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir. 1998) (“While the Fourth Amendment protects arrestees, once an arrest is complete, pretrial detainees are protected by the due process clause of the Fifth or Fourteenth Amendments.”); but see, *United States v.*

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<sup>2</sup> *Riley* was reversed in part on other grounds in *Wilkins v. Gaddy*, 559 U.S. 34, 38-39 (2010).

*McRae*, 702 F.3d 806, 833 (5th Cir. 2012) (noting that the scope of the Fourth Amendment in property seizures had not yet been separately addressed by the Fifth Circuit).

**Tenth Circuit:** While the Tenth Circuit in *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007) ultimately decided that the plaintiff had not actually been seized at all, in reaching that conclusion the Tenth Circuit discussed and agreed with the decisions which rejected a “continuing seizure” rationale. *Id.*, 915-16. At best, the court found that seizure might extend to the beginning of pretrial incarceration, but rejected the idea that it extended for the duration of custody. *Id.*

As held by this Court in *Thompson*, a seizure is the specific event of obtaining possession that is completed once the property is secured. *Thompson, supra*, 85 U.S. at 471. While other cases might raise factual questions as to when or how the process of taking possession was completed, at some point the public entity will complete the seizure and have possession, as the City did with Brewster’s vehicle. (See App. 6 and 18, n.1). Thereafter, possession is the continuous state of having custody. As the majority of circuit courts have concluded, the propriety of that possession, and the disposition of the property, is governed by due process under the Fifth and Fourteenth Amendments, not the Fourth Amendment. The Ninth Circuit’s holding below is directly opposed to those decisions, and holds instead that the ongoing possession of Brewster’s vehicle constitutes a daily “re-seizure” that repeatedly triggers the Fourth Amendment – notwithstanding the lawful seizure which began that possession. See, *Ante* at 9. This fundamental conflict over the meaning of “seizure”

is irreconcilable and requires the guidance of this Court.

**B. The other circuit decisions are consistent with the California state courts.**

The California courts have upheld the constitutionality of section 14602.6 with the same basic analysis of the other circuit courts. The California courts recognize the legitimate legislative purpose of protecting public safety by deterring unlicensed drivers. See *Smith v. Santa Rosa Police Dept.*, 97 Cal. App. 4th 546, 558-560 (2002) (noting legislative findings that unqualified drivers are disproportionately involved in fatal accidents and confirming that Section 14602.6 was part of a statutory scheme “aimed at increasing penalties for driving without a valid license”); *Samples v. Brown*, 146 Cal. App. 4th 787, 805 (2007) (explaining that § 14602.6 implements “the legislative policy decision to deter and punish unlicensed driving”); and see § 14607.4 [statement of legislative findings].

In *Alviso v. Sonoma County Sheriff's Dept.*, 186 Cal. App. 4th 198 (2010), as with *Brewster*, there was no challenge to the initial seizure of the vehicle, only a claim that continued possession of the vehicle supported a new Fourth Amendment challenge. *Id.*, at 214. *Alviso* rejected this approach, finding that without a challenge to the actual seizure of the vehicle, the subsequent events—notice, the storage hearing, and the continued retention of the vehicle—are governed by issues of due process, and do not constitute an unconstitutional seizure. *Ibid.*; and see *Thompson v. Petaluma Police Dept.*, 231 Cal. App. 4th 101 (2014)

(“The courts have . . . concluded that the statute does not violate state and federal constitutional principles of . . . freedom from unreasonable seizures.”)

### **III. The Issue in Conflict Is Recurring and of Great Practical Importance.**

The fact that nearly all of the circuits have addressed the issue of whether a “seizure” is limited to its common definition of taking possession, or whether it extends to the subsequent possession or custody of the person or property at issue, demonstrates that this is a reoccurring and important issue that needs to be resolved. This distinction also has a broad and meaningful practical effect, as impound statutes are common in a variety of situations at the state and local level. These local public entities need guidance on how they should design and execute their procedures, and what legal standards need to be addressed.

The Court has previously acknowledged this and related issues, but has not had the occasion to resolve them. For example, in her concurring opinion to *Albright v. Oliver*, 510 U.S. 266, 277-279 (1994), Justice Ginsburg argued that a suspect remained “seized” even when out on bail awaiting trial, and therefore the Fourth Amendment should apply to control the grounds and contours of all pretrial custody. The plurality opinion did not opine on a potential Fourth Amendment claim. *Id.*, at 271. This proposed expansion of the Fourth Amendment to include subsequent custody, and not just the actual seizure, was expressly rejected by the circuit courts in *Lee*, *Riley*, *Brothers*, and *Becker*, each discussed above. See *Lee*, *supra*, 330 F.3d at 463; *Riley*, *supra*, 115 F.3d at 1162; *Brothers*, *supra*, 28 F.3d at 456; *Becker*, *supra*, 494 F.3d at 915;

and see, *Nieves v. McSweeney*, 241 F.3d 46, 55-56 (1st Cir. 2001) (rejecting the extension of the Fourth Amendment beyond the point at which the arrest/seizure ends). Conversely, this idea is now supported, if not specifically cited, by the Ninth Circuit.

The definition of “seizure” was again raised in the context of a criminal suspect in a concurring opinion earlier this year by Justice Alito in *Manuel*, in which he noted “[t]hat proposition—that every moment in pretrial detention constitutes a ‘seizure’— is hard to square with the ordinary meaning of the term.” See, *Manuel, supra*, 137 S. Ct. at 926-927. Consistent with the several circuit opinions discussed above, Justice Alito cited multiple examples showing the ordinary meaning of “seizure” was limited to the act of taking possession, and cautioned against “stretch[ing] the Fourth Amendment beyond its words”. *Id.*, at 927, citing *Hodari D., supra*, 499 U. S., at 627. While neither represents the final decision of the Court, these conflicting indications add to the potential division of the circuits and further emphasize the need for authoritative guidance on this issue.

## CONCLUSION

There remains an explicit conflict among the circuits on the fundamental issue of the definition of “seizure” in the Fourth Amendment. The guidance of this Court and a resolution to this dispute is urgently needed.

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