No. _____

In the Supreme Court of the United States

BLAKE CONYERS AND KEVIN FLINT, PETITIONERS,
v.
CITY OF CHICAGO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Persons who are arrested submit to an inventory search of their personal property. This serves "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

Pursuant to an explicit policy, the City of Chicago will sell or destroy all arrestee property that is not claimed within 30 days of arrest, even for arrestees like petitioners who cannot reclaim their property because they have remained in custody awaiting trial. Other municipalities will store inventoried property until the criminal case is resolved.

The Seventh Circuit described the City's practice as a "destroy-or-sell policy" and held that it does not violate the Fourth or Fifth Amendments. The Court of Appeals acknowledged a circuit split on whether the protections of the Fourth Amendment apply to property after it has been lawfully seized or whether the Fourth Amendment applies only to the initial seizure. The question presented is:

> May a municipality, consistent with the Fourth and Fifth Amendments and pursuant to an explicit policy, destroy or sell property seized during the inventory search of an arrestee because the arrestee remains in custody awaiting trial for more than 30 days and is unable to retrieve the property?

PARTIES TO THE PROCEEDINGS

Petitioners are Blake Conyers and Kevin Flint, who, along with Lamar Ewing, were the appellants below.

Respondent is the City of Chicago.

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

Conyers v. City of Chicago, No. 12-cv-6144 (March 24, 2015) (ruling on motion to dismiss)

Conyers v. City of Chicago, 162 F. Supp. 3d 737 (N.D. Ill. 2016) (granting motion to dismiss Takings claim and denying motion to dismiss Due Process claim)

Conyers v. City of Chicago, No. 12-cv-6144 (September 27, 2017) (granting plaintiffs' motion for class certification)

Conyers v. City of Chicago, No. 12-cv-6144 (May 18, 2020) (granting summary judgment to defendant)

United States Court of Appeals (7th Cir.):

Conyers v. City of Chicago, 10 F.4th 704 (7th Cir. 2021)

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Blake Conyers and Kevin Flint respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 10 F.4th 704. The opinions of the district court are available at 2020 WL 2528534 (App. 20a-46a), 2017 WL 4310511 (App 47a-66a), 162 F. Supp. 3d 737 (App. 67a-84a), and 2015 WL 1396177. (App. 85a-103a.)

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2021. The court of appeals denied rehearing and a suggestion for rehearing en banc on September 16, 2021. (App. 104a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment provides:

> 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.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress …

Sections 2-48-160 and 2-48-180 of the Chicago Municipal Code are reproduced in the appendix, *infra*, 104a-06a.

INTRODUCTION

The Chicago Police Department, like all police departments, removes and inventories the personal property of arrestees.

Unlike other police departments, Chicago sells or destroys inventoried property if the arrestee does not retrieve it within 30 days, even if the arrestee has remained in custody as a pretrial detainee.[1]

Petitioners, two former detainees who were held in custody awaiting trial for more than 30 days and were unable to engage someone to retrieve their property, contend that what the Seventh Circuit aptly described as the "City's destroy-or-sell policy" (App. 2a) violates the Fourth Amendment's protection of "effects" as well as the Takings Clause of the Fifth Amendment.

The Seventh Circuit held that the municipal policy did not implicate the Fourth Amendment (App. 8a-10a) and that there was no "taking" because petitioners voluntarily abandoned their property by failing to engage someone to retrieve it. (App. 13a.)

Three other circuits interpret the Fourth Amendment as the Seventh Circuit did in this case, holding that if the initial seizure is lawful, the Fourth Amendment does not require the police to protect property while it remains in police custody.[2] The Ninth Circuit, as the Seventh

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[1] Other police departments retain arrestee property until after the termination of criminal proceedings or send the property, along with the detainee, to the pretrial detention facility. *See infra* at 7-8.

[2] *Denault v. Ahern*, 857 F.3d 76, 83 (1st Cir. 2017); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Fox v. Van Oosterum*, 176 F.3d 342, 350-51 (6th Cir. 1999). *See infra* at 11-13.

Circuit acknowledged (App. 9a) follows a contrary rule.[3] The Fourth Circuit is in accord with the Ninth.[4]

Recent scholarship presents clear guidance about the intent of the Framers to protect personal property when they included "effects" in the Fourth Amendment.[5] This case provides an appropriate vehicle for the Court to resolve the conflict between the circuits and restore the "effects" clause of the Fourth Amendment to the role intended by the Framers.

STATEMENT

1. Petitioner Blake Conyers was arrested by Chicago police officers in February of 2012; the officers inventoried Conyers's personal property—an earring, a bracelet and two cell phones. (App. 2a.) The Chicago Police Department retained those items when Conyers was transferred to the county detention facility to await trial. (App. 2a-3a.) Chicago destroyed Conyers's property when he failed to retrieve it within 30 days of his arrest. (App. 5a.)

Petitioner Kevin Flint was arrested by Chicago police officers in January of 2013; the officers inventoried Flint's cell phone and a ring. (App. 2a.) These items remained with the Chicago Police Department when Flint was transferred to the county detention facility to await trial. (App. 2a-3a.) Flint remained at the Cook County Jail until May of 2013 (App. 52a) and learned on release that the City had destroyed his property. (*Id.*)

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[3] *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017), discussed *infra* at 14-15.

[4] *Presley v. City of Charlottesville*, 464 F.3d 480, 487–89 (4th Cir.2006). *See infra* at 14.

[5] Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946 (2016), discussed *infra* at 16-17.

2. The Chicago Police Department retained petitioners' property pursuant to an explicit policy it had adopted in 2007. (App. 2a.) The policy identifies the property that will accompany the arrestee to the Cook County Jail; all other property, such as cell phones, wallets, and jewelry other than a "plain metal ring without stones" is inventoried and held by the Chicago Police Department. (*Id.*) The department gives the arrestee a written notice that the property held by the police department will be "considered abandoned" if not claimed within 30 days of arrest. (App. 3a-4a.)

3. An ordinance of the City of Chicago requires that all property seized during an inventory search of an arrestee will be sold or destroyed if not reclaimed within 30 days."[6] The ordinance, which the Seventh Circuit found is intended to relieve "constraints on storage space for seized property" (App. 11a), does not include any exception for arrestees who are held in custody for more than 30 days. The court of appeals found that the effect of the ordinance is "to deem property abandoned after 30 days have elapsed." (App. 13a.)

Evidence presented during summary judgment proceedings showed that from December 1, 2011 through December 31, 2013, the City declared abandoned more than 3,800 cell phones, 2,000 wallets, and 1,100 credit or debit cards seized during inventory searches of arrestees who remained in custody as pretrial detainees for more than 30 days.[7] These items were destroyed or sold at auction, with proceeds paid "to the board of trustees of the policemen's annuity and benefit fund," pursuant to

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[6] The ordinance, Chicago Municipal Code § 2-84-160, is reproduced in the appendix, *infra*, at 104a-05a.

[7] Report of Defendant's Expert Jason T. Wright, District Court Docket No. 182 at 101.

Chicago Municipal Code § 2-84-180 (reproduced in the appendix, *infra*, at 106a).

4. Petitioner Conyers initiated this case in a pro se complaint while a pretrial detainee. (District Court Docket No. 1.) One of Conyers's claims involved his personal property: Conyers had been arrested by Chicago police officers; the officers sent some of Conyers's property to the Cook County Jail, where it would be held while he awaited trial; Conyers's cell phone and jewelry were retained by the Chicago Police Department for 30 days and then destroyed because Conyers failed to retrieve the property. (Complaint, Docket Item No. 1, ¶ 48.)

Conyers secured counsel and, along with petitioner Kevin Flint and another co-plaintiff, filed a third amended complaint, limited to the municipal policy to sell or destroy arrestee personal property.[8] (Third Amended Complaint, Docket Item No. 13.) Petitioners brought claims under the Fourth, Fifth, and Fourteenth Amendments and sought to maintain the case for a class of persons "who have been permanently deprived of the use and enjoyment of personal property because of the municipal policies described herein." (Third Amended Complaint, ¶ 36.)

5. The district court rejected on a Rule 12(b)(6) motion to dismiss petitioners' Fourth Amendment claim, applying the Seventh Circuit's holding in *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) that "the Fourth Amendment is not implicated when a plaintiff's challenge concerns recovery of property that was lawfully seized and then retained by the defendant." (App. 92a.) The district court concluded that "since the plaintiffs have not alleged that the City's seizure of arrestees'

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[8] Lamar Ewing, the third co-plaintiff, is not a party to this petition.

property is unreasonable, they have not stated a cognizable § 1983 injury based on the Fourth Amendment." (*Id.)*

The district court then turned to the Fifth Amendment Takings Claim (App. 92a-95a) and applied *Williamson County. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to dismiss that claim for failure to exhaust state remedies. (App. 93a.) The district court also dismissed petitioners' Fourteenth Amendment Due Process Claim complaining about inadequate notice (App. 9ga-101a) but invited petitioners to cure the pleading deficiencies in an amended complaint. (App. 102a.)

6. Petitioners amended their complaint to restate their Fourteenth Amendment claim about the sufficiency of notice.[9] (Fourth Amended Complaint, ¶¶ 15-27, (Docket Item No. 81.) The district court allowed that claim to go forward (App. 83a-84a) and subsequently ordered the case to proceed as a class action under Federal Rule of Civil Procedure 23(b)(3) for:

> All persons who, following an arrest, had property inventoried as "available for return to Owner" by the Chicago Police Department from December 1, 2011 to December 31, 2013, who were then held in custody for more than 30 days and whose property was destroyed or sold by the Chicago Police Department.

(App. 66a.)

7. Thereafter, the parties engaged in discovery, culminating in cross-motions for summary judgment. Chicago engaged a police practices expert, who compared the Chicago policy to that followed in other municipalities (Report of Defendant's Expert Dr. Jon Shane,

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[9] Petitioners do not raise the Fourteenth Amendment notice claim in this petition.

District Court Docket No. 174-14.) The expert compared the Chicago procedures with those followed by four other police departments; none of the other agencies employed Chicago's "destroy-or-sell" policy. Three municipalities do not retain any arrestee property, but transfer it, along with the detainee, to the pretrial detention facility.[10]New York City is the only police department that retains arrestee property. Unlike Chicago, New York City does not destroy the property while a criminal case is pending but will hold the property until 120 days after the termination of criminal proceedings.[11]

8. This Court decided *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) while the fully briefed summary judgment motions were awaiting decision. Petitioners asked the district court to reconsider its dismissal of their Takings Claims. (Motion to Reconsider, District Court Docket No. 201.) The City agreed "that the premise of the Court's dismissal of the plaintiffs' takings claim has been invalidated by *Knick*," but argued that the Takings Claim failed "because the City did not take the plaintiffs' property 'for public use' but rather pursuant to the City's police powers." (Response to Motion to Reconsider, District Court Docket No. 217 at 18.)

9. The district court granted the City's motion for summary judgment. (App. 20a-46a.) The district judge rejected the Takings Claim, reasoning that petitioners had failed to show a "public purpose" for the taking. (App. 44a.) The district court then turned to the Due Process Claim and concluded that the class had received

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[10] These municipalities are Newark, New Jersey, Los Angeles, California, and Portland, Oregon. (Shane Report at 12-14, District Court Docket No. 174-14 at 16-18.)

[11] The notice provided to arrestees by the New York City Police Department, which sets out the 120-day period, appears in the district court docket as Item No. 182 at 103.

adequate notice because instructions to reclaim property were available on the police department's website. (App. 25a-40a.)

10. The Seventh Circuit affirmed. (App. 1a-19a.) The court of appeals rejected petitioners' Fourth Amendment claim on the basis of *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003). (App. 9a.) Petitioners argued that this Court's post-*Lee* decision in *Manuel v. Joliet*, 137 S. Ct. 911 (2017) showed that the Fourth Amendment "applies to a continuing seizure." (App. 9a.) The court of appeals acknowledged that the Ninth Circuit had read *Manuel* this way in *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017) but concluded that *Manuel* did not control because it "dealt with pretrial confinement, not the retention of property." (App. 9a.) In addition, the Seventh Circuit viewed *Manuel* as limited to cases where "the seizure and detention [were] flawed from the outset" (App. 10a), unlike this case, where petitioner agreed that the police were entitled to inventory their property.

The Seventh Circuit then turned to the Takings Claim and concluded that there had not been any taking because petitioners had "intentionally relinquished" their inventoried property (App. 11a) and had received ample notice that their property would be forfeit if they did not reclaim it within 30 days. (App. 13a.)

REASONS FOR GRANTING THE PETITION

Police officers routinely inventory the personal property (or "effects") of arrestees "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). Many state courts view an

inventory search as creating a "temporary storage bailee."[12]

The Seventh Circuit held in this case that the power to inventory arrestee property vests the government with the right to "dispose of it as it sees fit" when the property is not reclaimed within 30 days. (App. 13a.)

Petitioners and thousands of other similarly situated persons could not reclaim their property in 30 days because they were in custody as pretrial detainees. The Seventh Circuit held that this "destroy-or-sell" policy (App. 2a) does not violate the Fourth or Fifth Amendments (App. 8a-10a) and thereby continued a circuit split on an important question about the scope of the Fourth Amendment.

I. The circuits are divided on whether the Fourth Amendment protects an individual's interest in personal property that has been lawfully seized

The courts of appeals for the First, Second, and Sixth Circuits follow the rule applied by the Seventh Circuit in this case that the "the Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property." *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999).

The court of appeals for the Fourth and Ninth Circuits follow the contrary rule, holding that the scope of the Fourth Amendment includes acts that interfere with possessory interests.

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[12] This phrase first appeared in *People v.* Ortiz, 147 Cal. App. 2d 248, 249, 305 P.2d 145, **147** (1956). *See infra* at 18.

A. The rule followed by the First, Second, Sixth, and Seventh Circuits

Fox v. Van Oosterum, 176 F.3d 342, 351 (6th Cir. 1999) is the first published appellate decision to consider whether the Fourth Amendment requires the police to return property that had been lawfully seized. There, police seized a driver's license and wallet (both belonging to Fox) during an inventory search of a lawfully seized truck. The officers agreed to return the wallet but refused to return the driver's license. Fox then brought suit under 42 U.S.C. § 1983 complaining about the refusal to return his driver's license. The district court dismissed the action and a divided panel of the Sixth Circuit affirmed.

The panel majority held "that no seizure occurred when the defendants refused to return Fox's license, and therefore no Fourth Amendment violation." 176 F.3d at 349. "Once that act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.* at 351. Judge Clay, dissenting, pointed out that the panel majority had not cited "a single case in support of the narrow view that a seizure begins and ends at the moment it takes place." *Id.* at 355 (Clay, J., dissenting).

The Seventh Circuit considered this issue in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003). There, Lee's automobile had been struck by "stray gunfire." *id.* at 458, and the police seized the vehicle to "search for, retrieve, and analyze any bullets that might have become lodged in it." *Id.* at 458-59. After the police had completed their search, Chicago informed Lee that he could retrieve his vehicle if he paid the storage and towing fees. *Id.* at 459. Lee challenged the City's right to collect these fees, arguing that demand for payment of fees

resulted in an unlawful seizure. The district court dismissed the action and the Seventh Circuit affirmed.

The Seventh Circuit concluded that the word "secure" in the Fourth Amendment limited the protections of the amendment to the initial seizure of property, after which "the individual is no longer secure in his possessory interest within the meaning of the amendment." 330 F.3d at 462. The court of appeals also relied on its decision in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) where it had rejected the concept of a "continuing seizure." *Id.* at 463.

The Second Circuit followed *Lee* in *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177 (2d Cir. 2004), a case that involved the property of a teacher suspended from employment. One of the teacher's claims involved his personal property that the school failed to return after the suspension. *Id.* at 187. The teacher argued that the failure to return the items "constitutes an unreasonable seizure." *Id.* The court of appeals disagreed, citing *Fox v. Van Oosterum*, *supra*, and *Lee v. Chicago*, *supra*, to conclude that the Fourth Amendment does not protect "an unreasonable refusal to return property." *Id.*

In *Denault v. Ahern*, 857 F.3d 76 (1st Cir. 2017), police seized a vehicle to search it for evidence of a crime. After determining that the car did not contain such evidence, the officers delivered the vehicle to a towing company, which refused to release the vehicle without payment for storage and towing charges. One of the issues on appeal was whether "the retention of the seized property, and its transfer to the tow company, violated the United States Constitution." *Id.* at 83. The First Circuit followed the cases cited above and concluded that when "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 83.

The court of appeals in *Denault* considered whether a different result was required by this Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), but held that *Manuel* was limited to seizure of "a person rather than property." *Denault*, 857 F.3d at 84. The First Circuit suggested that the appropriate remedy would be under "the Fifth Amendment's express protections for property." *Id.*

The Seventh Circuit in this case likewise concluded that *Manuel* did not undermine its previous holding in *Lee v. City of Chicago*, *supra*. In the view of the court of appeals, *Manuel* is not controlling because it "dealt with pretrial confinement, not the retention of property" (App. 9a) and is limited to cases where "the seizure and detention [is] flawed from the outset." (App. 10a.)

The Seventh Circuit's view of *Manuel* is inconsistent with the Court's opinion in that case, which carefully separated the plaintiff's claim about his initial arrest and his claim about his "subsequent weeks in custody." *Manuel*, 137 S. Ct. at 919.

Moreover, the Fourth Amendment does not provide any different protection for seizures of the person and seizures of effects. As Justice Gorsuch pointed out in his dissenting opinion in *Torres v. Madrid*, 141 S. Ct. 989, 1007 (2021), "The Fourth Amendment's Search and Seizure Clause uses the word "seizures" once in connection with four objects (persons, houses, papers, and effects)." *Id.* at 1007.

Finally, as Professor Sacharoff notes, none of these cases addressed the history of the Fourth Amendment. Laurent Sacharoff, *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 IOWA L.

REV. 1643, 1696 (2020). These cases "confuse[] seizures with searches" because "even after completion of the search, the seizure continues beyond the initial taking of the items." *Id.* at 1697. Thus, "the Fourth Amendment should continue to apply to the seizure of property after the initial taking." *Id.* This is the rule followed by the Fourth and Ninth Circuits.

B. The contrary rule followed by the Fourth and Ninth Circuits

The Fourth Circuit first recognized that retaining property after a lawful seizure may violate the Fourth Amendment in *Moms, Inc. v. Willman*, 109 F. App'x 629 (4th Cir. 2004). There, officers stole property that had been seized pursuant to a search warrant. The court of appeals held that the theft, which occurred after the initial seizure, violated the Fourth Amendment but concluded that that right had not been "clearly established when the theft allegedly occurred."[13] *Id.* at 636.

The Fourth Circuit again applied the Fourth Amendment to conduct that occurred after an initial seizure of property in *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). That case arose from the erroneous designation by the municipality of Pressley's home and yard as the site of a public trail. *Id.* at 482. Pressley filed suit after the City refused to withdraw the designation, which had caused members of the public to travel "across Presley's yard, leaving behind trash, damaging the vegetation, and sometimes even setting up overnight camp sites." *Id.* at 482.

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[13] *Moms* was decided before *Pearson v. Callahan*, 555 U.S. 223 (2009), where the Court abrogated *Saucier v. Katz*, 533 U.S. 194 (2001) and authorized the lower federal courts to resolve the "clearly established" question before deciding constitutional issues.

A divided panel of the Fourth Circuit held that the municipality's action violated the Fourth Amendment because it had caused "meaningful interference with an individual's possessory interests in that property." 464 F.3d at 482, quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Judge Traxler dissented, asserting that the Fourth Amendment should be limited to "relatively brief and completed seizures" and should not apply to a "continuing seizure." 464 F.3d at 494 (Traxler, J., dissenting).

The Ninth Circuit followed the Fourth Circuit in *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017). There, officers had impounded a vehicle because the driver had a suspended license. *Id.* at 1195. The officers insisted on holding the vehicle for 30 days, relying on a state statute. *Id.* The vehicle owner challenged the 30-day hold as unreasonable under the Fourth Amendment. *Id.* at 1196.

The Ninth Circuit agreed with the vehicle owner, holding that "[t]he Fourth Amendment doesn't become irrelevant once an initial seizure has run its course." 859 F.3d at 1197.[14] The court of appeals relied on *Manuel v. City of Joliet*, *supra*, to support its disagreement with the decision of the Seventh Circuit in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003).

The Ninth Circuit reaffirmed this view of the Fourth Amendment in *Sandoval v. County of Sonoma*, 912 F.3d 509 (9th Cir. 2018). There, after lawfully seizing a vehicle, the police held it for 30 days pursuant to state law and county policy. *Id.* at 513-14. The court of appeals upheld

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[14] The Ninth Circuit did not apply this holding to the theft of items that had been seized pursuant to a search warrant in *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) because the alleged theft in *Jessop* had occurred in 2013, four years before *Brewster*. *Id.* at 942.

the grant of summary judgment to the motorist because the municipality could not justify its continued retention of the vehicle. *Id.* at 516-17.

The conflict between the circuits is well-defined and is ripe for resolution.

C. The conflict is ripe for resolution

The decision of the Tenth Circuit in *Springer v. Albin*, 398 F. App'x 427 (10th Cir. 2010) shows that the framework the Court adopted in *Pearson v. Callahan*, 555 U.S. 223 (2009) for resolving claims of qualified immunity makes it unlikely that other circuits will take sides on the conflict presented in this case.

Springer arose from execution of a search warrant and seizure of currency; the plaintiff alleged that the officers had stolen some of the currency. The Tenth Circuit noted the circuit split discussed above, 398 F. App'x at 434-36 and declined to resolve the constitutional question because the absence of clearly established law entitled the officers to qualified immunity. *Id.* at 436. The Ninth Circuit reached the same result in *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) when it upheld a grant of qualified immunity because the officer's acts (stealing property that had been described in a search warrant) pre-dated the Ninth Circuit's decision in *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017) (discussed above at 15 n.14) and was factually distinguishable from that case. *Jessop*, 936 F.3d at 941-42.

This case, brought against a municipality because of an express policy, comes to the Court without any issue of qualified immunity, *Owen v. City of Independence*, 445 U.S. 622, 638 n.18 (1980), and provides the Court with an opportunity to resolve the conflict between the circuits.

II. Recent scholarship demonstrates that the Fourth Amendment protects "effects" that remain in the custody of the government after a lawful seizure

The Fourth Amendment should "*provide at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in original). Recent scholarship provides "precise guidance from the founding era," *Riley v. California*, 573 U.S. 373, 385 (2014), on the Framer's view that the Fourth Amendment protects "effects" lawfully seized.

Professor Brady "provides a new historical account of Founding-era debates focused specifically on personal property" in her carefully researched article *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L. J. 946, 951 (2016). In her "review of the textual history of effects," *id.* at 981, Professor Brady notes that the word "effects" in the Fourth Amendment replaced "their other property" in a draft proposed by James Madison, *id.* at 984, and, as this Court concluded in *Oliver v. United States*, 466 U.S. 170, 177 & n.7 (1984), meant "personal property." *Id.* at 985-987.

Professor Brady's thorough canvassing of the historical record shows that "effects" were included in the Fourth Amendment "because of the risk of mishandling or damage generally associated with interferences with personal property," as well as the "harms to privacy and dignity that could be incurred by their inspection." *Id.* at 987. "Interferences with personal property threatened privacy interests with respect to that property but also a person's interests in continued possession and control of the unadulterated object." *Id.* at 994.

This Court recognized a person's interest in continued possession in *Warden v. Hayden*, 387 U.S. 294 (1967) when it quoted from *Entick v. Carrington* 19 How.St.Tr. 1029, 1066 that one of the evils of general warrants is that they "enabled 'the party's own property (to be) seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.'" 387 U.S. at 304.

The Fourth Amendment permits a police department to inventory the personal property of an arrestee, *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983), "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). But the Fourth Amendment does not drop out of the picture after the property is originally seized, just as it does not fade away after an arrestee's probable cause hearing. *Manuel*, 137 S. Ct. at 919. Under the original understanding of Fourth Amendment, which places the protection of "effects" and "persons" on equal footing, the government's treatment of property after it is seized must be reasonable.

The rule applied by the court below gives the government free rein to handle arrestee property "as it sees fit." (App. 13a.) In this case, the rule permits the City of Chicago to sell or destroy arrestee property simply because the owner of the property is in custody as a pretrial detainee.

The general view among the state courts is that a police department that seizes arrestee property is a "temporary storage bailee." *People v. Ortiz*, 147 Cal. App. 2d

248, 249, 305 P.2d 145, 147 (1956).[15] The Framers understood that a bailment required the bailee to keep the property safe. 2 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 452. This case provides the Court with an opportunity to restore this portion of the Fourth Amendment to its intended meaning.

III. The importance of resolving the conflict

The thousands of cell phones and pieces of jewelry that the City of Chicago sells or destroys under its policy are of special importance to petitioners and to other persons impacted by the policy.

Cell phones are especially valuable property, collecting "in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record." *Riley v. California*, 573 U.S. 373, 394 (2014). Jewelry is also valuable property; some pieces have "pretium affectionis," possessing a value to the owner greater than its cost.

The Seventh Circuit sought to minimize the harm of Chicago's "destroy-or-sell policy" by asserting that pretrial detainees who failed to engage "a representative" were voluntarily abandoning their personal property.

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[15] *Ortiz* appears to the first case to use this phrase, which has been followed in numerous decisions. *See, e.g., Heffley v. State*, 83 Nev. 100, 103, 423 P.2d 666, 668 (1967); *St. Clair v. State*, 1 Md. App. 605, 615, 232 A.2d 565, 570 (1967); *State v. Wallen*, 185 Neb. 44, 47, 173 N.W.2d 372, 374 (1970); *People v Robinson*, 320 N.Y.S.2d 665, 669, 36 A.D.2d 375, 378, (1971); *State v. Phifer*, 39 N.C. App. 278, 286, 250 S.E.2d 309, 314 (1979); *State v. Peck*, 194 Wash. 2d 148, 155, 449 P.3d 235, 239 (2019).

(App. 13a.) This argument is similar to that rejected by the Court in *Griffin v. Illinois*, 351 U.S. 12 (1956) when it refused to "sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by [the City of Chicago]" and quoted the famous aphorism of Anatole France.[16] *Id.* at 23 (Frankfurter, J., concurring). The Court should not be a party to such a result.

This case is an excellent vehicle for the Court to answer the important questions raised and to resolve the circuit's conflicting interpretations of the Fourth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[16] "'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' [citing] John Cournos, A Modern Plutarch, p. 27." *Griffin v. Illinois*, 351 U.S. at 23 (1956) (Frankfurter, J., concurring).