APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1934

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs-Appellants,

v.

City of Chicago,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 12 C 06144 — **John J. Tharp, Jr.**, *Judge.*

ARGUED FEBRUARY 25, 2021–DECIDED AUGUST 18, 2021

Before EASTERBROOK, WOOD, AND KIRSCH, *Circuit Judges.*

WOOD, *Circuit Judge.* The City of Chicago requires its police officers to seize, inventory, and store any property belonging to an arrested person, if that property is not permitted in the Cook County Jail. After 30 days, the City deems abandoned any property unclaimed by the owner or her authorized representative, and it sells or destroys the presumptively abandoned items. Chi., Ill., Municipal Code § 2-84-160 *et seq.* (2007). Blake Conyers, Lamar Ewing, and Kevin Flint seek to represent hundreds of people whose property has been destroyed under this regime. Invoking 42 U.S.C. § 1983 and several constitutional provisions, they challenge the City's policy as unconstitutional.

It is important to note at the outset that the City's right to seize and inventory the property upon arrest is not at issue. It is well settled that it may do so. See *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). Likewise, plaintiffs do not contend that municipalities are not permitted to manage seized property. Their focus is instead on the policy the City has chosen for property owned by arrestees held at the Jail for more than the permitted 30-day period. As applied to that property, they contend, the City's destroy-or-sell policy violates the Fourth, Fifth, and Fourteenth Amendments, as well as Illinois law. While we can understand their frustration, however, we find no error in the district court's decision that they have failed to state any claim on which relief can be granted. We therefore affirm the judgment of the district court.

I

Since 2007, the City of Chicago has had an explicit policy pursuant to which it keeps possession of the property of each arrestee transferred to the custody of the Sheriff of Cook County for detention at the Cook County Jail. There are a few exceptions to the confiscation policy. The Sheriff allows arrestees to keep certain items, including outer garments, U.S. currency of $500 or less, one plain metal ring without stones, government-issued identification cards, prescription glasses and medications, shoelaces, belts, keys, court documents, police receipts, credit cards, and debit cards. See Chicago Police Department (CPD) Notice 07-40, as amended by CPD Special Order S06-01-12. (The City has amended this list since the initiation of this lawsuit, but these changes do not affect our analysis.)

At the time of Blake Conyers's arrest in February 2012, CPD seized from his person an earring, a bracelet, and two cell phones. Lamar Ewing was required to turn

over his wallet, a debit card, a library card, and two cell phones in connection with his December 2012 arrest, and Kevin Flint relinquished a cell phone and a ring with a small stone at his January 2013 arrest. All three men were then transferred to the Cook County Jail. Pursuant to CPD Notice 07-40, the City kept possession of each one's property under a unique tracking number, sending it to its Evidence and Recovered Property Section ("Recovered Property," or "ERPS") for storage.

Between December 1, 2011, and December 31, 2013, the City's policy was to give every arrestee an inventory receipt that identified the seized property. The receipt included a short note that explained the governing procedures. It advised the holder to contact Recovered Property by phone; it informed the arrestee that he or she should have received another form entitled "Notice to Property Owner or Claimant"; and it told him that he could either visit the CPD's website for a complete copy of the Notice or go back to the CPD facility at which his property was inventoried and there obtain a hard copy. The hard-copy Notice stated in part:

> You may get inventoried property back by following the procedures detailed below. Information on how to get back inventoried property is also available at www.ChicagoPolice.org. If you have any questions, please contact the CPD Evidence and Recovered Property Section ("ERPS") at (312) 746-6777. ERPS is located at 1011 S. Homan Avenue, Chicago, Illinois 60624 and is open Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).
>
> **Property Available for Return to Owner:**
>
> If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at ERPS.

> If you do not contact the CPD to get your property back within 30 days of the date on this receipt, it will be considered abandoned under Chicago Municipal Code Section 2-84-160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq.
>
> If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get money returned to you by sending copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to: Chicago Police Department Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624. If the property is money, a check will be sent to you at the facility where you are jailed or incarcerated.

The CPD website, which the hard-copy Notice and receipt directed arrestees to visit, provided additional information about non-monetary property and third-party authorized representatives:

> If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get personal property returned to you by designating a representative in writing, pursuant to the procedures of the facility where you are jailed or incarcerated. You must have your designated representative bring your receipt, the written authorization designating your representative and authorizing your representative to pick up your property, and a photo ID to: Chicago Police Department[,] Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624 during business hours, Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).

None of the plaintiffs contacted the CPD to reclaim his property in any of the ways designated in these notices within the required 30-day period, and so the City destroyed it.

Conyers initiated this lawsuit on August 3, 2012. The third amended complaint, filed on September 13, 2013, is the first one that the district court considered. In it, plaintiffs alleged that the notice the City furnished was not adequate to alert them to the fact that CPD would destroy their personal property if they did not claim it within 30 days after they were transferred from CPD's custody to that of the Sheriff. The inadequate notice, they asserted, violated their rights under the Fourth and Fourteenth Amendments to the Constitution, as well as the Takings Clause of the Fifth Amendment. See U.S. CONST. amends. IV, V, XIV.

The district court found plaintiffs' Fourth Amendment claim foreclosed by our decision in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), and dismissed it with prejudice. The takings theory met the same fate: the court found that plaintiffs' effort to assert a facial violation of the Takings Clause failed for lack of an allegation that the City took their property without providing just compensation. To the extent plaintiffs were complaining about lack of adequate notice, the court ruled, the correct theory was due process. Plaintiffs fared no better with an as-applied approach to takings, because (contrary to the requirements of the then-applicable law) they had not exhausted state-court remedies. See *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). (The Court overruled *Williamson County* in *Knick v. Township of Scott, Pa.*, —— U.S. ——, 139 S. Ct. 2162 (2019), and so the district court's exhaustion rationale is no longer correct. We have more to say about this below.)

Finally, the district court found that plaintiffs lacked standing to bring a Fourteenth Amendment due-process claim because they had not alleged that they relied on the notice to their detriment.

In response to these adverse rulings, plaintiffs filed a fourth amended complaint on April 21, 2015. The court dismissed the Fifth Amendment claims without prejudice, again on exhaustion grounds, but it allowed an updated due-process count to proceed. Plaintiffs' primary point was that the City's policy of destruction or sale was not publicly available, and so it did not alert anyone to the imminent loss of his property. Plaintiffs also criticized the hard-copy Notice for failing to describe the procedures through which incarcerated persons could secure the return of non-monetary property or the details about how a third-party representative could retrieve the property. Although that information was found on CPD's website, and the hard-copy Notice directed arrestees to visit that site, plaintiffs asserted that jail detainees did not have ready access to the Internet and thus as a practical matter could not benefit from information found there. In their view, nothing but individualized notice, furnished before any step was taken to sell or destroy the property, would be sufficient to satisfy due-process requirements. See *Gates v. City of Chicago*, 623 F.3d 389, 412 (7th Cir. 2010) (requiring individualized notice in the absence of publicly available policies). The court found that the question whether Cook County detainees could obtain access to the Internet was a factual dispute that required further development in the record.

Ahead of discovery geared toward that dispute, the district court certified the following class:

> 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.

Both parties filed motions for summary judgment. The court boiled the factual-dispute analysis down to three questions, affirmative answers to which would establish that the City had provided plaintiffs with adequate notice of its procedures:

> (1) does the content of the website satisfy the City's due process obligations? (2) did Cook County Jail inmates have access to the internet during the class period? and (3) if Cook County Jail inmates did have access, has the City sufficiently established that the webpage was active and online during the class period?

With respect to question 1, everyone agreed that the content of the notice on the website was sufficient. There was less harmony about question 2. The City argued that law librarians and social workers at the Jail, called Correctional Rehabilitation Workers (CRWs), routinely retrieved information from the Internet on behalf of detainees. Detainees could also submit requests to the CRWs to contact the Recovered Property Section on their behalf. (Perhaps for obvious reasons, CPD units do not accept collect calls.) Plaintiffs challenged the CRW assistance system as unavailable in practice, but the district court found that they failed to provide any convincing evidence in support of their argument. In the interest of completeness, the court then moved to the third question: Can the City establish that the webpage was active during the class period?

The City presented a June 13, 2013, screenshot of the CPD website that then-Commander of the Recovered Property Section, Michael J. Mealer, had used during a

deposition for another unrelated but factually similar matter. The screenshot by itself does not show whether the website was active during the class period. But there was more: Mealer provided a declaration confirming that the screenshot accurately captured the CPD website for the entirety of the class period. The court found the City's evidence sufficient to answer the third and final question affirmatively, and so it granted the City's motion for summary judgment.

We alluded briefly to *Knick* earlier. As we noted, during the time this lawsuit was pending in the district court, a significant change in takings law took place. In *Knick*, the Supreme Court announced that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." 139 S. Ct. at 2170. Thus, contrary to *Williamson County*, plaintiffs do not have to exhaust state-court remedies prior to bringing a takings claim. In light of *Knick*, Plaintiffs asked the court to reconsider its dismissal of their Takings Clause claim. The court declined, finding that plaintiffs had not presented enough evidence to support a finding that the destruction of their property was done for "public use." Plaintiffs now appeal from all these rulings.

II

A

We first consider the question whether plaintiffs' property was seized by the City in violation of their Fourth Amendment rights. As the district court correctly recognized, the leading case on this point is our decision in *Lee*. That case involved the efforts of plaintiff Lee to retrieve his car from the City after the police no longer needed it for evidentiary purposes. *Lee*, 330 F.3d at 458–59. While the City possessed the car, it had spray-painted prominent inventory numbers in several places,

thus ruining the paint job. *Id.* at 459. Invoking the Fourth Amendment, Lee complained about both the City's insistence that he pay towage and storage fees before recovering his car and about the damage from the spray-painting. *Id.*

We began our Fourth Amendment analysis by noting that Lee did not challenge the initial impoundment of the car for evidentiary purposes. *Id.* at 460. Nor did Lee make any claim related to the length of time the City took to complete its search of the car. *Id.* Instead, he contended that its refusal to return the car until Lee paid the storage and towing fees amounted to an additional seizure. *Id.* He also argued that the City's retention of the car after its law-enforcement interest expired was an impermissible seizure. *Id.* We rejected both points. "At bottom," we concluded, "Lee's complaint against the charging of towing and storage fees concerns the fairness and integrity of the criminal-justice process, and does not seek to constrain unlawful *intrusions* into the constitutionally protected areas of the Fourth Amendment." *Id.* at 465 (emphasis in original).

If *Lee* stood alone, it might indeed resolve this part of the plaintiffs' case. But it does not. Plaintiffs contend that the Supreme Court's later decision in *Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911 (2017), shows that *Lee* wrongly rejected the idea that the Fourth Amendment applies to a continuing seizure. See also *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017) (finding that a "seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification."). But for at least two reasons, *Manuel* does not help them. First, *Manuel* dealt with pretrial confinement, not the retention of property. More importantly, even if we were

to equate persons and property for these purposes, it would not help our plaintiffs. *Manuel* was about a defendant's ability to show that a finding of probable cause—necessary to support the detention—was based upon fabricated evidence. 137 S. Ct. at 914. In other words, were the seizure and detention flawed from the outset? No such question arose in *Lee*, and no such question exists in our case. All we are concerned with is the distinct question whether the City had a duty to release the property sooner, or on more favorable terms. As *Lee* recognized, that issue falls more naturally under the Due Process Clause of the Fourteenth Amendment, or perhaps the Takings Clause of the Fifth Amendment. The district court thus correctly rejected the plaintiffs' Fourth Amendment theory.

B

At the time the district court had this case, the Supreme Court had a firm rule that no Takings Clause case could go forward until all state remedies—including state-court options—had been exhausted. See *Williamson County*, 473 U.S. at 195, 105 S.Ct. 3108. But the Court announced a new rule in *Knick*, which held that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it," and that the owner had no obligation to exhaust state remedies before suing. 139 S. Ct. at 2170.

Although the district court's reliance on the now-repudiated exhaustion rule meant that it did not reach the merits of the plaintiffs' takings claim, our review of this legal issue is *de novo*, and so nothing prevents us from examining on our own whether summary judgment was nevertheless proper on this aspect of the case. A person who asserts a Takings Clause claim must show several things: (1) that the governmental entity "took" his

property, either through a physical taking, see *Cedar Point Nursery v. Hassid*, —— U.S. ——, 141 S. Ct. 2063, 2071, (2021), or through unduly onerous regulations, *id.* at 2071–72; (2) that the taking was for a public use, see *Kelo v. City of New London*, 545 U.S. 469, 477, (2005); and (3) that, no matter what type of property (real or personal) was taken, the government has not paid just compensation, see *Horne v. Dep't of Agriculture*, 576 U.S. 350, 358 (2015).

Implicit in this scheme is the predicate requirement that the private property must belong to the plaintiff. This is not one of those situations in which a plaintiff would be permitted to assert third-party rights. See *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (third-party rights may be raised only if the party raising the claim has a close relationship with the person who possesses the right, and only if there is a hindrance preventing the possessor from protecting his own interests). And the case of abandoned property is, if anything, even more straightforward. As we wrote in *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), "[*o*]*f course* the state can take abandoned property without compensation—there is no owner to compensate." *Id.* at 581 (emphasis in original).

In our case, we can assume that the City "took" the personal-property items from the plaintiffs, that there was a valid public use stemming from the City's asserted (and unrefuted) constraints on storage space for seized property, and that the plaintiffs were not compensated for the items in question. The key question is whether the City was entitled to treat this property as abandoned—that is, intentionally relinquished—when the plaintiffs failed to follow the reclamation procedures the City offered. Nothing compels the City to hold property forever. At the other end of the spectrum, we can assume

that a statutory declaration of abandonment after only one day would be untenable. But where, between a day and forever, does the Constitution draw the line?

The City argues that because its original seizure of the property was done pursuant to its police powers, not its power of eminent domain, there are no limits on its authority to dispose of the property. It relies on *Bennis v. Michigan*, 516 U.S. 442 1996), but there are significant differences between *Bennis* and the present case. In *Bennis*, a Michigan court ordered the forfeiture on public-nuisance grounds of a car that was jointly owned by Husband and Wife, when Husband was caught in the car engaged in sexual activity with a prostitute. *Id.* at 443. Wife argued that the forfeiture, as applied to her, was an unconstitutional taking, but the Court said no. *Id.* at 452, 116 S.Ct. 994. Critically, the Michigan court's order transferred 100% of the ownership of the car to the state, and it did so permanently, for a punitive reason. See *id.* at 443, 451. In that situation, the Supreme Court said that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* at 452, 116 S.Ct. 994.

In the case before us, however, the City did not seize the plaintiffs' property with an intent to keep it permanently; its motive for the original seizure related to safety at the Jail, not punishment of the property owner; and the 30-day limit reflected the practical constraints on storage capacity. Both the written notice and the website instructions disclaim any intent either to punish the owner or to retain the property. To the contrary, the City offered several ways for the detainee to reclaim his property, and it facilitated that process by giving Jail

inmates access to Correctional Rehabilitation Workers and offering a way for a chosen representative to recover the property. Only if all of that failed did the City deem the property abandoned. Practical, not punitive, considerations lie behind the destroy-or-sell regime that the City follows. *Bennis*, in short, is a poor fit for the City's system of controlling property in the hands of detainees.

Nonetheless, several considerations persuade us that there is nothing unconstitutional about the City's decision to deem property abandoned after 30 days have elapsed. First, the detainee knows exactly what has been taken from him and when that confiscation occurred. Second, the detainee is told both how (either personally or through a representative) to get his property back and how quickly he must do so. Finally, the hard-copy Notice plainly states that "[i]f you do not contact the CPD to get your property back *within 30 days of the date on this receipt*, it will be considered abandoned under Chicago Municipal Code Section 2-84-160, and the forfeiture process will begin ...." (Emphasis added.) This all looks plain to us—plain enough to entitle the City to treat as abandoned any property that remains unclaimed after 30 days have gone by. And, as *Cerajeski* holds, genuinely abandoned property does not belong to anyone, 735 F.3d at 581, and thus the City may dispose of it as it sees fit.

C

We acknowledge that our takings analysis is, to a degree, intertwined with the adequacy of the notice that members of the plaintiff class received. But notice is quintessentially an element of due process, not the power of government to take property. Due process demands both adequate notice and an opportunity to be heard before the state may take property. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Black Earth Meat Market, LLC v. Village of*

Black Earth, 834 F.3d 841, 850 (7th Cir. 2016). The district court recognized that the question whether the notice provided by the City met constitutional standards was a serious one, and so it allowed discovery to proceed on that issue. At the summary-judgment stage, the court assumed that the initial notice might not have been enough by itself to satisfy due process. On the other hand, it thought that the information available on the CPD website was adequate, *if* it was accessible to the Jail inmates. As we noted earlier, the court identified three subsidiary questions: (1) the adequacy of the content found on the website; (2) the adequacy of inmate access to the website; and (3) proof that the website was active and online during the class period. It answered all three in the affirmative, and on that basis concluded that the City's notice was satisfactory under the standards enunciated in *Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010).

We agree with the district court that the answer to the first question favors the City. Indeed, as we just noted, plaintiffs do not argue that the *content* found on the website is too terse or omits critical points. It explains just what a detainee must do, either in person or through a delegate, to ensure the recovery of property within the 30 days the City provides.

As for the third question—whether the webpage was active during the class period—the City presented evidence showing that it was, and plaintiffs pointed to nothing but speculation to undermine that showing. The City submitted two pieces of evidence to support its position: a screenshot of a document showing the webpage, and the testimony of the then-Commander of Evidence and Recovered Property, Michael J. Mealer. Mealer confirmed that the document shown in the screenshot was

an accurate representation of the CPD website for the entirety of the class period.

The plaintiffs contend, in response, that Mealer could not authenticate the screenshot, because pursuant to our holding in *Specht v. Google*, only someone with personal knowledge of the reliability of the archive service from which the screenshots were retrieved can do so. 747 F.3d 929, 933 (7th Cir. 2014). The City did not rely on an archive service, however; it relied instead on the head of the section, who had personal knowledge of the information on the website. Mealer also testified that before authenticating the screenshot, he reviewed it and found it to be the same as the one about which he testified in a different case, *Elizarri v. Sheriff of Cook County*, No. 07 C 2427, 2011 WL 247288 (N.D. Ill. Jan. 24, 2011). Nothing in Federal Rules of Evidence 1002 (requirement of an original "writing, recording, or photograph") or 1006 ("summaries to prove content") undermines this conclusion, as neither of those rules addresses the issue of screenshot authentication. The City thus established the third point the district court identified.

That leaves the second and most difficult: did the undisputed facts show that, as a practical matter, the Jail inmates had access to the CPD's website, and hence to the vital information it contained about the way to recover seized property?

The Deputy Director of Inmate Services, John Mueller, offered the following testimony on that point during his deposition:

Q: If an inmate wants or needs access to the internet for some reason, are there procedures in place to handle those requests?

A: Yes.

Q: Can you describe those for us?

A: It's an inmate request procedure. It's a document that the – that's available on each of the living units. The inmate fills it out. It's submitted to the CRWs [Correctional Rehabilitation Workers] on a daily basis, and when the CRW goes to that living unit to respond to the request, they provide the response to their request.

Q: Let me ask you a couple questions about what you just said. The request form that the inmates use is there available in the living unit; is that right?

A: They are. We also accept their request on blank paper as well. It's not limited to a form.

Q: Are they submitted to some type of drop box or other area where the CRWs then check for them?

A: Sure. What happens is the inmates through the course of 24 hours will fill out these request – these request slips are on each living unit. They fill them out. They hand them to the correctional officer. The correctional officer then deposits those into a central security office location at the end of his or her shift. At the beginning of every CRW shift they visit the security office and obtain those documents, sort them out to whose living unit is assigned to the particular CRW then reviews those requests and provides the responses to them.

Q: Let me ask that with regard to a notification of this nature like we're looking at, even if we're not talking about this particular form, would there be any barrier or concern to you as a former social worker with regard to obtaining that information for an inmate?

A: No.

Q: Do you know – let me ask you this: Is that something you had ever done back when you were an actual social worker on the ground?

A: I can't remember for that time period, but the honest situation regarding this is that the releasing of property and the assistance of obtaining CPD-

held property is a very natural, common occurrence at the jail that they wouldn't necessarily refer to this or need to refer it for direction on how to do it. We have regular contact with ERPS to achieve what needs to be done to release the property so we don't – even though we had access to it, we wouldn't necessarily need to refer to it for a procedure.

Q: Let me ask you this which is, as a supervisor would there be any concerns that you would have with regard to one of your CRWs getting information from Chicago police on the web and providing it to an inmate?

A: No, not at all.

Q: This is a practice that's performed by all the CRWs you supervise, correct?

A: Correct.

That portion of Mueller's testimony is the primary basis on which the district court relied in finding that the jail inmates could indeed obtain access to the information on the CPD's website, indirectly through the CRWs, if not directly on their own.

The plaintiffs urge that this is not good enough, but they provide no evidence that contradicts Mueller's account. They accuse the Sheriff of misinforming the detainees in his custody, but they do not identify anyone in the class who actually tried to gain access to the Internet in this way and was unsuccessful. Plaintiff Conyers said that he never went to the CPD website, either before, during, or after his time in jail. When detailing his efforts to get his jewelry and cell phone back while he was detained, he said that he did not have access to the Internet. But that fact alone is not enough to enable him to prevail. He might have meant only that he lacked *personal* access and did not want to work through the

CRWs, which would be inadequate to make out a due-process claim. But even assuming that he meant to say that he lacked access to the Internet altogether while he was in the Jail, this statement by itself does not do enough to counter Mueller's testimony regarding the procedures for detainee access to the Internet. Perhaps Conyers lacked access to the Internet because the CRW from whom he sought help negligently failed to follow the procedures that Mueller outlined. This, too, is not enough to support a due-process violation. See *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (a single negligent failure to follow an otherwise sound procedure does not adequately allege a violation of the Due Process Clause), overruled in part by *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986).

All the district court could do, and all we can do, is to work with the record that we have. Whether Internet access in one setting or another is adequate depends entirely on the facts. The plaintiffs here did not show that they were unable to find out the details of the property-recovery process that were disclosed on the CPD's webpage. Nor did they offer enough to counteract Mueller's description of the role that the CRWs played to facilitate that access. Plaintiffs had the burden of proof on this issue, and so it was their responsibility to show why the system the Sheriff was using was constitutionally inadequate. After independently reviewing the facts presented at summary judgment, as we must, we conclude that plaintiffs did not meet that burden.

III

In ruling for the City, we do not mean to imply that plaintiffs brought a meritless or frivolous case. Far from it: 30 days is a short time for taking all the necessary steps to retrieve property that was seized. It may be especially difficult if the detainee is forced to work through

an intermediary. But we can find no support in due-process cases for the proposition that the City must serve as an involuntary bailee of property for lengthy periods of time, incurring all of the costs and responsibilities that such a status would implicate. Nor do we see any merit in the plaintiffs' takings or Fourth Amendment theories. We therefore AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12-cv-06144

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs,

v.

City of Chicago

Defendant.

MEMORANDUM OPINION AND ORDER
May 18, 2020

John J. Tharp, Jr., United States District Judge

Plaintiffs Blake Conyers, Lamar Ewing, and Kevin Flint, individually and on behalf of a class, bring claims under 42 U.S.C. § 1983 against the City of Chicago ("City"). The plaintiffs allege that the City's policies pertaining to the destruction of personal property seized from arrestees at the City's police stations violate the Due Process Clause of the Fourteenth Amendment. Before the Court are the City's motion for summary judgment, Def.'s Mot. for Summ. J. ("City's MSJ"), ECF No. 173, the plaintiffs' motion for partial summary judgment, Pls.' Mot. for Partial Summ. J. ("Plaintiffs' MPSJ"), ECF No. 180, the plaintiffs' motion for reconsideration, Pls.' Mot. for Recons., ECF No. 201, and the City's motion to exclude the opinion and testimony of the plaintiffs' expert witness, Def.'s Mot. to Exclude the Op. and Test. of Melissa Gutierrez Kapheim, ECF No. 176. For the reasons stated below, the City's motion for summary judgment is granted, the plaintiffs' motions for partial

summary judgment and reconsideration are denied, and the City's motion to exclude is denied as moot.

BACKGROUND

When an individual is arrested in Chicago, the City requires its police officers to seize all property in that person's possession. Pls.' Local Rule 56.1 Statement ("Pls. Statement") ¶ 3, ECF No. 182. If the arrestee is transferred to the custody of the Cook County Sheriff, City policy dictates that only certain categories of property—outer garments, U.S. currency totaling less than $500, one plain metal ring with no stones, government-issued identification cards, prescription eyeglasses and medications, shoelaces and belts, keys, court documents and Chicago Police Department ("CPD") eTrack receipts, and credit and debit cards—accompany the individual to Cook County Jail. *Id.* ¶ 5. The City retains and inventories all other personal property. If no one claims the inventoried property within 30 days of the arrest, the City's policy has been to treat the property as abandoned and either destroy it or sell it at auction. *Id.* ¶ 14.

From December 1, 2011 until December 31, 2013, the City's policy directed employees to provide a written Notice to Property Owner or Claimant ("Notice") to any arrestee who had property seized. The Notice stated in part:

> You may get inventoried property back by following the procedures detailed below. Information on how to get back inventoried property is also available at www.ChicagoPolice.org. If you have any questions, please contact the CPD Evidence and Recovered Property Section ("ERPS") at (312) 746-6777. ERPS is located at 1011 S. Homan Avenue, Chicago, Illinois 60624 and is open Monday through Friday (8:00a.m. to 3:00p.m., closed holidays).

> **Property Available for Return to Owner:**
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> If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at ERPS. If you do not contact the CPD to get your property back within 30 days of the date on this receipt it will be considered abandoned under Chicago Municipal Code Section 2-84-160 and the forfeiture process will begin under Illinois Law, 765 ILCS 103/1, et seq.
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> If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get money returned to you by sending copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to: Chicago Police Department Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624. If the property is money a check will be sent to you at the facility where you are jailed or incarcerated.

Ex. 5 to *id.* City policy also dictated that every arrestee with inventoried property was to receive a CPD Form 34.523, an itemized receipt also known as a "Copy 4." City's Local Rule 56.1(a)(3) Statement ("City's Statement") Ex. D, ECF No. 174.

Plaintiff Conyers was arrested on or about February 26, 2012, while in lawful possession of an earring, a bracelet and two cell phones. Upon Conyers's transfer to Cook County Jail, the City retained these items and subsequently destroyed them after they went unclaimed for 30 days. Plaintiff Ewing was arrested on or about December 20, 2012, while in lawful possession of a brown wallet, a debit card, a library card, and two cell phones. The City retained these items upon Ewing's transfer to Cook County Jail and destroyed them after they went unclaimed for 30 days. Plaintiff Flint was arrested on or

about January 1, 2013, while in lawful possession of a cell phone and a ring. The City retained and inventoried the property before destroying it or selling it at auction after no one claimed it for thirty days.

The plaintiffs subsequently filed suit against the City and alleged violations of the Fourth, Fifth, and Fourteenth Amendments. In granting the City's motion to dismiss the Third Amended Complaint, the Court dismissed the Fourth Amendment claims with prejudice. Mem. Op. and Order, ECF No. 80. The Court later granted in part and denied in part the City's motion to dismiss the Fourth Amended Complaint ("FAC," ECF No. 81); the Court dismissed the Fifth Amendment claims without prejudice pending exhaustion of state remedies but allowed the Fourteenth Amendment claims to proceed. Mem. Op. and Order, ECF No. 95. In the FAC, the plaintiffs put forth a new Fourteenth Amendment theory in which they argued that the City's policy of destroying or selling unclaimed property was not a publicly available policy (*e.g.*, dictated by statute), and thus the City was required to give individualized notice sufficient to satisfy due process. The Court agreed with the plaintiffs' statement of law, explaining that while due process does not mandate individualized notice of state law remedies when they are publicly available, *see City of W. Covina v. Perkins*, 525 U.S. 234 (1999), such notice is required when the policies are not generally available to the public. *See Gates v. City of Chicago*, 623 F.3d 389 (7th Cir. 2010).

The plaintiffs then argued that both the Notice and Copy 4 only referred to monetary property and thus did not provide any notice as to the procedures required to reclaim non-monetary items. The City countered that both the Notice and the Copy 4 referred the reader to the CPD website, where there was full documentation of

the relevant policy. The parties disputed, and continue now to dispute, whether the plaintiffs could use the internet at Cook County Jail to access the website, and also whether the webpage to which arrestees were directed by the City had been active during the relevant class period of December 1, 2011 to December 31, 2013.[1] The Court, taking this factual dispute into account, ruled that the FAC adequately alleged a due process claim:

> Here, too, the City's procedures for recovering inmate property were controlled by an internal City procedure and not by a state statute readily available to the public. As in *Gates*, *West Co*[ ]*vina* is therefore inapposite. The question that remains is whether the City provided notice of that procedure to the point of satisfying due process. As the Court explained in its prior opinion, the notice provided to incarcerated individuals did not explain how to obtain the return of non-monetary personal property so, standing alone, it is insufficient. In response, the City indicates they provided information on how to recover seized inmate property on the Chicago Police Department website. Though there is reason to doubt that the information available on the web was readily available to detainees, ultimately that is a factual matter disputed by the parties.

Mem. Op. and Order 14-15, ECF No. 95.

After conducting discovery geared toward that factual dispute, the parties filed dueling motions for summary judgment, the plaintiffs filed a motion to reconsider the previous dismissal of their Fifth Amendment claim,

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[1] The Court also later granted the plaintiffs' motion for class certification. Mem. Op. and Order, ECF No. 138.

and the City filed a motion to exclude the plaintiffs' expert. The Court will address each motion in turn.

DISCUSSION

I. The Procedural Due Process Claim

Generally speaking, courts grant summary judgment for the moving party when "there is no genuine dispute as to any material fact" and those undisputed facts entitle the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(a). For nonmoving parties to prevail, they must "set forth specific facts showing that there is a genuine issue for trial." *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 694 (7th Cir. 2006) (internal citations omitted). A mere "scintilla" of evidence in nonmoving parties' favor is insufficient, as they must demonstrate that there is enough evidence to support a favorable jury verdict. *Id.* Here, both sides have moved for summary judgment on the plaintiffs' due process claim. "Cross motions must be evaluated together, and the court may not grant summary judgement for either side unless the admissible evidence as a whole—from both motions—establishes that no material facts are in dispute." *Bloodworth v. Village of Greendale*, 475 Fed. App'x 92, 95 (7th Cir. 2012).

Because during the class period neither the Notice nor the Copy 4 included information on its face about the procedures for reclaiming non-monetary property, the City's motion for summary judgment hinges on the key issue of whether the plaintiffs and class members had access to a set of more complete instructions that the City claims were on the CPD website during the class period. As a result of the class certification defining the class as those incarcerated for at least 30 days following their arrest between December 1, 2011, and December 31, 2013, analysis of the website can be distilled down to three major questions: (1) does the content of the website satisfy the City's due process obligations? (2) did Cook County

Jail inmates have access to the internet during the class period? (3) if Cook County Jail inmates did have access, has the City sufficiently established that the webpage was active and online during the class period? If all three questions can be answered affirmatively without any genuine dispute of material fact, then the City has adequately provided notice of its procedures per *Gates*.

With respect to the first issue, the additional instructions referred to by the City provide specific and detailed notice of the procedures in place. The webpage reads, in part:

> You may get your inventoried property back by following the procedures detailed below. If you have any questions, please contact the CPD Evidence and Recovered Property Section ("ERPS") at (312) 746-6777. ERPS is located at 1011 S. Homan Avenue, Chicago, Illinois 60624 and is open Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).
>
> **Personal Property Available for Return to Owner:**
>
> • If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at ERPS.
>
> • If you do not contact the CPD to get your property back within 30 days of the date on your receipt, the property will be considered abandoned under Chicago Municipal Code Section 2-84-160 (click here), and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq. (click here).
>
> • If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get personal property returned to you by designating a representative in writing, pursuant to the procedures of the facility where you are jailed or incarcerated. You must have your

> designated representative bring your receipt, the written authorization designating your representative and authorizing your representative to pick up your property, and a photo ID to: Chicago Police Department Evidence and Recovered Property Section, 1011 S. Homan Avenue, Chicago, Illinois 60624 during business hours, Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).

City's Statement Ex. F 1. These instructions, which unlike the Notice and Copy 4, are not limited to monetary property, make clear that property that goes unclaimed for 30 days will be forfeited. They detail both the general reclaiming procedure for owners who can appear at the ERPS in person and also the specific steps required for property owners who are currently incarcerated. The webpage also provides specific contact information to allow readers to reach the ERPS by phone. In short, this notice, if available to the plaintiffs during the class period, satisfies the City's notice requirements—a conclusion that even the plaintiffs do not contest. Instead, the plaintiffs focus on perceived shortcomings of the second and third issues: was internet access available to detainees at the Jail and was this webpage available during the relevant period?

To address the second issue of website access, the City argues that social workers at Cook County Jail, known as Correctional Rehabilitation Workers ("CRWs"), played a crucial role in inmates' ability to reclaim their property. The City asserts that CRWs commonly served as intermediaries between the inmates and the agencies, including the CPD, that were in possession of the individuals' property. City's MSJ 5. Furthermore, the City states that CRWs during the class period were authorized to retrieve (and commonly did retrieve) online information for inmates who had submitted

written requests. *Id.* at 6. According to the City, the law librarians at Cook County Jail also performed a similar function and served as an additional avenue to retrieve information from the internet. The City concludes, therefore, that the plaintiffs could have used the assistance of either the CRWs or the law librarians to access the website in question. Inmates could also, per the City, submit requests to the CRWs to contact the ERPS directly by telephone if they had any lingering questions or concerns. *Id.* at 7. Depending on the inmate's security clearance, CRWs could either facilitate a phone call in which the inmate spoke directly to the ERPS without having to dial collect,[2] or could contact the ERPS on the inmate's behalf and relay any questions or concerns. *Id.*

In response to these assertions, the plaintiffs offer nothing but conclusory and unsupported statements. For instance, the plaintiffs claim that the CRWs' function as an internet resource was merely "theoretical," and not something that actually occurred at the Jail. Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. 13, ECF No. 190. They ground this argument by referring to the deposition of John Mueller, the Cook County Deputy Director of Inmate Services during the class period, which they summarize in part by explaining that Mueller "stated that he could not recall any instance in which a correctional rehabilitation worker had provided information from the CPD website to a detainee." *Id.* This summary, however, is misleading. The complete question and answer cited by the plaintiffs reads as follows:

> Q: Do you know – let me ask you this: Is that something you had ever done back when you were an actual social worker on the ground?

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[2] CPD units do not accept collect calls.

A: I can't remember for that time period, but the honest situation regarding this is that the releasing of property and the assistance of obtaining CPD-held property is a very natural, common occurrence at the jail that they wouldn't necessarily refer to this or need to refer it for direction on how to do it. We have regular contact with ERPS to achieve what needs to be done to release the property so we don't – even though we had access to it, we wouldn't necessarily need to refer to it for a procedure.

Q: Let me ask you this which is, as a supervisor would there be any concerns that you would have with regard to one of your CRWs getting information from Chicago police on the web and providing it to an inmate?

A: No, not at all.

Q: This is a practice that's performed by all the CRWs you supervise, correct?

A: Correct.

City's Statement Ex. G 25-26. The full context of the question and response make clear that Mueller's inability to remember referred to his own time working as a CRW more than 15 years prior (from 1994 to 2003), before he had been promoted to deputy director. Reply in Support of the City of Chicago's Mot. for Summ. J. 11-12, ECF No. 192. The answer plainly does not, as the plaintiffs assert, indicate that Mueller could not remember a single example of a CRW providing CPD website information to a Cook County Inmate. In fact, his full response illustrates just how routinely—and non-theoretically—CRWs perform the task described by the City.

The plaintiffs also claim that the City's position that CRWs freely facilitated internet access for inmates at

the Jail "disregards the contrary deposition testimony of plaintiff Conyers." Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. 13. The plaintiffs imply that because Mr. Conyers declared "without hesitation" that he "never had access" to the website, the CRW-assisted internet access procedure described by the City must not have existed in actuality. *Id.* Once again, the plaintiffs take the statement out of context. The complete exchange in Conyers's deposition is as follows:

Q: Mr. Conyers, either before or after you were arrested on February 26th of 2012, had you ever gone to the Chicago Police website to see if there was information there about getting personal property back?

A: I never had access.

Q Now, I'm not talking about when you were in jail, sir. I'm talking before you were arrested, did you ever go to that website?

A: No.

Q: And after you were released from jail, did you ever go to that website to look for information?

A: No.

Q: Till this day, have you ever gone to the website to look for information?

A: No.

Q: I presume that you have never directed someone to go to the website to look for information for you; is that right?

A: That's right, I didn't.

The City of Chicago's Opp'n to Pls.' Mot. for Class Certification Ex. E 24:20-25:17, ECF No. 125. The plaintiffs read Mr. Conyers's testimony to indicate that he

never had access to the website while incarcerated at Cook County Jail, but the line of questioning was focused not on what actions Mr. Conyers took while in custody, but rather on whether he had sought information about property return procedures either before or after he was in custody at the Jail—in other words, only time periods when he was *not* incarcerated. Mr. Conyers's statement, therefore, fails to establish that he never sought information about Chicago's property return procedures while in custody at the Jail.

In any event, this exchange does nothing to bolster the plaintiffs' case even if Mr. Conyers had, in fact, been referring to the period he was in custody at the Jail. That Conyers "never had access" does not tell us whether information about Chicago's property return procedures were, or were not, generally available to arrestees at the Jail. It does not tell us that Conyers tried unsuccessfully to access the site and obtain the property return instructions, much less contest that assistance with property return issues was not available in the manner that the City's evidence suggests. Indeed, it does not even establish that Ewing and Flint were similarly unable to access the site. Conyers' bare statement, even if describing his term of incarceration at the Jail, falls far short of establishing a material fact dispute about the availability of access to the City's property return procedures at the Jail. Because the plaintiffs offer no other meaningful evidence to oppose the City's claims—not even an affidavit from Conyers disputing the City's evidence that the City's procedures were generally available to arrestees at the Jail—the Court has no grounds for finding that Cook County inmates did not have access to the website during the class period. As a result, the Court agrees with the City that no reasonable jury could agree with

the plaintiffs' assertions that they did not have access to the CPD website while incarcerated.[3]

That leaves the third and final issue relating to the CPD website, which is whether the City has sufficiently established that the webpage was active throughout the class period. The City presents two key pieces of evidence to that end. First, it refers to a screenshot of the website used in the deposition of Michael J. Mealer that took place on June 13, 2013, in a separate but factually similar case *Elizarri v. Sheriff of Cook County et al.*, No. 07 CV 02427; City's Statement Ex. F; Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. 10. During the deposition, Mr. Mealer, then the Commander of the Evidence and Recovered Property Section, confirmed that the screenshot was available on the CPD website "as we sit here today." *Id.* 11. Although that response suggests that the webpage was active for the last 6 months of the class period (June 2013-December 2013), the plaintiffs rightly argue that the screenshot cannot, in and of itself, substantiate a conclusion that the website was active between December 2011 and June 2013. Aware of that deficiency,

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[3] The plaintiffs also introduce a new theory of liability in their response to the City's motion for summary judgment in which they claim that it is irrelevant whether the plaintiffs had access to the website because the Cook County Sheriff's prisoner handbook wrongly stated that inmate property was held for 90 days at the jail property office. Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. 14. The plaintiffs here appear to be conflating multiple municipal agencies and policies. The handbook, titled "Cook County Department of Corrections Rules and Regulations for Detainees," has no bearing on CPD or ERPS policy. Pls.' Local Rule 56.1(b) Statement Ex. 25. The property held at the jail property office is comprised of the personal items that are allowed to accompany inmates to the jail, such as keys and ID cards—not the other items that stay behind in the possession of the CPD. The plaintiffs' claim with respect to the handbook is thus wholly irrelevant to the current case.

the City's second key piece of evidence is a declaration from Mr. Mealer confirming that the screenshot used in the prior deposition was an accurate representation of the CPD website for the entirety of the class period. City's Statement Ex. B ¶¶ 13-14.

In response, the plaintiffs contend that the City has not sufficiently authenticated Mr. Mealer's deposition from the *Elizarri* case. Relying on *Specht v. Google Inc.*, the plaintiffs claim that Mr. Mealer's memory alone is not enough to demonstrate that the webpage was active during the class period. 747 F.3d 929, 933 (7th Cir. 2014) (concluding that authentication of website screenshots required "more than memory, which is fallible"). That case is easily distinguished from the present case, however, because the screenshots in *Specht* were retrieved using a third-party internet archive service. In fact, the plaintiffs' reliance on *Specht* is just as misleading as their previous citations to Mr. Mueller's and Mr. Conyers's deposition testimonies, as the full quote once again paints a much different picture: "But the district court reasonably required more than memory, which is fallible; it required authentication by someone with personal knowledge of reliability of the archive service from which the screenshots were retrieved. *See United States v. Bansal*, 663 F.3d 634, 667–68 (3d Cir. 2011) (screenshots from internet archive authenticated via testimony of witness with personal knowledge of how internet archive works)." *Specht* 747 F.3d at 933. Here, there is no analogous archive service. Instead, there is contemporaneous deposition testimony from Mr. Mealer indicating that the webpage was active as of June 2013, as well as a subsequent declaration specifying that that very same screenshot showed the contents of the website throughout the class period. The Seventh Circuit's finding in *Specht* is thus irrelevant to the current case, in which the plaintiffs have not otherwise challenged the legitimacy

of the screenshot. Because the plaintiffs provide no evidence of their own that the screenshot was not posted for the entirety of the class period, the Court has no basis for ruling against the City in that regard.

In summary, the plaintiffs have failed to demonstrate that there is a genuine dispute of material fact with respect to any of the three website issues. The Court finds that the content of the website provided sufficient notice of the property return procedures, that Cook County Jail inmates had access to the internet during the class period, and that the webpage was active and online during that same period.[4] Because the plaintiffs have failed to

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[4] The City also touts its statistical analysis indicating that 76.5% of property inventories were successfully returned to inmates during the class period, and that after the notice was amended to explicitly refer to both monetary and non-monetary property, the rate "only" increased to 79.7% and 81.6% in 2014 and 2015, respectively, before dropping again to 78.8% in 2016. City's MSJ 10. Although the Court need not rely on these figures in granting summary judgment for the City, the Court cautions the City from drawing faulty statistical conclusions about the "mere 3.2 percent difference" between the rate in 2014 and that in 2015. To begin, the percentage difference between the pre-amendment rate of property return and the post-amendment rate is not 3.2% (which is the difference between the rates themselves) but 4.2% (3.2%/76.5%). More important, considering that the CPD created 233,339 personal property inventories during the class period, a percentage difference of more than 4% with a sample of that magnitude is assuredly statistically significant—meaning that it is highly unlikely that the difference is due to chance. The positive correlation between the amendment to the notice and the rate of property returns therefore actually cuts against the City's argument by suggesting that the change in notice may have had a notable effect on property return rates. The usefulness of the City's metric is also questionable in any event both because the data do not separate out incarcerated individuals from those who were released prior to the expiration of the 30-day window and because

(footnote continued on next page)

establish any genuine dispute of fact in regards to these three issues,[5] the Court finds that the City has sufficiently shown that it provided the plaintiffs with notice of its property disposal policy, and in turn satisfied its due process requirements.[6]

This conclusion leads inexorably to denial of the plaintiffs' motion for summary judgment, which is premised on the argument that the City was required to provide individualized notice and a hearing before depriving them of their property.[7] Because due process does not

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the correlation does not control for the possible effects of any other potentially confounding variables, such other changes in implementation of the policy, a year-to-year change in the share of inmates with inventoried property being released from the Jail within 30 days, or any number of other unaccounted factors.

[5] The plaintiffs also argue that the CPD policy is an outlier when compared to similar policies maintained by other police departments around the country. While those comparisons are not wholly irrelevant, the key question in the analysis remains whether the CPD's policy passes constitutional muster—and the Court has determined that it does.

[6] The parties dedicate significant portions of their briefs to debating whether the plaintiffs' claim should be considered an express policy claim or widespread custom or practice claim under § 1983, and in turn whether they are required to show deliberate indifference. Because the Court has granted summary judgment for the City on the basis of the website's content and availability, it need not resolve this difference of opinion.

[7] The plaintiffs also repeat, albeit very briefly, the argument that they put forth in the motion to dismiss briefing that the City's policy "does not follow state law." Pls.' Mem. in Support of Mot. for Partial Summ. J. 3. According to the plaintiffs, Section 720.25(h) of Illinois law requires the City to return all property to an arrestee upon release, discharge, or transfer to custody of the Sheriff of Cook

(footnote continued on next page)

require individualized notice of state law remedies that are set forth in materials generally available to the public, *City of W. Covina v. Perkins*, 525 U.S. 234, 241 (1999), and because the Court finds that the undisputed facts establish that the City's procedures for obtaining the return of property seized at the time of arrest were generally available to those transported to the Cook County Jail following arrest, no individual notice was required. The plaintiffs argue that they are entitled to summary judgment because none of the named plaintiffs or class representatives actually received either the Notice or the Copy 4 when their property was inventoried. But in light of the Court's finding above that the City's policy satisfied due process because of its availability to inmates at the Jail, the failure to provide individualized notice does not violate due process.

Further, even if the City's procedure for obtaining the return of seized property had not been generally available, the plaintiffs due process claim against the City would still fail because the plaintiffs have not shown

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County. As the Court explained in its second motion to dismiss opinion, however, the plaintiffs have misread the law:

> As the City points out, Section 720.25(h) of the Illinois Administrative Code states that "The Chief of police shall determine what personal property, if any, a detainee may retain." Defs.' Reply at 6. Further undermining the plaintiffs' argument is that the same provision goes on to state return of an inmate's property is only required upon "release," which includes "parole, mandatory supervised release, discharge[ ], or pardon[ ]." Ill. Admin. Code, Title 20 § 470.20. Of course, this makes sense because an arrestee who is in custody has no right while in custody to retain with them the personal property that was in their possession at the time of arrest.

Mem. Op. and Order 13 n.11, ECF No. 95.

that the City's alleged failure to provide the Notice and Copy 4 on a handful of occasions, in the face of an explicit policy to the contrary, constitutes a violation of due process.[8]

In general, local governments can be held liable for injuries committed solely by their employees only when the injuries are the result of the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury ..." *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 694 (1978). The Seventh Circuit has expanded upon *Monell* and required plaintiffs to show that the constitutional deprivation resulted from "(1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a "custom or usage" with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *McTigue v. City of Chicago*, 60 F.3d 381, 382 (7th Cir. 1995) (cleaned up).

The plaintiffs have not made an adequate showing of any of the three types of *Monell* deprivations. To the contrary, the FAC admits that the City maintained an "explicit policy" during the class period of providing incarcerated individuals with the Notice. FAC ¶ 15. If even the plaintiffs acknowledge the existence of the policy, then allegations of sporadic violations of that policy,

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[8] The plaintiffs also put forth the same arguments in their motion for partial summary judgment relating to the evidentiary foundation of the CPD website that they relied upon in their opposition to the City's motion for summary judgment. As explained above, those arguments are unpersuasive.

even if true, do not constitute the types of violations for which the City could be held liable under *Monell*. *See Parratt v. Taylor*, 451 U.S. 527, 543 (1981) ("[T]he respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure."). Here, the City's alleged failure to provide the plaintiffs and class members with the Notice or Copy 4 represents the type of "unauthorized failure" described in *Parratt*.[9] In sum, even if the plaintiffs did not receive the Notice or Copy 4, they have done nothing to establish how that deficiency implicates the City in a violation of their right to due process.[10]

The plaintiffs also briefly allude to the fact that the City did not "provide[ ] plaintiffs with a hearing before the destruction of their property." Pls.' Mem. in Support of Mot. for Partial Summ. J. 3. They do nothing to explain on what grounds the City was required to offer such

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[9] A conclusion buttressed by the City's report that more than 75% of inventories in the class period resulted in individuals reclaiming their personal items. *See supra* note 4. Although the figure is relatively imprecise, it nonetheless suggests that City employees were, for the most part, adhering to the explicit policy of providing individuals with the Notice and Copy 4.

[10] The plaintiffs dedicate the bulk of their reply brief to delving into the minutia of the City's responses to their Statement of Facts. Pls.' Reply Mem. in Support of Mot. for Partial Summ. J., ECF No. 195. In doing so, the plaintiffs seemingly aim to establish that they truly did not receive copies of either form. Nowhere do they attempt, in any meaningful way, to establish that not receiving the forms constitutes a colorable violation under *Monell*.

hearings under the Due Process Clause. On that basis alone, the Court could deny this aspect of the plaintiffs' motion. But even assuming, arguendo, that the City was required to offer hearings of some kind, the plaintiffs also fail to show that the procedures in place during the class period did not satisfy due process hearing requirements. The Supreme Court "consistently has held that some kind of hearing is required at some time before a person is finally deprived of his property interests." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (cleaned up). There is no uniform rule for what such a hearing must entail, but instead it must only be "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). A hearing that consists of the "opportunity for informal consultation with designated personnel empowered to correct a mistaken determination" might constitute a "due process hearing" if the relevant individuals are provided noticed containing information on "where, during which hours of the day, and before whom" they may contest a deprivation. *Memphis Light, Gas & Water Div.* 436 U.S. at 16, n.17, 14, n.15.

Here, the plaintiffs have not even attempted to prove that the City's procedures were inadequate. The City's policy dictated that inmate property was to remain claimable for thirty days, and the Notice included the business hours and telephone number of the ERPS, as well as the instructions to access the CPD website where additional information was located. These features of the City's policy are sufficient to overcome the plaintiffs' claims with respect to pre-deprivation hearings, especially considering the wholly inadequate nature of the plaintiffs' argument.

In short, the plaintiffs' motion does not meet its burden to show that a reasonable jury could only rule in

their favor. Their claims with respect to the alleged lack of both individualized notice and pre-deprivation hearings are unpersuasive. Because the City has established that it provided constitutionally adequate notice to putative class members, the Court grants the City's motion for summary judgment and denies the plaintiffs' motion for summary judgment on the plaintiffs' due process claim.

II. Plaintiffs' Motion for Reconsideration

As detailed above, the Court previously granted the City's motion to dismiss the plaintiffs' claim that the City's disposal of their personal property amounted to an unlawful taking in violation of the Fifth Amendment. Relying on *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court held that the plaintiffs could not maintain an as-applied Fifth Amendment takings claim until they had pursued all available state court remedies. Mem. Op. and Order 5-11, ECF No. 95. In *Williamson County*, the Supreme Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195.

In *Knick v. Township of Scott, Pennsylvania*, however, the Supreme Court overruled *Williamson County* and held that a takings claim is ripe "as soon as a government takes [one's] property for public use without paying for it." 139 S. Ct. 2162, 2170 (2019). Shortly after *Knick* was decided, the plaintiffs filed a motion asking the Court to reconsider its dismissal of the plaintiffs' taking claim, as that ruling had been predicated on *Williamson County*'s now-invalid state-remedy exhaustion requirement.

In response, the City does not dispute that the premise of the Court's dismissal of the plaintiffs' takings claim has been invalidated by *Knick*. The City argues that the dismissal should nevertheless stand, however, because the City did not take the plaintiffs' property "for public use" but rather pursuant to the City's police powers; "no compensable Fifth Amendment Takings claim," the City maintains, can be brought against the government if the property at issue is lawfully seized through the exercise of governmental authority other than the power of eminent domain." City's Response to Pls.' Mot. to Reconsider 8, ECF No. 207. In the City's view, because the CPD was exercising its lawful police powers in seizing the plaintiffs' personal property when they were arrested, there was not a compensable taking under the Fifth Amendment. "Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008).

The City's argument that in the context of the seizure, retention, and disposal of arrestee personal property there is no taking for "public use" might be, in the Court's view, correct, though not for the reasons stated by the City. As the Court sees it, the City's argument misunderstands when the "taking" at issue occurred. The plaintiffs do not contend that the City violated the Takings Clause by collecting their personal property at the time of arrest; they acknowledge that police may take possession of such property incident to lawful arrests. Pls.' Reply in Support of Mot. to Reconsider 2, ECF No. 208 ("Plaintiffs do not dispute that the power to seize and inventory arrestee property is within a municipality's police powers."). Rather, the plaintiffs allege that the unlawful taking in this case occurred when the City destroyed their personal property rather than return it. That action, the plaintiffs maintain, "is not a valid

exercise of police powers because it fails to 'promote the public health, the public morals or the public safety.' " *Id.* (quoting *Chicago B&Q Ry. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 592-93 (1906)). The plaintiffs submit that the Court should reject the City's police powers argument "because defendant's sale or destruction of arrestee property has nothing to do with police powers." Pls.' Reply in Support of Mot. to Reconsider 2.

The Court agrees. The disposal of personal property seized from arrestees is not an action that has any discernible connection to the exercise of the State's police powers. At issue is not the retention and/or disposal of contraband, evidence, or instrumentalities of crime, but rather of items that were taken solely because detainees are not permitted to retain personal property while they are in custody. That rationale, the Court will assume, would insulate police from a takings claim premised on the seizure and retention of personal property while an arrestee remains in custody. But what is at issue here is not the initial taking and retention of personal property, but rather the disposal—i.e., the permanent deprivation of that property—by the police. No state "police power" justifies the act of permanently depriving arrestees of their personal property seized at the time of arrest when the state has no ongoing interest in retaining or ensuring the disposal of the property. That is the case here; indeed, Illinois law requires police to return personal property to arrestees upon release. 20 ILCS 720.25(h). That policy scotches any notion that there is some state "police power" that justifies the failure to return personal property seized only because an individual was arrested. Even if some such justification could be imagined, Illinois has disavowed any use of that power by requiring the return of such property to the arrestee upon release.

The cases on which the City relies for this proposition are all distinguishable on this basis—all involve the retention and/or disposition of property as to which the state has an ongoing interest consistent with the exercise of its police powers. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (upholding forfeiture of automobile in which husband committed crime as exercise of state police power to abate a nuisance; "an owner's interest in property may be forfeited by reason of the use to which the property is put"); *Kam-Almaz v. United States*, 682 F3d 1364 (Fed. Cir. 2012) (return of computer in non-working condition did not give rise to damages for loss of business resulting from lack of access to business files because computer had been seized as part of lawful investigation); *Tate v. District of Columbia*, 627 F.3d 904, 909 (2010) (impoundment and auction of auto for unpaid parking tickets effectively a forfeiture based on owner's unlawful conduct); *Seay v. United States*, 61 Fed. Cl. 32 (2004) (no taking where property was retained and damaged over course of criminal investigation and ultimately returned to owner); *Alde v. United States*, 28 Fed. Cl. 26, 34 (1993) (aircraft seized and held pending forfeiture proceedings); *Jarboe-Lackey Feedlots, Inc. v. United States*, 7 Cl Ct. 329 (1985) (seizure and non-return of meat unlawfully implanted with a prohibited drug not a taking). There is a fundamental difference between a police power seizure based on conduct that justifies forfeiture of all property rights to the seized property and one that offers no basis for such a forfeiture and allows for only a temporary deprivation of rights of possession with respect to the seized property. The City errs, in the Court's view, in arguing that all seizures pursuant to the state's police powers provide the City with unfettered license to destroy the property seized. Nothing in *Bennis* or the other cases relied on by the City suggests that there can be no compensable taking when the state deprives a

property owner of all rights to property as to which the state has only temporary custody. To the contrary, saying that "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain," *Johnson v. Manitowoc Cty.*, 635 F.3d 331, 336 (7th Cir. 2011), acknowledges that the scope of the Takings Clause extends to situations in which property is retained or damaged by the state when—as here—it is *not* exercising its police powers.

For that reason, the Court agrees with the plaintiffs that the destruction of their personal property by the state is not justified as an exercise of the state's police power, even if the initial seizure and retention of that property was. The destruction of that property was itself a taking of the plaintiffs' property independent of the first taking, which was the seizure pursuant to the state's police powers.

Nevertheless, the plaintiffs have done no work to establish whether the destruction of arrestee personal property constitutes a taking for "public use." A taking for public use is, as construed by the Supreme Court, a taking that serves a "public purpose." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005). And while the Court does not agree with the City's view that the disposal of the plaintiffs' property constituted an exercise of the state's police powers, for the plaintiffs to succeed on their motion, they must demonstrate a public purpose for the destruction of their property. The plaintiffs suggest no public purpose for the second taking (*i.e.*, the destruction) of their personal property in their filings

nor do they allege any in the operative complaint,[11] which simply alleges that the City's policy is to treat as abandoned and destroy any retained personal property of arrestees not claimed within 30 days of the inventory date. FAC ¶ 23. In fact, the phrase "public use" does not appear a single time in the plaintiffs' motion or reply. The plaintiffs, in short, have entirely ignored the public use element of a Takings claim. They have adduced no evidence and made no argument to show that their property was taken for a public use. As a result, they have not adequately shown that the City's policy violates the Taking Clause of the Fifth Amendment and their motion for reconsideration is denied.

II. City's Motion to Exclude Opinion and Testimony

Because the Court has granted the City's motion for summary judgment, denied the plaintiffs' motion for partial summary judgment, and denied the plaintiffs' motion for reconsideration, the Court need not rule on the City's motion to exclude the opinion and testimony of the plaintiffs' expert witness. That motion is therefore denied without prejudice as moot.

* * *

For the reasons stated above, the Court finds as a matter of law that the City's policies satisfied the notice

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[11] The City's destruction of the plaintiffs' property might be characterized, at least in some cases, as a form of escheatment, but that would not establish a taking for "public use." Escheat laws—like the City's policy of destroying the unclaimed property of arrestees after 30 days—are premised on the abandonment of property, *Delaware v. New York*, 507 U.S. 490, 497 (1993). As such, they are not "takings" subject to the Takings Clause. *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527, 551 (D. Del. 2016) ("A holder generally has no property interest in abandoned property ... Thus, there is no unlawful taking when a state seeks to escheat abandoned property.").

and hearing requirements of the Due Process Clause of the Fourteenth Amendment. The City's motion for summary judgment, ECF No. 173, is therefore granted and the plaintiffs' motion for partial summary judgment, ECF No. 180, is therefore denied. The Court also finds that the plaintiffs have failed to show that the destruction of their property constituted a taking for public use under the Fifth Amendment, and thus their motion for reconsideration, ECF No. 201, is denied. Because of those rulings, the City's motion to exclude the opinion and testimony of the plaintiffs' expert witness, ECF No. 176, is denied as moot. Judgment will be entered for the City and against the plaintiffs and all members of the certified Class who did not timely opt out of the Class.[12]

[12] Plaintiffs' counsel are directed to submit a list of any Class members who filed a timely opt-out election to the Court's proposed order inbox within 7 days of the entry of this Opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12-cv-06144

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs,

v.

City of Chicago,

Defendant.

MEMORANDUM OPINION AND ORDER
September 28, 2017

John J. Tharp, Jr., United States District Judge

Plaintiffs Blake Conyers, Lamar Ewing, and Kevin Flint seek class certification in the suit they bring against the City of Chicago (the "City") pursuant to 42 U.S.C. § 1983. Now proceeding on their Fourth Amended Complaint ("Complaint"), the plaintiffs allege that the City violated their Fourteenth Amendment due process rights in connection with its policies regarding the sale or destruction of personal property items seized from arrestees. For the reasons stated below, the plaintiffs' motion for class certification is granted.

BACKROUND

The Seventh Circuit has instructed that district courts "should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Still, on issues that affect the class certification analysis, "a court may not simply assume the truth of the matters as asserted by the plaintiff.

If there are material factual disputes, the court must 'receive evidence ... and resolve the disputes before deciding whether to certify the class.'" *Id.* (quoting *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)). Although it is the plaintiffs' burden to show that their proposed class satisfies the requirements of Federal Rule of Civil Procedure 23, they need not do so "to a degree of absolute certainty;" rather, "[i]t is sufficient if each disputed requirement has been proven by a preponderance of evidence." *Id.* The facts summarized below are largely undisputed, though in some cases the proponent of certain facts is noted.

When the Chicago Police Department ("CPD") arrests an individual and takes him or her into custody, it also removes from that person and inventories certain items of personal property. *See* Complaint ¶ 4, ECF No. 81; Opp'n to Mot. to Certify Class ("Opp'n") at 2, ECF No. 125. According to the City, this personal property is inventoried at the time of arrest and recorded on a CPD form known as CPD-34.523, a copy of which—known as "Copy 4"—is provided to the arrestee and serves as the official "receipt" for the property. *See* Opp'n at 2. CPD Department Notices promulgated in 2007 and 2009 set out the City's explicit policy that for arrestees who were transferred to the custody of the Cook County Sherriff, the City would retain possession of all of the arrestee's property except for outer garments and items falling into nine enumerated categories: U.S. currency totaling less than $500, one plain metal ring without stones, government-issued identification cards, prescription eyeglasses, prescription medications, shoelaces and belts, keys, court documents and CPD "eTrack receipts," and credit and debit cards. *See* Complaint ¶¶ 12, 14; Answer ¶¶ 12, 14.

Since September of 2011, the City's explicit policy has also been to provide a written "Notice to Property Owner or Claimant" ("Notice") to each arrestee whose property the CPD retained. *See* Complaint ¶ 15; Answer ¶ 15, ECF No. 99. The Notice that the City provided through September 2014 set forth the following information about obtaining "Property Available for Return to Owner:"

If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at [the Evidence and Recovered Property Section, or "ERPS"]. If you do not contact the CPD to get your property back within 30 days of the date on this receipt, it will be considered abandoned under Chicago Municipal Code Section 2-84-160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq.

If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get money returned to you by sending copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to: Chicago Police Department Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624. If the property is money, a check will be sent to you at the facility where you are jailed or incarcerated.

Complaint ¶ 16; Answer ¶ 16. The Notice that the CPD provided to arrestees between September 2011 and September 2014 also stated that "[i]nformation on how to get back inventoried property is also available at www.ChicagoPolice.org." Complaint ¶ 19; Answer ¶ 19. The Copy 4 of Form CPD-34.523, which the City attached to its brief opposing the motion to certify the class—and which the plaintiffs do not discuss in their Fourth Amended Complaint, Motion, or Reply brief—

referred to that same website, and included the following language:

> Notice to Property Owner or Claimant
>
> This Property Inventory form is your receipt for property inventoried by the Chicago Police Department ("CPD"). When you received this receipt, you should have also received a form entitled NOTICE TO PROPERTY OWNER OR CLAIMANT (the "Notice") explaining how you may get back inventoried property. If you did not receive the Notice, return to the CPD facility where your property was inventoried and ask Desk Personnel for the Notice. A complete copy of the Notice is also available at www.ChicagoPolice.org[.] If you have further questions, please contact the CPD Evidence and Recovered Property Section at 312-746-6777.

Sample Copy 4, ECF No. 125-1; *see also* Opp'n at 2-3.

Notably, neither Copy 4 nor the Notice explains how an arrestee who remains in custody for more than 30 days is to obtain the return of personal property other than cash. The plaintiffs allege that people who are detained at the Cook County Jail have not been allowed Internet access, and that as a result, any information at www.ChicagoPolice.org on how to retrieve inventoried property "is neither published nor generally available" to those detainees. Complaint ¶¶ 20-21. The City denies that any such online information is not available to arrestees. Answer ¶ 21. In this lawsuit, the plaintiffs allege that the City has deprived them and others similarly situated of their property without the due process guaranteed by the Fourteenth Amendment. Complaint ¶ 27. The alleged basis for these violations is that there was no adequate procedure to reclaim their non-monetary property, they were not provided with individualized notice of any adequate procedure to reclaim such property,

they were not afforded a hearing before their property was sold at auction or destroyed, and they were not afforded a hearing after their property had been sold or destroyed. *Id.*

The CPD arrested plaintiff Blake Conyers on February 26, 2012, and transferred him to the custody of the Cook County Sheriff. Complaint ¶ 29; Answer ¶ 29. The plaintiffs allege that when he was arrested, Conyers was in lawful possession of an earring, a platinum and diamond bracelet, and two cell phones, all of which the City inventoried and retained. Compl. ¶ 30. Conyers wrote a letter to the City's ERPS seeking the return of his property, and also alleges that he filed a grievance with the Cook County Jail and asked the jail's social worker for help in recovering his property. Fourth Am. Compl. ¶ 31; Answer to Fourth Am. Compl. ¶ 31. In a July 20, 2012 letter, a captain from the ERPS told Conyers that his property "had been destroyed since it was not claimed within 30 days from the date inventory." [sic] Fourth Am. Compl. ¶ 32; Answer to Fourth Am. Compl. ¶ 32.

Plaintiff Lamar Ewing, meanwhile, was arrested by CPD members on December 20, 2012, and was also transferred to the custody of the Cook County Sheriff. Fourth Am. Compl. ¶ 36; Answer to Fourth Am. Compl. ¶ 36. Ewing says that when he was arrested, he possessed a brown wallet, a Link card, a Chicago Library card, and two cell phones, all of which the City inventoried and retained. Fourth Am. Compl. ¶ 37. The plaintiffs allege that in January 2013, Ewing—who was still incarcerated at the Cook County Jail—prepared a form authorizing his cousin to pick up his belongings, but that when the cousin went to ERPS, he was not able to retrieve Ewing's personal property. Fourth Am. Compl. ¶ 38. In February 2013, Ewing's personal property was destroyed. *Id.* ¶ 39. Finally, the third named plaintiff,

Kevin Flint, was arrested by CPD members on January 1, 2013, and was similarly transferred to the Cook County Sheriff's custody. *Id.* ¶ 43. Flint alleges that at the time, he was in possession of a ring with a small stone, as well as a cell phone, both of which the City inventoried and retained. *Id.* ¶ 44. The complaint alleges that Flint was housed in the Cook County Jail until May 2013, and that he learned upon his release that the CPD had destroyed his cell phone and his ring. *Id.* ¶ 45.

Conyers, Ewing, and Flint all testified in depositions in this case that they did not receive either a Notice or a Copy 4 of Form CPD-34.523 after they were arrested on the dates set forth in the Fourth Amended Complaint. *See* Flint Dep. 22:18-22, July 27, 2000; Ewing Dep. 18:14–19:6, Aug. 22, 2016; Conyers Dep. 10:5-16, 13:6-10, Oct. 21, 2016; *see also* Opp'n at 5-6, 8. The plaintiffs had all been arrested on prior occasions as well, and Ewing and Flint testified that in connection with at least some of those prior arrests, they did not take any steps to try to recover property that the CPD had inventoried on those occasions. *See* Flint Dep. 55:18–56:20, 63:22–64:3, 64:24–65:2; Ewing Dep. 47:14-19, 48:9–49:4; Conyers Dep. 11:22–12:1; *see also* Opp'n at 5-7.

The three named plaintiffs lodged their Fourth Amended Complaint in this case in April 2015. In February 2016, this Court partially granted the City's motion to dismiss that pleading, finding that the plaintiffs had failed to state a Fifth Amendment claim but allowing them to go forward on the procedural due process claim they bring under the Fourteenth Amendment. *See* Feb. 2016 Op., ECF No. 95. Conyers, Ewing, and Flint now seek an order certifying a class that they define as follows:

> 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.

Mot. to Certify Class at 1, ECF No. 114. For the reasons set forth below, the motion is granted.

ANALYSIS

"To be certified, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as one of the three alternatives in Rule 23(b)." *Messner*, 669 F.3d at 811 (citing *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010)). Rule 23(a) requires that a proposed class satisfy the requirements of numerosity, typicality, commonality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a). The plaintiffs here are seeking certification under Rule 23(b)(3), which requires them to also show: "(1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy." *Messner*, 669 F.3d at 811; *see also* Fed. R. Civ. P. 23(b)(3).

I. Preliminary Issues

The City argues in its brief that this Court need not even reach the question of whether the plaintiffs have satisfied these Rule 23 requirements—though the City argues they have not—because the plaintiffs admit that they did not receive the Notice and therefore cannot assert the *Monell* theory of liability on which the Fourth Amended Complaint is based. *See* Opp'n at 11-12. In particular, the City asserts that the "central question" in the lawsuit—which it argues has been the same for some four years—is "whether Plaintiffs can assert *Monell* liability against the City based on alleged deficiencies associated with the Notice," and that because Conyers,

Ewing, and Flint all say they never received they Notice, their injuries are distinct from those alleged in the complaint. Opp'n at 11. But the City has once again misconstrued the nature of the plaintiffs' claim. As the plaintiffs point out in their Reply, this Court previously corrected the City's reading of the plaintiffs' current theory when it rejected the City's argument that the plaintiffs lacked standing:

> The City argues that the plaintiff's theory continues to be that they were misled by the notice provided.... That is an unreasonable interpretation of the plaintiff's claim, however (notwithstanding a single use of the term "misleading" by the plaintiffs). Whether the plaintiffs were misled by the notice provided to them is no longer germane; their argument now is that the City provided an inadequate procedure to individuals who remained in custody to obtain the return of their personal property. In the context of this claim, *the plaintiffs need not establish that they relied on the notice provided because it provided nothing on which to rely*; as the plaintiffs see it, it is as if the City had provided no notice at all. The gravamen of the complaint now is not that the plaintiffs were misled into believing that they had a longer period in which to claim their property, *but that they were never provided notice that they could reclaim their property* (all of which was non-monetary).

Feb. 2016 Op. at 12-13 (emphasis added). The "central question" of the suit, therefore, is not whether the plaintiffs can assert *Monell* liability because the City misled them, but whether the City gave them any information at all about how to retrieve non-cash property. As to that question, that the three named plaintiffs testified that they did not receive that Notice in connection with the

arrests at issue has no bearing on their class certification bid.[11]

The City's additional *Monell*-based arguments also miss the mark. The City asserts that the named plaintiffs cannot pursue a *Monell* theory because they "concede" that any failure by the City to provide the Notice upon their arrest would have been a random act in violation of the City's explicit policy that the Notice be provided, meaning *Monell* liability does not apply. Opp'n at 12. But again, the plaintiffs have alleged that the City failed to provide them with sufficient notice regarding how to retrieve their property, and that this was the case whether an arrestee received the Copy 4 and/or the Notice—pursuant to the City's explicit policy—or not. Whether the plaintiffs will ultimately succeed on such a theory is a question for another day; this Court has already declined to dismiss the plaintiffs' due process claim at the pleading stage and made clear that they need not show they relied on the Notice, which they admittedly never received, to succeed on their claim.

The City next argues that the proposed class members are neither identifiable nor ascertainable because the class definition relies on "subjective criteria" in that it "presumes that each class member had an interest in reacquiring his or her personal property." Opp'n at 13.

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[1] This is not to say that whether the plaintiffs read the information that the City did provide is not relevant to their individual claims. If the question of the adequacy of the notice is resolved in the plaintiffs' favor (*i.e.*, if the notice is found to be constitutionally inadequate), the question of whether the plaintiffs bothered to review the information that was provided would be relevant to whether the lack of damages could have caused any actual damages. But, as noted *infra* at 9, proof of damages is not required to establish a due process violation, and the plaintiffs would be entitled to an award of nominal damages regardless.

The City asserts that identifying class members would therefore require this Court to engage in a time-consuming analysis for each arrestee to determine whether that individual really wanted his or her property back and made some affirmative effort to recover it. *Id.* at 14. That is wrong for at least two reasons. First, the proposed class definition does not include that subjective element; the proposed class membership criteria are entirely objective. The plaintiffs seek to represent a class of persons who were arrested, whose property was inventoried by CPD within a defined time period, who spent more than 30 days in custody, and whose property CPD sold or destroyed. These are all objective criteria and that is all that the implicit requirement of "ascertainability" demands. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (rejecting "heightened" conception of ascertainability that would move "beyond examining the adequacy of the class definition itself to examine the potential difficulty of identifying particular members of the class and evaluating the validity of claims they might eventually submit"). And even if the administrative feasibility of identifying class members were relevant to the concept of ascertainability, it would not pose an obstacle here, where it is undisputed that the City's own records identify the arrestees—including by name and address—whose property was seized, marked as "available for return to Owner, and later destroyed or sold during the class period." *See* Mot. to Certify Class at 4-5; Mot. Ex. 2. The City also does not dispute that its own records reflect which of these arrestees spent more than 30 days in custody, or that the same information regarding length of custody can be gleaned from records maintained by the Cook County Sheriff. *See* Mot. to Certify Class at 5.

Second, as the plaintiffs observe in reply, liability for failing to provide notice does not turn on an individual's subjective intent or on whether the violation actually caused any damages. Even if putative class members suffered no actual injury resulting from inadequate notice (because, for example, they did not read the notice they did receive), they would be entitled to nominal damages because "the right to procedural due process is 'absolute,' " *Carey v. Piphus*, 435 U.S. 247, 266 (1978), even when the violation is "not shown to have caused actual injury," *id. See also, e.g., Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003) ("nominal damages are not compensation for loss or injury, but rather recognition of a violation of rights").

To the extent that subjective intent has any relevance, therefore, it is to the issue of damages. And the Seventh Circuit has repeatedly held that the need for individualized damages determinations does not defeat class certification. *See, e.g., McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 875-76 (7th Cir. 2015); *Mullins*, 795 F.3d at 671; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.").

The proposed class definition here is also easily distinguished from that in *Haynes v. Dart*, No. 08 C 4834, 2009 WL 2355393 (N.D. Ill. July 29, 2009), to which the City makes its most developed comparison. *See* Opp'n at 14. In *Haynes*, the district court denied a motion to certify a class of all "current, former, and future pretrial detainees housed at Cook County Jail suffering from mental illnesses who [had] been deprived of necessary mental

health treatment" during the class period. *Haynes*, 2009 WL 2355393, at *3. As the district court found in *Haynes*, "suffering from mental illnesses" was a criterion too vague to define an ascertainable class, in part because that phrase raised "basic questions as to how 'mental illness' is to be defined and how it is to be diagnosed." *Id.* at *3-4. The court also pointed to the *Haynes* plaintiffs' own allegations that the defendants were "intentionally failing to identify mentally ill inmates by using inappropriate screening criteria," meaning that many potential class members had never received a mental illness diagnosis for the jail. *Id.* at *4. As a result, that court had "no assurance" that it would be able to identify class members without relying on time-consuming individual inquires. *Id.*

Here, by contrast, there is no vagueness to any aspect of the proposed class definition, and the objective requirements for class membership have already been determined and recorded by the City or the Cook County Sheriff. This Court will not need to embark on individual analyses, for example, of whether each class member spent more than 30 days in custody—much less interpret what that objective requirement means—because the City does not dispute that this information is readily available. Moreover, the City's argument that some of the proposed class members that the plaintiffs identify—and whose unsworn declarations they submitted with their motion—cannot join the class because they were arrested on dates falling outside the class period actually demonstrates that the proposed class ***is*** ascertainable. *See* Opp'n at 15-17. Individuals who do not satisfy the class definition can be excluded from the action on the basis of such objective criteria as the date their property was inventoried upon their arrest, as the City itself—albeit unintentionally—demonstrates.

Finally, the City also complains that the proposed class definition does not expressly refer to the notice (either the Copy 4 or the Notice) the City provided. But the dispute here is not that during the class period some arrestees received a form of notice that was adequate while others received notice in some other form that was not; it is clear that the question of adequacy of notice will turn on whether the information provided by the Copy 4 and the Notice, and the availability of online information, was sufficient to apprise arrestees of what they had to do to get their property back. It is undisputed, then, that anyone who qualifies as a member of the class, as defined, received no other notice than that provided by Copy 4 and the additional Notice; adding reference to those forms would not change the contours of the class and modifying the class definition on that basis is therefore unnecessary.

II. Rule 23(a) Requirements

Rule 23(a) requires that a proposed class satisfy the requirements of numerosity, typicality, commonality, and adequacy of representation. The City does not challenge the plaintiffs' satisfaction of the numerosity and representation requirements, and indeed this Court finds them to be satisfied here. The plaintiffs have also satisfied Rule 23(a)'s typicality and commonalty requirements, despite the City's arguments to the contrary.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and in arguing that the plaintiffs cannot satisfy this requirement, the City relies once again on its argument that the plaintiffs cannot assert *Monell* liability because they did not receive copies of the Notice upon their arrest. *See* Fed. R. Civ. P. 23(a)(2); Opp'n at 15-16. The City argues that the plaintiffs therefore have not experienced the "explicit policy" or "standardized conduct" alleged in the Fourth

Amended Complaint, and so "there is no common policy or conduct that connects or unites" the proposed class members. Opp'n at 16. This argument fails for the same reasons as the City's other *Monell*-related arguments; it ignores this Court's prior finding that receipt of the Notice—as opposed to the adequacy of the content of the notice—is no longer central to the plaintiffs' claims. As the court's previous opinion in this case noted, "[t]he question that remains is whether the City provided notice of [its] procedure to the point of satisfying due process." Feb. 2016 Op. at 15. The plaintiffs' class claim does not turn on whether the City gave them Copy 4 or the Notice; it turns on whether Copy 4 and the Notice provided sufficient information about the process required to obtain the return of non-cash property taken from them at the time of their arrest. If the City failed to provide adequate notice to arrestees about the process by which to secure the return of non-cash property, then whether a particular class member received defective notice is irrelevant because that defective notice would not have provided an adequate explanation of the required process. The common claim among the class members is that the notice provided by the City was inadequate, not that they did not receive something from the City purporting to be notice. The plaintiffs have therefore sufficiently asserted "a common contention" that is "of such a nature that it is capable of classwide resolution." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

The City's argument that the plaintiffs fail to satisfy Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class" fails for the same reason. The Seventh Circuit has described the typicality analysis in this way:

A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and her claims are based on the same legal theory. Even though some factual variations may not defeat typicality, the requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large.

Arreola, 546 F.3d at 798 (quoting *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)). The City again points to the purported significance of the fact that the three named plaintiffs did not receive the Notice or a Copy 4 of Form 34.523 in connection with their inventoried property, saying that their testimony to this effect "departs from" the Fourth Amended Complaint's allegations regarding the City's explicit policy of providing those documents to arrestees. *See* Opp'n at 16-17. As explained previously in this Opinion, that line of reasoning miscasts the plaintiffs' due process claim, which in its current iteration does not turn on receipt of the Notice.

The plaintiffs have satisfied the typicality requirement. Conyers, Ewing, and Flint all had property inventoried as "available for return to Owner" within the class period, following their arrest; each of those three plaintiffs was held for more than 30 days; and the CPD destroyed each of their inventoried property. These facts, which the City does not dispute, fall in line with the due process allegations the plaintiffs are pursuing in their Fourth Amended Complaint. The declarations from the eight proposed class members who were arrested within the class period also indicate that the plaintiffs' claims are typical of the claims of the class. Though the City correctly notes that some of those declarations actually request the return of their property or otherwise indicate that the arrestee did not know whether the property had

been sold or destroyed—for example, one declaration states "I have no idea what happened to my property," *see* Mot. Ex. 3—this does not make the claims of those who fall within the class definition inconsistent with the named plaintiffs' claims. This Court has already found that the class members are identifiable and ascertainable because the names and addresses of arrestees whose property was sold or destroyed, and who otherwise meet the class definition requirements, are recorded. The plaintiffs' claims thus arise "from the same event or practice or course of conduct" as the proposed class members, *see Arreola*, 546 F.3d at 798, and Rule 23(a)'s typicality requirement is satisfied.

III. Rule 23(b)(3) Requirements

Finally, the plaintiffs are seeking certification pursuant to Rule 23(b)(3), and so must satisfy that Rule's predominance and superiority requirements. *See* Fed. R. Civ. P. 23(b)(3). The City makes no direct arguments regarding superiority, but says that the plaintiffs have not adequately shown that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *See id.* "There is no mathematical or mechanical test for evaluating predominance." *Messner*, 669 F.3d at 814. This requirement is similar to Rule 23(a)'s requirements for commonality and typicality, but the Supreme Court has made clear that "the predominance criterion is far more demanding." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997); *see also Messner*, 669 F.3d at 814 (quoting same). Predominance may be satisfied where "a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." *Messner*, 669 F.3d at 815 (quoting *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006)). If making a prima facie showing on their claim requires proposed class members to "present evidence that varies from member to

member, then it is an individual question," but "[i]f the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Id.* (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)) (internal quotations omitted). Individual questions may well be present; the requirement is only "that those questions not predominate over the common questions affecting the class as a whole." *Id.*

Resorting to hyperbole, the City argues that there are "an astounding number" of individual questions at issue in this case. Opp'n at 19. Most, however, are variations on the same theme, which the Court has already rejected—namely, that it matters whether the class member claims to have received or relied upon what notice the City did provide. Relatedly, the City also argues that the plaintiffs have not offered any objective method for "identifying or excising" individuals who voluntarily abandoned their personal property during previous arrests, *see id.*, and that the Court would have to make individual inquiries regarding whether class members took some affirmative step or expressed some desire to recover their personal property within thirty days. *Id.* But why? As discussed above, an arrestee's subjective intent does not bear on the question of whether the notice provided by the City was constitutionally adequate. The City cannot dodge liability for providing inadequate notice of the process required to obtain the return of property by pointing to evidence that many arrestees made no attempt to do so; that would be akin to rewarding the metaphorical orphans for killing their parents. Given that neither Copy 4 nor the Notice addresses the return of non-cash property, it would not be surprising, or relevant, to learn that many arrestees did not take timely action to prevent the City from destroying the property that it had seized upon their arrests. How could they, if the City did not tell them how?

Another individual issue, the City says, is whether class members who were arrested during the class period successfully recovered their property such that, according to the City, those arrestees should be barred from asserting a claim for that arrest or others within the class period, as they would have clearly had notice of the process for recovering such property. *Id.* at 20. This argument also falls short. To begin, such persons are excluded from the proposed class definition, unless they were subsequently arrested again and had personal property seized and destroyed by the City. And even for that presumably small subset of the proposed class, managing to obtain the return of property following some prior arrest says little—nothing, really—about whether the City provided adequate notice of the procedure required to do so. The same holds true as to whether a class member voluntarily abandoned his or her property on some prior occasion; that fact (assuming *arguendo* that it could be established) would have no bearing on whether the City satisfied due process requirements during the period at issue in this case. That Plaintiff Ewing, for example, testified in his deposition that he did not make efforts to retrieve his personal property in 1982 in connection with an arrest—testimony that the City excerpts in its Opposition brief—has no bearing on whether he received adequate notice about how to retrieve property that was inventoried after a separate arrest some three decades later. *See* Opp'n at 7; Ewing Dep. at 48:9–49:4.

These "individual" questions about intent really go to whether arrestees valued their property highly enough to seek its return. The City characterizes that question as a critical individual inquiry necessary to assess the City's potential liability, but as noted above its relevance is to the question of damages, not liability. If an arrestee

assigned so little value to his property that he had no interest in securing its return, even had he known how to do so, then his claim for damages will be miniscule, but that is an assessment to be made after liability is determined. Again, "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner*, 669 F.3d at 815 (citing *Wal–Mart*, 564 U.S. at 362 (2011); *Arreola*, 546 F.3d at 801; *Hardy v. City Optical, Inc.*, 39 F.3d 765, 771 (7th Cir. 1994)). Any individual inquiry in this regard, therefore, will not stand in the way of the plaintiffs' pursuit of class certification. The plaintiffs have satisfied Rule 23(b)(3)'s predominance requirement.

Finally, that rule's requirement that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy" is also satisfied here, though as previously noted, the City does not challenge superiority. The central question here is the adequacy of the notice provided to arrestee's during the class period; it plainly makes more sense to adjudicate that common question on a class-wide basis than by means of individual claims. Further, the plaintiffs assert that only "a small amount of damages" would be available to each individual class member, so a class action represents the only realistic means of recovery for many potential claimants. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014) ("The district court might conclude on remand that the class device is superior, because no rational individual plaintiff would be willing to bear the costs of this lawsuit."). "If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while

leaving the remaining, claimant-specific issues to individual follow-on proceedings." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

* * *

For the foregoing reasons, the plaintiffs' motion for class certification is granted. The named plaintiffs may represent the following class:

> 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.

A status hearing is set for Thursday, October 12, 2017 at 9:00 a.m.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12-cv-06144

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs,

v.

City of Chicago,

Defendant.

MEMORANDUM OPINION AND ORDER
February 10, 2016

John J. Tharp, Jr., United States District Judge

Plaintiffs Blake Conyers, Lamar Ewing, and Kevin Flint, individually and on behalf of a class, bring claims under 42 U.S.C. § 1983 against the City of Chicago (the "City"). The plaintiffs allege that the City's policies pertaining to the destruction of personal property items seized from arrestees at the City's police station violate the Fifth and Fourteenth Amendments. The City has moved to dismiss the plaintiffs' Fourth Amended Complaint pursuant to Rule 12(b)(6). Def.'s Mot. to Dismiss Fourth Am. Compl., ECF No. 88. For the reasons stated below, the City's motion is granted with respect to the Fifth Amendment claim, but the plaintiffs may proceed on their Fourteenth Amendment procedural due process claim.

BACKGROUND

The City requires that its police officers remove and inventory all personal property in the possession of arrestees who are detained at the City police station. At the time of arrest, the City provides arrestees with a

Chicago Police Department ("CPD") inventory receipt identifying the seized property and a written notice explaining how that property can be retrieved. Fourth Am. Compl., ECF No. 81, ¶ 15. Pursuant to CPD policy, if an arrestee is subsequently transferred to the Cook County Jail the City sends certain types of inventoried personal property with the arrestee to the Jail and retains all other types of inventoried personal property. *Id.* at ¶ 12.[1] Since September 14, 2007, the City's policy has been to destroy any retained personal property of arrestees transferred to the Jail that is not claimed within 30 days of the inventory date. *Id.* at ¶ 23. Each of the plaintiffs had personal property items seized and ultimately destroyed as a result of the City's policies.

Plaintiff Conyers was arrested by City police officers on or about February 26, 2012, while in lawful possession of an earring, a bracelet, and two cell phones. *Id.* at ¶ 30. This property was removed and inventoried by the City, retained by the City upon Conyers' transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. *Id.* at ¶ 32. Plaintiff Ewing was arrested by City police officers on or about December 20, 2012, while in lawful possession of a wallet, a debit card, a library card, and two cell phones. *Id.* at ¶ 37. This property was removed and inventoried by the City, retained by the City upon Ewing's transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. *Id.* at ¶ 39. Plaintiff Flint was arrested

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[1] CPD Notice 07-40, as amended by CPD Special Order S06-01-12, provides that the following types of inventoried personal property are sent with arrestees to the Jail: outer garments, U.S. currency of $500 or less, one plain metal ring without stones, government-issued identification cards, prescription eyeglasses, prescription medications, shoelaces, belts, keys, court documents, CPD receipts, credit cards, and debit cards. *Id.* at ¶ 12.

by City police officers on or about January 1, 2013, while in lawful possession of a cell phone and a ring with a small stone. *Id.* at ¶ 44. This property was removed and inventoried by the City, retained by the City upon Flint's transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. *Id.* at ¶ 45. All three plaintiffs remained incarcerated in the Jail throughout the 30-day period following their respective arrests. *Id.* at ¶¶ 29, 38, 45.

The City provided a written notice to each of the plaintiffs at the time of their arrest (the "Notice") that included the following information:

> You may get inventoried property back by following the procedures detailed below. Information on how to get back inventoried property is also available at www.ChicagoPolice.org. If you have any questions, please contact the CPD Evidence and Recovered Property Section ("ERPS") at (312) 746-6777. ERPS is located at 1011 S. Homan Avenue, Chicago, Illinois 60624 and is open Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).
>
> **Property Available for Return to Owner:**
>
> If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at ERPS. If you do not contact the CPD to get your property back within 30 days of the date on this receipt, it will be considered abandoned under Chicago Municipal Code Section 2-84-160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq.
>
> If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get money returned to you by sending

> copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to: Chicago Police Department Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624. If the property is money, a check will be sent to you at the facility where you are jailed or incarcerated.

Ex. 1 to *Id.* at 14.[2]

Plaintiffs Conyers and Ewing attempted to retrieve their property while incarcerated before learning that it had been destroyed. Conyers "filed a grievance with the Cook County Jail, requested assistance from the jail's social worker, and wrote a letter to [ERPS] seeking return of his personal property." *Id.* at ¶ 31.[3] Ewing "prepared a form authorizing his cousin to [claim his] property" and had his cousin go to ERPS to attempt to retrieve the property before the 30-day period had elapsed. *Id.* at

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[2] The City also urges the Court to consider the additional instructions posted on the website listed on the Notice. The Court has declined to take judicial notice of those instructions, however, since even assuming—without deciding—that that the Court may take judicial notice of information on the CPD website, the instructions that are currently posted are not necessarily reflective of the instructions that were posted throughout the entire relevant time period for this lawsuit. *See Information Regarding Personal Property Seized by the Chicago Police Department*, Chicago Police, http://home.chicagopolice.org/wp-content/uploads/2014/12/Information-Regarding-Personal-Property-Seized-By-CPD.pdf (listing an effective date of September 2014).

[3] These reclamation attempts were made sometime between February 26, 2012, when Conyers was arrested, and July 2012, when he learned that his property had been destroyed. It is unclear, however, whether any of the attempts were made within 30 days of Conyers' arrest. *Id.* at ¶¶ 29, 31, 32.

¶ 38. Flint made no attempt to retrieve his property while incarcerated but eventually learned of its destruction upon his release. *Id.* at ¶ 45.

In dismissing the Third Amended Complaint, *see* Order Dismissing Third Amended Complaint, Dkt. 80, the Court gave plaintiffs specific instructions with respect to repleading and filing a Fourth Amended Complaint. The Court dismissed plaintiffs' Fifth Amendment-based § 1983 claim with prejudice to the extent that it purported to assert a facial challenge to the City's policy, but without prejudice to the extent that it presented an as-applied challenge. Order, Dkt. 80, at 15. However, the Court cautioned that an as-applied Fifth Amendment challenge could not be pursued unless and until Plaintiffs have exhausted all potential remedies under state law. *Id.* at 15. The plaintiffs' Fourteenth Amendment-based § 1983 claim was also dismissed without prejudice for lack of standing. The Court granted the plaintiffs leave to replead that claim within 28 days. *Id.* The plaintiffs timely filed their Fourth Amended Complaint, and this Motion to Dismiss followed.

ANALYSIS

The plaintiffs allege that the City is liable under 42 U.S.C. § 1983 because its policies pertaining to the destruction of retained personal property of arrestees transferred to the Jail deprive arrestees of rights secured by the Fifth and Fourteenth Amendments. To state a claim against a municipal entity under § 1983, a plaintiff must allege that a person acting under color of state law violated a right secured by the Constitution or laws of the United States, and that the violation was caused by a policy or custom of the defendant. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 822 (7th Cir. 1009). The City argues that the Complaint (1)

does not assert a valid § 1983 claim based on the Fifth Amendment because the plaintiffs have not exhausted state law remedies, and (2) it does not assert a valid § 1983 claim based on the Fourteenth Amendment because the plaintiffs have not satisfied the standing requirements of Article III. The City's arguments are addressed in turn below.

I. Fifth Amendment

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The plaintiffs claim that the City's disposal of their property after 30 days without providing adequate notice or opportunity to reclaim it amounts to a deprivation of their property without just compensation. Compl. at ¶ 7. The plaintiffs, however, cannot bring an as-applied Takings Clause challenge in federal court until they have pursued all state law remedies that are available to them.[4] *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–95 (1985); *Peters v. Vill. of Clifton*, 498 F.3d 727, 731–32 (7th Cir. 1007).[5] The City argues that plaintiffs have failed to

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[4] The City argues that the Court's prior order foreclosed an amendment to the complaint to assert an as-applied takings claim. Def.'s Mot. to Dismiss at 6. Not so. As explained, the Court concluded that the Third Amended Complaint did not even assert an as-applied takings claim, but to the extent that it did, such claim was dismissed without prejudice. This order in no way precluded the plaintiffs from asserting an as-applied claim in the next complaint, so long as the exhaustion requirement was satisfied. As discussed further below, that requirement has not been satisfied and so the as-applied takings claim is again dismissed without prejudice.

[5] Although a plaintiff may raise a facial challenge based on the Takings Clause without first exhausting state law remedies, *see San*

(footnote continued on next page)

exhaust state law remedies to redress the loss associated with the disposal of their property. Def.'s Mot. to Dismiss at 7. But the plaintiffs maintain that the Illinois Local Government and Governmental Employee Tort Immunity Act, 745 Ill. Comp. Stat. *et seq.*, precludes them from pursuing tort claims against the City in state court, and thus there are no state law remedies available for them to exhaust. There are substantial reasons to doubt the plaintiff's premise, however, and so the Court cannot conclude that the plaintiff has satisfied the exhaustion requirement. In a takings case, "a state violates the constitution only by refusing to pay up." *SGB Financial Services, Inc. v. Consolidated City of Indianapolis–Marion County, Indiana*, 235 F.3d 1036, 1037 (7th Cir. 2000). The plaintiffs have not established that it is inevitable that they will be bounced from state court and so they do not as yet have a ripe takings claim.

The plaintiffs maintain that § 4-103 of the Illinois Local Governmental and Governmental Employee Tort Immunity Act, 745 Ill. Comp. Stat. 10/4-103 (the "Act"), provides the City with immunity from claims involving the sale or destruction of inmate property. Section 4-103 states:

> Neither a local public entity nor a public employee is liable for failure to provide a jail, detention, or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel,

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Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323, 345–46 (2005) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)); *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 1007). As noted, the Court previously dismissed the plaintiffs' Fifth Amendment claim to the extent that it purported to assert a facial challenge to the City's policies. Order Dismissing Third Am. Comp., ECF No. 80, 8-9, 15.

> supervision or facilities therein. Nothing in this Section requires the periodic inspection of prisoners.

745 Ill. Comp. Stat. 10/4-103. In essence, this provision of the Act creates immunity for public entities and employees for injuries related to the supervision of inmates; it has no obvious application in the context of a case like this one, where the plaintiffs are seeking compensation for property taken from them. *See, e.g.*, *Thomas v. Sheahan*, 499 F.Supp.2d 1062 (N.D.Ill. 1007) (county was immune from liability for wrongful death of pretrial detainee who died from meningitis and pneumonia at county jail); *Hayes v. City of Des Plaines*, 182 F.R.D. 546 (N.D.Ill. 1998) (police officers were immune from claims that they were negligent in supervising detainee who committed suicide while left unattended in interview room in police station); *Bollinger v. Schneider*, 64 Ill.App.3d 758, 21 Ill.Dec. 522, 381 N.E.2d 849 (1978) (county and county sheriff were immune from suit to recover for injuries sustained by minor who was physically and sexually assaulted by other inmates while confined in juvenile section of county jail); *Payne for Hicks v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), *cert. denied* 527 U.S. 1004 (1999) (county and county sheriff were immune from liability for alleged failure to provide proper jail space and to protect detainees against self-inflicted harm).

Although the statute does not indicate that the government is immune from claims for the destruction of inmate property, the plaintiffs point the Court to *Black v. Dart*, 390 Ill.Dec. 231, 28 N.E.3d 884 (2015), as support for their argument that the City would be immune under section 10/4-103 from liability for the alleged takings. In *Black*, the plaintiff claimed, among other things, that the Sheriff failed to return his clothing to him at the time of his release. 28 N.E.3d at 885. The sheriff moved for

summary judgment, raising several defenses, including immunity under the Act and the pendency of a similar federal class action suit in *Elizarri v. Sheriff of Cook County*. *Id.* at 886. The plaintiff, however, never responded to the Sheriff's motion despite several opportunities to do so and the trial court granted summary judgment without reaching the substance of the defendant's argument. *Id.* The plaintiff appealed, arguing only that "the trial court's alleged dismissal of his lost clothing claim based on the pendency of *Elizarri* was erroneous." *Id.* at 887. The appellate court affirmed, stating, "[t]he plaintiff failed to assert any challenge to the Sheriff's immunity defense throughout the proceedings below, and concededly foregoes any such argument on appeal." *Id.* at 888. Thus, the opinion in *Black* was founded primarily on waiver, not on consideration of the immunity issue after developed argument.[6]

Nevertheless, as the plaintiffs note, the Illinois appellate court cited Section 10/4-103 as support for affirming the grant of summary judgment. As Judge Lee has observed in a recent case, however, although *Black* cited Section 10/4-103, its analysis was primarily based not on Section 10/4-103, but on a different immunity provision, namely 745 ILCS § 10/2-201. *See Wilson v. City of Evanston*, No. 14 C 8347, 2016 WL 344533, at *3 (*Black*'s language "tracks the immunity established by § 10/2-201, not § 10/4-103"). Whereas Section 10/4-103 addresses liability for "failure to provide sufficient equipment, personnel, supervision or facilities" at a jail—matters that

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[6] The City's contention that in dismissing the Third Amended Complaint, this Court rejected the plaintiffs' argument concerning *Black* misreads the Court's opinion. The Court expressly noted that it had not considered the arguments about *Black* (because the Court's rulings made it unnecessary to do so). *See* Order Dismissing Third Am. Compl., ECF 80, 13 n.12.

are not implicated by the plaintiffs' property loss claims—Section 10/2-201 concerns decisions by employees "involving the determination of policy or the exercise of discretion" by individual employees. Here, there is no allegation that the plaintiffs lost their property as the result of discretionary policy determinations, so even that statute seems a poor fit. There is, therefore, reason to question the plaintiff's argument that *Black* stands for the proposition that Section 10/4-103 provides immunity for claims based on the disposal of prisoner property.[7]

There is another relevant distinction between these immunity provisions. Although Section 10/4-103 plainly applies to local public entities, by its terms Section 10/2-201 applies only to public employees. *See S.J. v. Perspectives Charter Sch.*, 685 F.Supp.2d 847, 859 (N.D.Ill. 1010) (charter school not immune under § 4/2-201 because not an employee as defined by the statute); 745 ILCS 10/1-202 (defining "employee" to include "a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee"). The question is not so clear cut, however. In *Hanley v. City of Chicago*, 343 Ill.App.3d 49, 277 Ill.Dec. 140, 795 N.E.2d 808, 814 (2003), the Illinois appellate court expressly held that the immunity conferred by Section 2-201 on public employees extends to their municipal employer as well. In support, the appellate court pointed to the Illinois Supreme Court's decision in *In re Flood Litigation*, 176 Ill.2d 179, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997), in which the

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[7] In the Fourth Amended Complaint, the plaintiffs similarly conflate a citation to § 10/4-103 while quoting language from the *Black* opinion. *See* Compl. at ¶ 7. The Court attributes this error to the imprecision reflected in the *Black* opinion rather than to any intentional attempt to misquote § 10/4-103.

Court concluded that the City of Chicago was immune from liability for the discretionary acts of its employees under § 2-201. *Id.*, 223 Ill.Dec. 532, 680 N.E.2d at 272–73. Notably, however, in *Flood Litigation*, the state Supreme Court did not address the fact that, by its terms, Section 2-201 applies only to employees, not local public entities. That omission undermines, to some degree, confidence that the Court's answer would be the same if it were presented with an argument based on the statute's "plain language."[8] Though the state Supreme Court applied Section 10/2-201 to the City, it did not address—and therefore did not reject—the proposition that the "plain language" of the provision applies only to employees.

There is, for the same reason, reason to question the City's reliance on the Seventh Circuit precedent. The City points out that the Court of Appeals has repeatedly confirmed that common law suits for conversion and replevin provide adequate post-deprivation remedies for takings claims, and so it has. Indeed, it has done so in the particular context of takings claims by prisoners. *See, e.g.*, *Davenport v. Giliberto*, 566 Fed.Appx. 525, 529 (7th Cir.2014) (holding that negligent loss of arrestee property does not offend due process and, even if intentional, is not actionable under § 1983 because Illinois law provides an adequate post-deprivation remedy—namely, a suit for conversion); *Stewart v. McGinnis*, 5 F.3d 1031, 1036 (7th Cir. 1993) (holding that Illinois provides an adequate post-deprivation remedy to prisoner whose

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[8] Elsewhere in its opinion, the Illinois Supreme Court confirmed that it is the "plain language" of § 2-201 that governs its interpretation. 223 Ill.Dec. 532, 680 N.E.2d at 273 (concluding that § 2-201 immunizes willful and wanton misconduct as well as negligence).

property was confiscated and destroyed by prison guards). In none of those cases, however, has the Seventh Circuit had occasion to consider whether Sections 10/4-103 or 10/2-201 render those state law remedies unavailable for purposes of exhaustion. Circuit precedent does not, therefore, resolve the question.

That said, the Seventh Circuit *has* pointed the way out of this particular thicket. As the Court explained in *SGB Financial*, where a state offers a cause of action to seek redress for a taking, a plaintiff is obliged to pursue that cause of action; there is "nothing to litigate under § 1983" until it has been definitively established that the government taker will not pay "just compensation" for property taken. 235 F.3d at 1038; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("[N]o constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action."). Where there is room for doubt about the prospects of a state remedy, the party must pursue that remedy. *Cf. SKS & Associates, Inc. v. Dart*, 619 F.3d 674, 680 (7th Cir. 1010) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.") (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) (reversing lower courts' failure to apply Younger abstention where federal plaintiff had not tried to present its federal constitutional claims to state courts)). That does not mean that the "availability" of a remedy depends on the likelihood of success, *SGB Financial*, 235 F.3d at 1038, but rather that resort to the state remedy is not excused unless it would clearly be futile.

Here, the prospect that the plaintiffs can obtain just compensation is not illusory because, as discussed above, it is unclear whether the immunity provisions at issue would apply in the context of the plaintiffs' claims, both because there is room to doubt their legal applicability and because immunity is an affirmative defense that must be pled and proved by the City. The outcome of such a defense in this case, or any other, is not a given; the defense, if available, could be waived, forfeited, or defeated on the merits and, as the Seventh Circuit observed in *SGB Financial*, "efforts to predict how state courts will handle a particular [state law claim challenging a taking] are bootless." Rather than asking federal judges to guess how state courts would resolve such suits, the appropriate tack is to let the state courts do so. *Id.* at 1038. In the absence of a "blanket rule...that would block all consideration of a claim that [government] action amounts to a taking," *id.* at 1039, that is what the exhaustion doctrine requires. Illinois has no such blanket rule and, accordingly, the plaintiffs must pursue their takings claim in state court. Only if that effort proves unsuccessful will they be able to pursue a takings claim under Section 1983.[9] *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 456 (7th Cir. 1002) ("After utilizing a state remedy, such as a suit for inverse condemnation, if the owner does not receive what he believes is just compensation, he may proceed with a Takings Clause claim in federal court.").

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[9] It should be noted as well that exhaustion applies to appellate remedies as well. *See Rockstead v. City of Crystal Lake*, 486 F.3d 963, 965 (7th Cir. 1007) (takings claimant "must exhaust his state judicial remedies, if necessary by appealing an adverse decision").

II. Fourteenth Amendment

In the Third Amended Complaint, the due process claim asserted by the plaintiffs was that the notice provided to them by the City was misleading, as it suggested by reference to state forfeiture procedures that the plaintiffs had more than 30 days to recover their property. *See, e.g.*, Third Am. Compl., ECF No. 59, ¶¶ 16-20. That theory failed because the plaintiffs lacked standing to assert that claim because they failed to allege that they had even read, much less relied on, the purportedly confusing notice. Their failure to timely seek the return of their property could not have been "fairly traceable" to a misleading notice that the plaintiffs never read.

In the Fourth Amended Complaint, however, the plaintiffs have changed their due process theory.[10] They now contend that because the Notice provided by the City fails to identify any procedure for an incarcerated arrestee to secure the return of non-monetary property, and because the City failed to provide plaintiffs with individualized notice or a hearing regarding the destruction of their property, they have been deprived of due process of law in violation of the Fourteenth Amendment. *See* Fourth Am. Compl., ECF No. 81, at 6-7.

Notwithstanding this change in theories, the City continues to fight the last war, maintaining that the plaintiffs have still failed to allege Article III standing adequately. The City argues that the plaintiff's theory continues to be that they were misled by the notice

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[10] The defendants' argument that the plaintiffs violated the Court's prior order by filing an amended complaint that changed their theory is baseless. The Court granted leave for the plaintiffs to replead their due process claim, which was dismissed due to lack of jurisdiction. The Court imposed no restrictions on the plaintiffs with respect to repleading that claim.

provided. Def.'s Mot. for Summ. J., at 9-10. That is an unreasonable interpretation of the plaintiff's claim, however (notwithstanding a single use of the term "misleading" by the plaintiffs). Whether the plaintiffs were misled by the notice provided to them is no longer germane; their argument now is that the City provided an inadequate procedure to individuals who remained in custody to obtain the return of their personal property. In the context of this claim, the plaintiffs need not establish that they relied on the notice provided because it provided nothing on which to rely; as the plaintiffs see it, it is as if the City had provided no notice at all. The gravamen of the complaint now is not that the plaintiffs were misled into believing that they had a longer period in which to claim their property, but that they were never provided notice that they could reclaim their property (all of which was non-monetary). There is no deficiency in the plaintiffs' standing to assert this claim.

So, we move on to consider the due process claim. Due process does not require individualized notice of state law remedies that are set forth in materials generally available to the public. *City of W. Covina v. Perkins*, 525 U.S. 234, 241(1999) (noting that no individualized notice of state-law remedies is required when those remedies are available to the public via statutes and case law); *Gates v. City of Chicago*, 623 F.3d 389, 398 (7th Cir. 1010).[11] Notice of procedures that are not generally

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[11] The plaintiffs' argument that the City has no right to take possession of their personal property following an arrest, and thus making this case distinguishable from *West Covina*, is unpersuasive. As the City points out, Section 720.25(h) of the Illinois Administrative Code states that "The Chief of police shall determine what personal property, if any, a detainee may retain." Defs.' Reply at 6. Further undermining the plaintiffs' argument is that the same provision goes

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available, however, is required. *See Gates*, 623 F.3d at 398. As the City correctly notes, the Court in *West Covina* held that individualized, particularized notice of state procedures for obtaining the return of property seized is not required when those procedures are established by "published, generally available state statutes and case law." *City of W. Covina*, 525 U.S. at 241, 119 S.Ct. 678. That is because "[o]nce the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him. The City need not take additional steps to inform him of those options." *Id.*

By contrast, in *Gates* the Seventh Circuit held that when those remedial procedures are dictated by an internal, non-publicly available procedure the City must provide individual notice to the property owner. 623 F.3d at 398. In that case, much like here, at issue was the procedure Chicago police officers followed when seizing property from arrestees—in that case, cash. *Id.* at 391–92. When the plaintiff arrestees had property seized upon intake they were issued a general written notice that indicated they would receive "official notification that [their] inventoried property is available for release," and were instructed that once they received that notice they had thirty days to pick up their property before it was disposed. *Id.* But the plaintiffs never received "official notification" that their property was available

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on to state return of an inmate's property is only required upon "release," which includes "parole, mandatory supervised release, discharge[ ], or pardon[ ]." Ill. Admin. Code, Title 20 § 470.20. Of course, this makes sense because an arrestee who is in custody has no right while in custody to retain with them the personal property that was in their possession at the time of arrest.

for release. *Id.* That was because upon release, in non-narcotic cases, an internal City procedure required arrestees to bring their inventory slip to the desk sergeant who would then connect the arrestee with the arresting officer. *Id.* at 397. Only after the arresting officer certified that the property no longer had an investigative purpose could the funds be released. *Id.* Because the notice that the City provided did not describe these procedures, the plaintiffs were left waiting for an "official notification" that would never come. In effect, much like the plaintiffs here, the inmates were not given inadequate notice—they were in fact given no notice at all. In finding *West Covina* distinguishable, the Seventh Circuit noted that while *West Covina* controls "as to the procedures set forth in state statutes, [but] it does not control as the City's additional difficult-to-access police department rules" that were not readily available to the public. *Id.* at 399.

Here, too, the City's procedures for recovering inmate property were controlled by an internal City procedure and not by a state statute readily available to the public. As in *Gates*, *West Convina* is therefore inapposite. The question that remains is whether the City provided notice of that procedure to the point of satisfying due process. As the Court explained in its prior opinion, the notice provided to incarcerated individuals did not explain how to obtain the return of non-monetary personal property so, standing alone, it is insufficient. In response, the City indicates they provided information on how to recover seized inmate property on the Chicago Police Department website. Though there is reason to doubt that the information available on the web was readily available to detainees, ultimately that is a factual matter disputed by the parties. For the Court's purposes here, it is enough to say that the plaintiffs have adequately alleged that the notice provided by the City here

was not "published, generally available state statutes and case law." *City of W. Covina*, 525 U.S. at 241, 119 S.Ct. 678. Accordingly, the motion to dismiss the due process claim must be denied on that basis alone.[12]

* * *

For the reasons set forth, the plaintiffs' as-applied takings claim is dismissed. That dismissal is without prejudice, but the claim may not be presented again in any federal court until the plaintiffs have exhausted potential state court remedies. The plaintiffs' due process claim may go forward.

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[12] Accordingly, the Court need not address the plaintiffs' argument that the City's procedure for reclaiming property is deficient because it does not afford either a pre-or post-deprivation hearing prior to disposal of the property. At this juncture, the content of the City's policy is disputed, so the question of the adequacy of the procedures it defines remains open.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12-cv-06144

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs,

v.

City of Chicago,

Defendant.

MEMORANDUM OPINION AND ORDER
March 24, 2015

John J. Tharp, Jr., United States District Judge

Plaintiffs Blake Conyers, Lamar Ewing, and Kevin Flint, individually and on behalf of a class, bring claims under 42 U.S.C. § 1983 and a state law bailment claim against the defendant, the City of Chicago (the "City"). The plaintiffs allege that the City's policies pertaining to the destruction of personal property items seized from arrestees violate the Fourth, Fifth, and Fourteenth Amendments, as well as Illinois law. The City has moved to dismiss the plaintiffs' Third Amended Complaint (the "Complaint") pursuant to Rule 12(b)(6). For the reasons stated below, the City's motion is granted.

BACKGROUND

The City requires that its police officers remove and inventory all personal property in the possession of

arrestees who are detained at a City police station.[1] At the time of arrest, the City provides such arrestees with a Chicago Police Department ("CPD") inventory receipt identifying the seized property and a written notice explaining how that property can be retrieved. Pursuant to CPD policy, if an arrestee is subsequently transferred to the Cook County Jail (the "Jail"), the City sends certain types of inventoried personal property with the arrestee to the Jail and retains all other types of inventoried personal property.[2] Since September 14, 2007, the City's policy has been to destroy any retained personal property of arrestees transferred to the Jail that is not claimed within 30 days of the inventory date.

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[1] In reviewing a motion to dismiss, the Court may consider: (1) the complaint and any documents attached to it, (2) documents attached to the motion to dismiss that are critical to the complaint and referred to in it, (3) additional facts set forth in the response to the motion or in any documents attached to the response, as long as those additional facts are consistent with the allegations in the complaint, and (4) information that is subject to proper judicial notice (such as public records). *Geinosky v. City of Chi.*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Rosenblum Ltd., v. Travelbyus.com* 299 F.3d 657, 661 (7th Cir. 2002). When considering these materials, the Court accepts the plaintiff's factual allegations as true and construes all reasonable inferences in favor of the plaintiff. *Gessert v. United States*, 703 F.3d 1028, 1033 (7th Cir. 2013). The factual background is therefore summarized with this standard in mind and drawn primarily from the Complaint (Dkt.59).

[2] CPD Notice 07–40, as amended by CPD Special Order S06–01–12, provides that the following types of inventoried personal property are sent with arrestees to the Jail: outer garments, U.S. currency of $500 or less, one plain metal ring without stones, government-issued identification cards, prescription eyeglasses, prescription medications, shoelaces, belts, keys, court documents, CPD receipts, credit cards, and debit cards.

Each of the plaintiffs had personal property items seized and ultimately destroyed as a result of the City's policies. Conyers was arrested by City police officers on or about February 26, 2012, while in lawful possession of an earring, a bracelet, and two cell phones. This property was removed and inventoried by the City, retained by the City upon Conyers' transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. Ewing was arrested by City police officers on or about December 20, 2012, while in lawful possession of a wallet, a debit card, a library card, and two cell phones. This property was removed and inventoried by the City, retained by the City upon Ewing's transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. Flint was arrested by City police officers on or about January 1, 2013, while in lawful possession of a cell phone and a ring with a small stone. This property was removed and inventoried by the City, retained by the City upon Flint's transfer to the Jail, and destroyed by City personnel because it was not claimed within 30 days. All three plaintiffs remained incarcerated in the Jail throughout the 30–day period following their respective arrests.

The written notice provided to each of the plaintiffs at the time of arrest (the "Notice") included the following information:

> You may get inventoried property back by following the procedures detailed below. Information on how to get back inventoried property is also available at www.ChicagoPolice.org. If you have any questions, please contact the CPD Evidence and Recovered Property Section ("ERPS") at (312) 746–6777. ERPS is located at 1011 S. Homan Avenue, Chicago, Illinois 60624 and is open Monday through Friday (8:00 a.m. to 3:00 p.m., closed holidays).

Property Available for Return to Owner:

If your receipt is marked "Property Available for Return to Owner" you may get your property back by providing the receipt and a photo ID at ERPS. If you do not contact the CPD to get your property back within 30 days of the date on this receipt, it will be considered abandoned under Chicago Municipal Code Section 284–160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq."

If you are in jail or incarcerated, and your receipt is marked "Property Available for Return to Owner," you may get money returned to you by sending copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to: Chicago Police Department Evidence and Recovered Property Section; 1011 S. Homan Avenue, Chicago, Illinois, 60624. If the property is money, a check will be sent to you at the facility where you are jailed or incarcerated.

Ex. 2 to Mem. in Support, Dkt. 61–1, at 4.[3] Although the Notice provides a procedure for incarcerated individuals

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[3] The Complaint quotes only one sentence of the Notice ("If you do not contact the CPD to get your property back within 30 days of the date on this receipt, it will be considered abandoned under Chicago Municipal Code Section 2–84–160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq."). *See* Complaint, Dkt. 59, ¶ 17. But the City included a complete copy of the Notice as an exhibit to its opening brief, and the plaintiffs have not raised any objections regarding this document. Since the Notice is critical to the Complaint and referred to in it, the Court may consider the copy provided by the City in reviewing the motion to dismiss. *See Geinosky*, 675 F.3d at 745 n.1. The City also urges the Court to consider the additional instructions posted on the website listed on the Notice. The Court declines to take judicial notice of those

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to claim property that is money, it does not specify a procedure for such individuals to claim non-money property.[4] Plaintiffs Conyers and Ewing nevertheless

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instructions, however, since even assuming—without deciding—that that the Court may take judicial notice of information on the CPD website, the instructions that are currently posted are not necessarily reflective of the instructions that were posted throughout the entire relevant time period for this lawsuit. *See Information Regarding Personal Property Seized by the Chicago Police Department*, Chicago Police, http://home.chicagopolice.org/wp-content/uploads/2014/12/Information–Regarding–Personal–Property–Seized–By–CPD.pdf (listing an effective date of September 2014).

[4] According to the Complaint, the Notice provides that an incarcerated person can claim his property by sending a copy of his receipt, a copy of his photo identification card, and the name of the facility where he is detained to ERPS. *See* Complaint, Dkt. 59, ¶ 16. The text of the Notice itself, however, states that this procedure is only available for property that is money. *See* Ex. 2 to Mem. in Support, Dkt. 61–1, at 4 ("[Y]ou may get *money* returned to you by sending copies of your receipt, your photo ID and the name of the facility where you are jailed or incarcerated to [ERPS].... If the property is *money*, a check will be sent to you ...." (emphases added)). *See generally Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013) ("To the extent that an exhibit attached to or referenced by the complaint contradicts the complaint's allegations, the exhibit takes precedence."). The Notice provides no corresponding procedure for obtaining non-money property without going to ERPS in person. The repeated contentions to the contrary in the City's briefs are thus both incorrect and inexplicable (especially given that it was the City that created the Notice and provided the full text of the Notice to the Court). *See* Mem. in Support, Dkt. 61, at 3 (citing to the text of the Notice in support of the propositions that "the Notice ... advises that arrestees may reclaim their personal property and money at [ERPS]" and "[i]f an individual is unable to reclaim his or her property in person, he or she may designate an authorized representative to do so instead"); *id.* at 3–4 (stating that plaintiff Ewing "availed [himself] of the procedures set forth in the Notice" when he "sent an authorized representative to ERPS in

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attempted to retrieve their property while incarcerated before learning that it had been destroyed. Conyers "filed a grievance with the Cook County Jail, requested assistance from the jail's social worker, and wrote a letter to [ERPS]."[5] Complaint, Dkt. 59, ¶ 24. Ewing "prepared a form authorizing his cousin to [claim his] property" and had his cousin go to ERPS to attempt to retrieve the property before the 30–day period had elapsed. *Id.* ¶ 29; Response, Dkt. 65, at 8. Flint made no attempt to retrieve his property while incarcerated but eventually learned of its destruction upon his release.

The plaintiffs allege that the City's policies pertaining to the destruction of retained personal property of arrestees transferred to the Jail deprive arrestees of rights secured by the Fourth, Fifth, and Fourteenth Amendments. The plaintiffs also allege that the City's retention of arrestees' personal property creates a constructive bailment under Illinois law, and that the City violates its obligations as bailee by destroying the property. The Court has jurisdiction over the plaintiffs' § 1983 claims pursuant to 28 U.S.C. § 1343 and has supplemental jurisdiction over their state law claim pursuant to 28 U.S.C. § 1367. Pursuant to Rule 12(b)(6), the City has moved to

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order to retrieve his personal effects"); Reply, Dkt. 69, at 7 (stating that the Notice explained "how to recover personal property, even if incarcerated"). The Notice makes no mention of the concept of "authorized representative" or, indeed, of any procedure that would enable incarcerated individuals to claim non-money property.

[5] These reclamation attempts were made sometime between February 26, 2012, when Conyers was arrested, and July 2012, when he learned that his property had been destroyed. It is unclear, however, whether any of the attempts were made within 30 days of Conyers' arrest.

dismiss the Complaint on the basis that it fails to state a claim under § 1983.[6]

ANALYSIS

"To survive a motion to dismiss under Rule 12(b)(6), a complaint must 'state a claim to relief that is plausible on its face.'" *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although a court must accept all of the plaintiff's factual allegations as true when reviewing a complaint, conclusory allegations merely restating the elements of a cause of action do not receive this presumption. *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

To state a claim against a municipal entity under § 1983, a plaintiff must sufficiently allege that a person acting under color of state law violated a right secured by the Constitution or laws of the United States, and that the violation was caused by a policy or custom of the defendant. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 822 (7th Cir. 2009). The City argues that the Complaint (1) fails to identify a cognizable § 1983 injury based on the Fourth Amendment, (2) does not assert a valid § 1983 claim based on the Fifth or Fourteenth Amendments because the plaintiffs have not exhausted

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[6] The City has not raised any direct challenges to the state law bailment claim.

state law remedies, (3) fails to identify a cognizable § 1983 injury based on the Fourteenth Amendment, and (4) does not contain sufficient factual content about the City's policies to support *Monell* liability.

I. Fourth Amendment

A complaint states a Fourth Amendment violation if the defendant's alleged conduct constitutes an unreasonable seizure. *Bielanski v. Cnty. of Kane*, 550 F.3d 632, 637 (7th Cir. 2008). Since "a seizure occurs upon the initial act of dispossession," *Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 660 (7th Cir. 2012), 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. *See Lee v. City of Chi.*, 330 F.3d 456, 466 (7th Cir. 2003) ("Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable. The amendment then cannot be invoked by the dispossessed owner to regain his property."); *Waldon v. Wilkins*, 400 Fed.Appx. 75, 80 (7th Cir. 2010) (citing *Lee*, 330 F.3d at 466) (rejecting a Fourth Amendment claim where the plaintiffs "ha[d] not alleged anything unreasonable about the seizure itself"). In this case, the plaintiffs do not challenge the City's policy of removing and inventorying arrestees' personal property; they challenge only the City's policies pertaining to the retention of inventoried property. *See* Response, Dkt. 65, at 2, 4. Accordingly, since the plaintiffs have not alleged that the City's seizure of arrestees' property is unreasonable, they have not stated a cognizable § 1983 injury based on the Fourth Amendment.

II. Fifth Amendment

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. A

plaintiff cannot bring an as-applied Takings Clause challenge in federal court until he has pursued all state law remedies that are available and adequate. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–95 (1985); *Peters v. Vill. of Clifton*, 498 F.3d 727, 731–32 (7th Cir. 2007). A plaintiff may, however, raise a facial challenge based on the Takings Clause without first exhausting state law remedies. *See San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 345–46 (2005) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)); *Peters*, 498 F.3d at 732. That is because "facial takings challenges ... by their nature request[ ] relief distinct from the provision of 'just compensation.' " *San Remo*, 545 U.S. at 345; *see also Ezell v. City of Chi.*, 651 F.3d 684, 698 (7th Cir. 2011) ("In a facial challenge like this one, the claimed constitutional violation inheres in the terms of the statute, not its application.... The remedy is necessarily directed at the statute itself and must be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied to anyone."). A plaintiff has presented a facial takings challenge to a municipal policy or ordinance if he argues that the relevant policy or ordinance "did not substantially advance a legitimate state interest regardless of how it was applied." *Sorrentino v. Godinez*, 777 F.3d 410, 414 (7th Cir. 2015) (citing *San Remo*, 545 U.S. at 345, and *Yee*, 503 U.S. at 534).

In this case, the plaintiffs contend that their Fifth Amendment-based § 1983 claim makes only a facial challenge and may proceed on that basis.[7] Response, Dkt. 65,

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[7] In light of this contention, to the extent the Complaint can be read as making an as-applied takings challenge, that claim is dismissed without prejudice (but any such claim cannot be pursued unless and until the plaintiffs have exhausted potential remedies under state law).

at 13–14. But it is clear that the plaintiffs do not advance a facial *takings* challenge. The Complaint asserts that Municipal Code § 2–84–160 provides for the disposal of property "not claimed within 30 days after seizure," Complaint, Dkt. 59, ¶ 18, and that the City's policy "has been to destroy the personal property of any arrestee that remained in the custody of the City 30 days after the arrestee had been transferred to the [Jail]," *id.* ¶ 14. Although the plaintiffs make the conclusory claim that the City's policy violates the Takings Clause (among other constitutional provisions), *see id.* ¶¶ 7, 14; Response, Dkt. 65, at 13–14, the Complaint makes no mention of "just compensation" or "public use." Instead, the Complaint presents detailed information about the notice given to arrestees and alleges that the City failed to provide adequate notice that it would destroy unclaimed property after 30 days. Complaint, Dkt. 59, ¶¶ 15–17. Specifically, the plaintiffs allege that the City failed to comply with the notice requirements set forth under Illinois law and failed to satisfy due process standards. *Id.* ¶ 20.

The gravamen of the Complaint, then, is not that the City destroyed the plaintiffs' property without providing just compensation; it is that that City destroyed their property without providing adequate notice.[8] Indeed, if the Complaint's two references to the Fifth Amendment were removed, one reading the Complaint would have no idea that the allegations were intended to support such a

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[8] The plaintiffs' brief confirms this view of the Complaint. *See* Response, Dkt. 65, at 3–4 ("The City ... will only retain this property for 30 days and then ... it will destroy the arrestee's property without further notice. Plaintiffs contend that this aspect of the City's policy is unconstitutional."). The City is correct, then, to say that the plaintiffs do not contest the City's power to dispose of unclaimed property. *See* Reply, Dkt. 69, at 11.

claim. Accordingly, the Court does not read the Complaint to assert a facial takings challenge. To the extent that the Complaint alleges that the notice provided by the City was constitutionally inadequate, it raises not a takings claim but a due process claim. *That* claim is discussed further below.[9]

The Court notes as well that *if* the plaintiffs were actually making a facial takings challenge to the City's policy, the Court would be required to address whether the plaintiffs have standing to make such a challenge. Constitutional standing requires that the plaintiff have sustained, or face, an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). In the context of a facial challenge, standing requires an injury arising from the enactment of a law or policy rather than its application; a facial takings challenge is premised on the effect of the law or policy on a plaintiff's property by virtue of its enactment or continuing existence. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 & n.10 (1997) ("Such facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle, since it is difficult to demonstrate that mere enactment of a piece of legislation deprived [the owner] of economically viable use of [his] property." (alterations in original) (citations and internal quotation marks omitted); *see also, e.g.*, *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc) ("[I]n the takings context, the basis

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[9] To the extent that the Complaint alleges that the City failed to comply with the requirements of Illinois law concerning retention of seized property, that is a state law issue, not one that implicates the federal Constitution.

of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." (quoting *Levald, Inc. v. City of Palm Desert*, 998 F. 2d 680, 688 (9th Cir. 1993)) (internal quotation marks omitted)). Often, for example, such claims are asserted in cases involving laws governing the use of property, where the plaintiffs have a basis to allege that enactment of an ordinance or regulation deprives them of some or all of the value of their property, without regard to whether, or how, the governmental restriction was actually applied to them. *Yee v. City of Escondido*, 503 U.S. 519 (1992), the case on which the plaintiffs untenably rely for their argument that the Complaint states a facial takings challenge, was such a case. *See also, e.g., Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 467 (7th Cir. 2002). But here, the mere enactment, or existence, of the City's ordinance did nothing to injure the plaintiffs; it is only the application of the ordinance to their property that effected any "taking" of that property. The plaintiffs suffered no injury at all from the existence of the City's policy until that policy was *applied* to them and resulted in the destruction of their property. As the Court concludes that the plaintiffs have not actually asserted a facial takings claim, however, it is unnecessary to definitively resolve this jurisdictional question.

III. Fourteenth Amendment

Due process requires both adequate procedures for reclaiming seized property and adequate notice of those procedures. *See Gates v. City of Chi.*, 623 F.3d 389, 394, 405 (7th Cir. 2010). The purpose of adequate notice is to ensure that the owner of the property can pursue available remedies for its return. *See id.* at 398 (citing *City of West Covina v. Perkins*, 525 U.S. 234 (1999)). Where the procedures for reclaiming seized property "are

established by published, generally available state statutes and case law, no individualized notice of those procedures is required." *Id.* (citing *West Covina*, 525 U.S. at 241). Where, however, the procedures "are not available in documents that are published and generally available," individualized notice of the procedures is required. *Id.* at 400 (citing *West Covina*, 525 U.S. at 242). In addition, any individualized notice provided—whether required or not—cannot be misleading. *See id.* at 401 (vacating summary judgment for the City on the plaintiffs' due process claim and stating that the City cannot mislead arrestees about the procedures for reclaiming property).

In this case, the premise of the plaintiffs' due process claim is that the Notice is misleading because it does not clearly indicate that owners of seized property only have 30 days to claim their property before it will be destroyed.[10] The Notice states that property not claimed within 30 days of the inventory date "will be considered

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[10] Although the Notice does not set forth the procedures for incarcerated individuals to reclaim non-money property, *see* note 4, *supra*, and it appears possible that those procedures are not "published and generally available," the plaintiffs have not asserted a due process claim based on failure to provide individualized notice. Therefore, the Court does not address the viability of that potential claim. In addition, although the plaintiffs state in their brief that they "complain about inadequate procedures" for reclaiming their seized property, Response, Dkt. 65, at 11, the Complaint does not describe the procedures for incarcerated individuals to reclaim non-money property, *see* note 4, *supra*, and the Court does not read the Complaint to assert a due process claim that the reclamation procedures are constitutionally deficient. As discussed in Section 2 of this opinion, the clear thrust of the Complaint is that the notice provided by the City was inadequate. To the extent that the plaintiffs intended to assert any due process claim based on inadequate reclamation procedures, such a claim has not been adequately stated.

abandoned under Chicago Municipal Code Section 2–84–160, and the forfeiture process will begin under Illinois Law, 765 ILCS 1030/1, et seq." Complaint, Dkt. 59, ¶ 17. The ordinance referenced in the Notice provides that property seized by the CPD will be destroyed, auctioned, or re-appropriated for City use if it is not claimed within 30 days of (1) "the final disposition of the court proceedings ... in connection with which [the] property was seized," or (2) the date of seizure, if there are no such court proceedings. Chi. Mun.Code § 2–84–160. The statute referenced in the Notice is the Law Enforcement Disposition of Property Act ("LEDPA"), which provides, *inter alia*, that owners of property covered by LEDPA have six months to recover their property. *See* 765 ILCS §§ 1030/3, 1030/5.

The plaintiffs concede that Municipal Code § 2–84–160 establishes that the type of property at issue will be disposed of if not claimed within 30 days of seizure.[11] But

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[11] Both sides apparently regard the type of property at issue in this case as property not seized "in connection with" court proceedings within the meaning of Municipal Code § 2–84160. Although the ordinance might be read to allow an arrestee to claim his inventoried personal property until up to 30 days after the conclusion of the criminal case in connection with which he was arrested, the Notice reveals that the City interprets the phrase "the court proceedings ... in connection with which [the] property was seized" to apply only to court proceedings in which the property seized is itself at issue (*e.g.*, as evidence). *See* Ex. 2 to Mem. in Support, Dkt. 61–1, at 4 (indicating that "Property Available for Return to Owner" will be considered abandoned under the ordinance if not claimed within 30 days of the inventory date, while "Property Held for Evidence or Investigation" must be claimed, pursuant to the ordinance, within 30 days of "the final court date of the proceedings in which [the] property was inventoried" or within 30 days of the inventory date, if there are no court proceedings involved). And the plaintiffs do not challenge

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they argue that the Notice is nevertheless misleading because the reference to the ordinance is immediately followed by a reference to "the forfeiture process ... under [LEDPA]," which makes the sentence as a whole suggest that the City does not in fact dispose of arrestees' unclaimed personal effects after 30 days, but instead begins at that point to institute forfeiture proceedings based on the procedures outlined in LEDPA (regardless of whether or not LEDPA itself actually applies). Since LEDPA provides for a six-month recovery period, the plaintiffs argue, the Notice could mislead arrestees into believing that they have more than 30 days in which to seek to recover their property.

The Court agrees that the phrasing of the Notice could reasonably suggest to arrestees who consult the text of LEDPA and Municipal Code § 2–84–160 that they have more than 30 days to recover their property. To the extent that the City's actual policy is to dispose of property not claimed within 30 days, then, the plaintiffs have adequately alleged that the Notice is constitutionally deficient. *Cf. Gates*, 623 F.3d at 401 ("[T]he City may not mislead arrestees about the necessary procedures for the return of their [property]....").[12]

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the ordinance itself as unclear or contest the City's interpretation of the ordinance.

[12] In addition to arguing (unsuccessfully) that the plaintiffs have not adequately alleged constitutionally deficient notice, the City also contends that the Fourteenth Amendment-based § 1983 claim should be dismissed because the plaintiffs failed to exhaust state law remedies. That argument is unavailing, however, since the Seventh Circuit has held that the exhaustion requirement for claims of due process violations does not apply when—as here—a complaint asserts municipal liability under *Monell*. *See Wilson v. Civil Town of Clayton*, 839 F.2d 375, 380 (7th Cir. 1988). The exhaustion

(footnote continued on next page)

That the plaintiffs have adequately alleged that the City provides constitutionally deficient notice, however, does not establish that they have standing to pursue their Fourteenth Amendment-based claim. Although the theory the plaintiffs advance is that the Notice misleads arrestees into believing that they have more than 30 days to seek the return of their property, the plaintiffs have not alleged that they *were* misled. The Complaint does not assert that the plaintiffs read the Notice and detrimentally relied on it by waiting too long to claim their property. In fact, the Complaint expressly alleges that two of the plaintiffs "diligently" sought to recover their property, Complaint, Dkt. 59, ¶¶ 24, 29, and that at least one of the plaintiffs sought the return of his property within 30 days of his arrest, *id.* ¶ 29; Response, Dkt. 65, at 8. Moreover, in their brief, the plaintiffs assert that "Jail officials take [the Notice] from arrestees when they reach the Cook County Jail" and that the Notice is thus "inaccessible" to arrestees once they are at the Jail. Response, Dkt. 65, at 4–5. Although these new allegations

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requirement for due process claims, established in *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986), applies only to random and unauthorized acts as to which there is no municipal liability under *Monell*. That is because when "conduct is engaged in pursuant to the custom or policy of a municipality, it can hardly be viewed as random or unauthorized" action that must be redressed through post-deprivation state law remedies. *Follkie v. City of Chi.*, No. 97 C 154, 1997 WL 527304, at *4 (N.D.Ill. Aug. 19, 1997) (citing *Wilson*, 839 F.2d at 380). Accordingly, where a *Monell* claim has been alleged, the exhaustion requirement has no application. *Wilson*, 839 F.2d at 380 ("[A] complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite."). Since the exhaustion requirement does not apply to the plaintiffs' Fourteenth Amendment-based § 1983 claim, the Court need not consider the parties' supplemental briefs on the availability of state law remedies for the alleged due process violation (Dkt. 74 and Dkt. 78).

are irrelevant to the question of the City's liability, as the City points out, *see* Reply, Dkt. 69, at 2–3, they highlight the absence of any allegation that the plaintiffs relied on the Notice. The plaintiffs were injured by the allegedly misleading Notice only if they relied on it to their detriment; if they "diligently" sought to recover their property within the City's 30–day reclamation period despite reading the Notice, or if they did not read and rely on the Notice, then there is no causal connection between the injury they claim (the loss of their property) and the alleged constitutional violation (the misleading Notice).

This is not an argument raised by the City, but it is an argument that concerns the plaintiffs' standing and, therefore, this Court's jurisdiction; the Court is thus obliged to raise the issue *sua sponte*. *See Monsanto*, 561 U.S. at 149 (noting that constitutional standing requires that the injury by "fairly traceable to the challenged action"). It is the plaintiffs' burden to establish standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and in this context that requires them to allege facts sufficient, taken as true, to plausibly establish that they relied on the defective aspects of the Notice. *See Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995) ("[W]e agree with the holdings of other circuits that a plaintiff must demonstrate reliance on the allegedly defective denial notices [in order to satisfy the requirements of Article III standing]."). The plaintiffs have not done so and, accordingly, their § 1983 claim based on the Fourteenth Amendment cannot go forward as presently alleged.[13]

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[13] In light of the above rulings dismissing the plaintiffs' § 1983 claims, the Court need not address the City's argument that the Complaint contains insufficient factual content about the City's policies to support *Monell* liability.

* * *

For the reasons set forth above, the City's motion to dismiss is granted. The Fourth Amendment-based § 1983 claim is dismissed with prejudice. The Fifth Amendment-based § 1983 claim is dismissed without prejudice to the extent that it presents an as-applied challenge (but any such claim cannot be pursued unless and until the plaintiffs have exhausted potential remedies under state law). The Complaint fails to assert a facial challenge based on the Fifth Amendment, and cannot do so given that enactment of the ordinance did not effect a taking of the plaintiffs' property, so that theory is also closed to the plaintiffs. The Fourteenth Amendment-based § 1983 claim is dismissed without prejudice for lack of subject matter jurisdiction—specifically, standing. The plaintiffs will be given leave to replead that claim within 28 days. In the event the plaintiffs do not do so, the Court will decline to exercise jurisdiction over the state law bailment claim (to the extent that such a theory has been asserted), enter judgment for the City, and dismiss the case, which will make this ruling final and appealable.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1934

Blake Conyers, Lamar Ewing, and Kevin Flint, individually and for a class,

Plaintiffs-Appellants,

v.

City of Chicago,

Defendant-Appellee

September 16, 2021

ORDER

Before EASTERBROOK, WOOD, AND KIRSCH, *Circuit Judges.*

Plaintiffs-appellants filed a petition for rehearing and rehearing *en banc* on September 1, 2021. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore **DENIED**.

[1] Judge Candace Jackson-Akiwumi did not participate in the consideration of this matter.

APPENDIX G

Municipal Code of the City of Chicago

2-84-160 Sale of seized property.

(a) The department shall keep a record of all seized property. For purposes of this section, "seized property" means property seized by the department in connection with an arrest.

(b) The department shall make reasonable efforts to notify and advise to the owner of any seized property not being held for investigation, or potential forfeiture, of the procedure to claim such property.

(c) The department shall dispose of any seized property that is:

(1) not retained for investigatory or evidentiary purposes, or for potential forfeiture, and the owner fails to claim the seized property within 30 days from the date of its seizure; or

(2) held for investigatory or evidentiary purposes and the owner fails to claim the seized property within 30 days;

(i) from the date of the final disposition of the court or administrative hearing proceeding pertaining to such property; or

(ii) after notice from the department that the investigation for which the property was seized has been concluded, if the property is not subject to a court or administrative hearing proceeding, or potential forfeiture.

(d) Any seized property not recovered by the owner at the expiration of the holding period provided in subsection (c) shall be disposed of in the following manner:

(1) seized property deemed by the superintendent to be of use to the city shall be forfeited to the city for its use;

(2) seized property deemed by the superintendent to be unsalable and of no use to the city shall be destroyed; or

(3) seized property deemed salable by the superintendent shall be sold through online public auction.

(e) The department shall publish on its website the procedures to claim any seized property eligible for return and information directing the owners to the website of the third-party online or live auctioneers that auction the seized property.

(f) After the expiration of the holding period provided in subsection (c) the department shall transfer salable seized property to a third-party online or live auctioneer for auction to the highest bidder. Before such sale, the third-party online or live auctioneer shall provide a publicly available description and photograph of the seized property on its auctioning website. Any owner believing his property is subject to auction shall have the opportunity to recover, subject to ownership verification, the property from the third-party auctioneer before the sale of the property.

(g) No member of the department shall, directly or indirectly, participate in the bidding for, or purchase of, seized property.

APPENDIX H

Municipal Code of the City of Chicago

2-84-180 Proceeds of sales – Disposition

The proceeds of any sale or sales so made, after deducting the cost of storage, advertising, selling, and other expenses incident to the handling or selling of such property, shall be paid by such custodian to the board of trustees of the policemen's annuity and benefit fund, to be credited to that fund.

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