No. 21-898

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONERS

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Respondent seeks to minimize the circuit split by offering an overly narrow reading of the decisions of the Fourth and Ninth Circuits that adopted the rule petitioners urge in this case. (Br. in Opp. 12-14.) Respondent also refuses to engage the views of the Framers that the government must safeguard property it has lawfully seized. (Br. in Opp. 17.)

In an attempt to avoid the Fourth Amendment question presented in this case, respondent repeatedly asserts that petitioners voluntarily abandoned their property. (Br. in Opp. 11, 17, 18, 20.) This is incorrect. Pretrial detainees at a county jail do not "abandon" their property by failing to escape from the jail to retrieve their property from the police station.

Respondent also seeks to avoid resolution of the circuit split by asking the Court to view this case as a challenge to "procedures for claiming or disposing of legally seized property." (Br. in Opp. 12.) But notice of an unconstitutional policy does not make that policy reasonable. Respondent's "destroy-or-sell" policy is unlawful

"regardless of the fairness of the procedures used to implement" it. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The Court should grant certiorari to resolve the conflict among the circuits over whether the protections of the Fourth Amendment apply to property after it has been lawfully seized or whether the Fourth Amendment applies only to the initial seizure.

ARGUMENT

1. Respondent is mistaken in refusing to acknowledge the conflict between the circuits

Respondent seeks to limit the decision of the Fourth Circuit in *Mom's, Inc. v. Willman*, 109 F. App'x 629 (4th Cir. 2004) to cases where police officers steal property that had been lawfully seized. (Br. in Opp. 12.) This narrow view of *Mom's* is inconsistent with the conclusion of that case that the Fourth Amendment extends beyond "the initial acquisition of possession" and protects against "'meaningful interference with an individual's possessory interest in that property.'" *Mom's, Inc.*, 109 F. App'x at 637 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The sale or destruction of seized property, as in this case, is the ultimate "interference with an individual's possessory interest." Respondent's assertion that petitioner's claim would fail in the Fourth Circuit is wrong.

Respondent is also incorrect in reading *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), as limited to cases involving property seized for a "*mandatory* 30 days." (Br. in Opp. 13, emphasis in original.) Nothing in *Brewster* supports such a fact-specific limitation. The reasoning of *Brewster* that "[a] seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force," *Brewster*, 859 F.3d at 1197, is fully applicable to the sale or destruction of

lawfully seized property. The Seventh Circuit recognized the conflict when it cited *Brewster* as supporting petitioners' argument "that the Fourth Amendment applies to a continuing seizure." (Pet. App. 9a.)

Respondent cites the decision of the Eleventh Circuit in *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009) as holding that the retention of lawfully seized property does not implicate the Fourth Amendment. (Br. in Opp. 9.) The Fifth Circuit applied the opposite rule in *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978) when it reversed a jury verdict and held that the continued retention of a lawfully seized truck was an unreasonable deprivation of property. *Id.* at 629.

Other federal courts acknowledge that the "circuits are split on the Fourth Amendment issue" arising from "the failure to return lawfully seized property." *Springer v. Albin*, 398 F. App'x 427, 434 (10th Cir. 2010). *See, e.g.*, *Hammond v. Lancaster City Bureau of Police*, CV 17-1885, 2021 WL 5987734, at *4 (E.D. Pa. Dec. 16, 2021); *Brite Fin. Servs., LLC v. Bobby's Towing Serv., LLC*, 461 F. Supp. 3d 549, 557 (E.D. Mich. 2020); *Saunders v. Baltimore City Police Dept.*, CV CCB-19-551, 2020 WL 1505697, at *3 (D. Md. Mar. 30, 2020).

Commentators also acknowledge the circuit split. See M. Jackson Jones, *Examining Why the Fourth Amendment Does Not Protect Property Interests Once the Initial Search and Seizure Have Been Completed*, 45 S.U. L. REV. 96, 98-118 (2017); Graham Miller, *Right of Return: Lee v. City of Chicago and Contesting Seizure in the Property Context*, 55 DEPAUL L. REV. 745, 748-55 (2006). This case provides the Court with an opportunity to resolve this conflict.

2. The views of the Framers are not irrelevant

Respondent asks the Court to disregard Professor Brady's "thorough discussion of how the term 'effects' came to be included in the Fourth Amendment text and the meaning of the word at the time," *Mayfield v. Bethards*, 826 F.3d 1252, 1256 n.3 (10th Cir. 2016), because her article "discusses 'personal property in public space.'" (Br. in Opp. 17.) There is no support for this proposed limitation of Professor Brady's work.

Petitioners cited Professor Brady's research to show the protection to seized property afforded when the Fourth Amendment was adopted. (Pet. 17.) *See Mendez v. County of Los Angeles*, 897 F.3d 1067, 1077 (9th Cir. 2018) (citing Professor Brady's research that "attendees at the Boston Town Meeting of 1772 raised concerns about damage done to chattels after searches").

Professor Brady's thorough review of the "textual history of effects" (Pet. 17) provides ample reason for this Court to review the decisions collected by respondent (Br. in Opp. 7-10) that the Fourth Amendment does not require that the police safeguard and return property lawfully seized.

3. Petitioners did not intend to abandon their property

Respondent concedes in its reformulation of the question presented that it relies on the claim that "petitioners abandoned their property by failing to claim it." (Br. in Opp. i.) Petitioners, of course, could not reclaim their property because they were not permitted to leave the jail and they were not allowed to possess the inventoried items while pretrial detainees. (Pet. App. 2a.) Nor were petitioners able to retain an agent to retrieve and store their property. The Court should reject respondent's cruel insistence that "petitioners could have retrieved

their property at any time, but they did not." (Br. in Opp. 14.)

"Abandonment is a question of intent." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 240 (1918). There must be "an actual intent to abandon." *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 31 (1900). Petitioners did not intend to abandon their property any more than they "intended" to be held as pretrial detainees for more than 30 days.

The "abandonment" in this case was the result of respondent's written policy that does not require any intent to abandon property. As respondent concedes, a Chicago ordinance decreed that the property was "deemed abandoned" after 30 days. (Br. in Opp. 1.)

Petitioners' property, inventoried by respondent "to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger," *Colorado v. Bertine*, 479 U.S. 367, 372 (1987), did not become "*bona vacantia*," *Abel v. United States*, 362 U.S. 217, 241 (1960), simply because petitioners remained in custody as pretrial detainees for more than 30 days. Respondent's meritless claim of abandonment should not deter the Court from resolving the conflict presented in this case.

4. Petitioners are not challenging the procedures for claiming or disposing of lawfully seized property

Respondent is in error in seeking to recast the question presented in this case to be "whether the Fourth Amendment provides a cause of action to challenge procedures for claiming or disposing of legally seized property." (Br. in Opp. 11.)

The right to own property is an "absolute right, inherent in any Englishman … which consists in the free use, enjoyment, and disposal of all his acquisitions, without

any control or diminution, save only by the laws of the land." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1765). There is no combination of notice and hearing that permits the government to sell or destroy personal property without "a compelling state interest."[1] *Reno v. Flores*, 507 U.S. 292, 302 (1993). Respondent's "sell-or-destroy" policy results in the sale or destruction of personal property "regardless of the fairness of the procedures used to implement" it. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The question presented in this case is whether respondent's "destroy-or-sell" policy is unreasonable under the Fourth Amendment when applied to persons, like petitioners, who are in custody awaiting trial and whose property has been seized "to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). The Court should grant certiorari to answer this question.

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[1] The court of appeals in this case held that "constraints on storage space for seized property" (Pet. App. 11a) provided a sufficient interest. Respondent wisely declines to assert that "constraints on storage space" is a compelling state interest.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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