No. _____

In the Supreme Court of the United States

JEVARREO KELLEY-LOMAX, PETITIONER,
v.
CITY OF CHICAGO

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Persons who are arrested surrender their property to the arresting authority "to insure against claims of lost, stolen, or vandalized property." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). Most police departments follow the common law rule, in effect when the Fourteenth Amendment was adopted, that a state official who lawfully seizes property becomes a "temporary bailee" who is required to safeguard the property.

The City of Chicago ignores the common law rule and follows the "destroy or sell policy" upheld by the Seventh Circuit in *Conyers v. Chicago*, 10 F.4th 704 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022) and reaffirmed in this case. This policy results in the sale or destruction of arrestee property that is not claimed within 30 days of arrest, even for persons like petitioner who remain in custody for six months before being acquitted and released.

The circuits are divided on whether the refusal to return lawfully seized property implicates the Fourth Amendment. The question presented is:

May a municipality, consistent with the Fourth and Fourteenth Amendments, sell or destroy property seized for safekeeping from an arrestee, merely because the arrestee is held in custody as a pre-trial detainee for more than 30 days?

PARTIES TO THE PROCEEDINGS

Petitioner is Jevarreo Kelley-Lomax.

Respondent is the City of Chicago.

RELATED PROCEEDINGS

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

Kelley-Lomax v. City of Chicago, 20-cv-4638 (August 19, 2021 (ruling on motion to dismiss)

Kelley-Lomax v. City of Chicago, 20-cv-4638 (October 1, 2021 (ruling on motion to reconsider)

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

Kelley-Lomax v. City of Chicago, 49 F.4th 1124 (7th Cir. 2022)

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Jevarreo Kelley-Lomax respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is reported at 49 F.4th 1124. The opinion of the district court (App. 5a-9a) and its order denying reconsideration (App. 10a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. 12a) was entered on September 28, 2022. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

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

The Due Process clause of the Fourteenth Amendment, Section 1, provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. Petitioner Jevarreo Kelley-Lomax was arrested by Chicago police officers on April 18, 2019; the officers inventoried petitioner's personal property—a cell phone, charger, and two earrings. (App. 6a.) The officers designated the property as "available for return to owner," making it available for pickup by petitioner or his designee for 30 days following arrest. (*Id.*) A policy of the City of Chicago requires its police to sell or throw away all property that is not reclaimed during that 30-day period. (App. 1a.)

2. The municipal policy, which is justified by "rationing available storage [space]" (App. 4a), does not include any exception for arrestees, like petitioner, who are held in custody for more than 30 days. The effect of the policy is that any property not retrieved within 30 days is deemed abandoned and "is sold or thrown away." (App. 1a.)

3. Petitioner remained in custody for nearly six months and was unable to find anyone willing to retrieve his property. (App. 1a.) Respondent therefore applied its policy and disposed of petitioner's property. (App. 1a-2a.)

4. Petitioner brought this action under 42 U.S.C. § 1983 following his release from custody, complaining that he had been deprived of rights secured by the Fourth, Fifth, and Fourteenth Amendments when respondent disposed of his property.[1] Respondent moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; the district court granted the motion, relying on the decision of the Seventh Circuit in *Conyers v. City of Chicago*, 10 F.4th 704 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022). (App. 5a-11a.) The Seventh Circuit affirmed. (App. 1a-4a.)

5. The Seventh Circuit rejected petitioner's request that it revisit its holding in *Conyers* on the Fourth Amendment issue, stating "we do not see any deficiency in that opinion's reasoning." (App. 2a.) The court of appeals then turned to petitioner's substantive due process claim that had not been at issue in *Conyers*. (*Id.*)

6. The Seventh Circuit recognized that the right to own property is a fundamental right (App. 3a) but upheld dismissal of the Due Process claim because petitioner had failed to show "that our historical tradition recognizes a right to have the government serve as unpaid custodian of property for extended periods." (App. 2a.)

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[1] Petitioner also sought to represent a class of those similarly situated pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. (App. 5a.) The district court did not rule on whether the case could be maintained as a class action.

REASONS FOR GRANTING THE PETITION

Chicago's police officers routinely inventory the personal property ("effects") of arrestees "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). "It is not unheard of for persons employed in police activities to steal property taken from arrested persons." *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). An inventory seizure thus protects "the owner's property while it remains in police custody" and shields "the police against claims or disputes over lost or stolen property." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

The question presented in this case is: May a municipality solve its limited storage space problem by requiring its police officers to sell or throw away an arrestee's property when the arrestee remains in custody for 30 days and has been unable to secure an agent to retrieve the property?

The answer is "no" under the view of the Fourth Amendment applied by two circuits; the answer is "yes" in five circuits. The answer of "no" is consistent with the Framer's view of the "effects" clause of the Fourth Amendment and the common understanding of bailment law in 1886 when the Fourteenth Amendment was adopted. The Court should grant certiorari to resolve the well-defined conflict and restore the respect for property rights embodied in the Fourth and Fourteenth Amendments.

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

The Tenth Circuit has correctly observed 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).

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

The court of appeals for the Fourth and Ninth Circuits follow the contrary rule, holding that, after an initial seizure, the Fourth Amendment continues to protect against "'meaningful interference with an individual's possessory interests in that property.'" *Presley v. City of Charlottesville*, 464 F.3d 480, 482 (4th Cir. 2006), quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

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

Five circuits follow the rule first applied by the Sixth Circuit in *Fox v. Van Oosterum*, 176 F.3d 342 (6th Cir. 1999) that after the "act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.* at 351. The panel majority in *Fox* did not, as the dissenting judge pointed out, cite "a single case in support of the narrow view that a seizure begins and ends at the moment it takes place." *Id.* at 355 (Clay, J., dissenting). Nor did the panel majority consider the original intent of the framers of the Fourth or Fourteenth Amendments.

The Seventh Circuit followed a similarly limited exposition in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), relying on a textual analysis to conclude that the word "secure" in the Fourth Amendment limited the

protections of the amendment to the initial seizure of property, after which "the individual is no longer secure in his possessory interest within the meaning of the amendment." *Id.* at 462. The Seventh Circuit did not advert to the intent of the Framers in including the "effects" clause in the Fourth Amendment.

The Second Circuit followed *Fox* and *Lee* in *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177 (2d Cir. 2004), where a teacher suspended from employment complained that the school had failed to return all of the personal items that he had left behind. The Second Circuit did not cite any authority to support its conclusion that when "an initial seizure of property was reasonable, defendants' failure to return the items does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure."[2] *Id.* at 187.

The Eleventh Circuit in *Case v. Eslinger*, 555 F.3d 1317 (11th Cir. 2009) rejected in a single sentence the plaintiff's assertion "that the retention of his seized property violated the Fourth Amendment." *Id.* at 1330. The court explained that its result was compelled by the fact that there had been probable cause for the initial seizure.

The First Circuit followed *Fox*, *Lee*, *and Shaul* in *Denault v. Ahern*, 857 F.3d 76 (1st Cir. 2017), concluding that when "an initial seizure of property was reasonable, defendants' failure to return the items does not, by itself, state a separate Fourth Amendment claim of

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[2] The Second Circuit suggested that a remedy would be available as a denial of procedural due process under the Fourteenth Amendment. *Shaul*, 363 F.3d at 187. The Eleventh Circuit made the same suggestion in *Case*, 555 F.3d at 1331, but concluded that a due process claim was barred by *Parratt v. Taylor*, 451 U.S. 527 (1981).

unreasonable seizure."[3] *Id.* at 83. Once again, the court of appeals did not consider the views of the Framers.

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

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

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

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[3] The First Circuit held that the claim sounds "in the Fifth Amendment rather than in the Fourth Amendment" because the Fifth Amendment, rather than the Fourth, protected personal property. *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017). The Court did not acknowledge that the Framers intended their use of "effects" in the Fourth Amendment to refer to personal property. *See infra* at 10-11.

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

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

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

The Ninth Circuit agreed with the vehicle owner, holding that "[t]he Fourth Amendment doesn't become irrelevant once an initial seizure has run its course." 859 F.3d at 1197.[5] The court of appeals relied on *Manuel v. City of Joliet*, 580 U.S. 357 (2017), to support its disagreement with the decision of the Seventh Circuit in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003).

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

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

the municipality could not justify its continued retention of the vehicle. *Id.* at 516-17.

The conflict between the circuits is well-defined and should be resolved by the Court.

C. The conflict is ripe for resolution

The decision of the Tenth Circuit in *Springer v. Albin*, 398 F. App'x 427 (10th Cir. 2010) shows that it is unlikely that other circuits will take sides on the conflict presented in this case. This case therefore presents a "fully percolated conflict." *California v. Carney*, 471 U.S. 386, 398 (1985) (Stevens, J., dissenting).

Springer arose from the execution of a search warrant and seizure of currency; the plaintiff alleged that the officers had stolen some of the currency. The Tenth Circuit acknowledged the circuit split, 398 F. App'x at 434-36, and declined to resolve the constitutional question because the absence of clearly established law entitled the officers to qualified immunity.[6] *Id.* at 436.

The Ninth Circuit reached the same result in *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), a case arising from the theft of more than $200,000 by officers executing a search warrant. *Id.* 939-40. The court of appeals described the officers' actions as "morally reprehensible," *id.* at 943, but upheld the grant of qualified immunity because the officers had not violated clearly settled law. *Id.* at 941-42.

District court decisions make plain that the lower federal courts will avoid weighing in on the conflict presented in this case because, as authorized by *Pearson v. Callahan*, 555 U.S. 223 (2009), they will grant qualified

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[6] This is a consequence of the framework the Court adopted in *Pearson v. Callahan*, 555 U.S. 223 (2009) for resolving claims of qualified immunity.

immunity when the law is not clearly established. *See, e.g.*, *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, *Note, 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, brought against a municipality because of its express policy, comes to the Court without any issue of qualified immunity, *Owen v. City of Independence*, 445 U.S. 622, 638 n.18 (1980), and provides the Court with an opportunity to resolve the conflict between the circuits.

II. The Framers and the drafters of the Fourteenth Amendment considered an official holding property seized under color of office as a bailee

This case provides the Court with an opportunity to restore the "effects" clause of the Fourth Amendment to the original intent of the Framers, an understanding shared by the drafters of the Fourteenth Amendment.

The Framers intended the "effects" clause of the Fourth Amendment to refer to "personal property."[7] At

[7] "Founding-era debates focused specifically on personal property." *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L. J. 946, 951 (2016). "Effects" were included in the Fourth Amendment "because of the risk of mishandling or damage generally associated with interferences with

the time of the framing, "'effects' was usually understood to designate moveable goods or property (but not real property or premises)."[8] The Framers sought to implement through the "effects" clause the right "to know and understand what property was taken, and a person is entitled to have the power to get it back." Laurent Sacharoff, *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 IOWA L. REV. 1643, 1671 (2020).

The "power to get it back" is consistent with the view that by inventorying and storing arrestee property, the government becomes a bailee "bound to an appropriate degree of care or diligence in preserving the thing bailed, because it is the property of another to whom he is bound to restore it." *Adams v. Gardiner*, 52 Ky. 197, 200 (Ky. App. 1852). Thus, a person who holds property seized through judicial process,

> [I]s treated as only the temporary bailee of the property, with the right to use it by the consent of the debtor, but liable at any time to be called to account if guilty of converting the property by any abuse, or wrongful use, or refusal to deliver on demand."

Tinker v. Morrill, 39 Vt. 477, 479, 1866 WL 3047, at *2 (Vt. 1866).

That a "temporary bailee" has the duty "to take care of and preserve the property," *Crawford v. Newell*, 23 Iowa 453, 455 (1867), was well settled when the Fourteenth Amendment was enacted. *See, e.g.*, *Kendall v. Morse*, 43 N.H. 553, 555 (1862); *Hartleib v. McLane*, 44

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personal property," as well as the "harms to privacy and dignity that could be incurred by their inspection." *Id.* at 987.

[8] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 710 (1999).

Pa. 510, 514 (1863); *Moore v. Westervelt*, 27 N.Y. 234, 239 (1863); *Walker v. Commonwealth*, 59 Va. 13, 43 (1867).

The Fourth Amendment should "*provide at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in original). This protection extended to property lawfully seized that the government was temporarily holding.

"[G]uidance from the founding era," *Riley v. California*, 573 U.S. 373, 385 (2014), shows that the Court should resolve the conflict between the circuits and restore the Fourth and Fourteenth Amendments to their intended meaning to protect personal property.

III. Numerous states recognize that a police department that holds arrestee property is a "temporary" or "involuntary" bailee

The concept of "temporary" or "involuntary" bailee has been frequently applied to property seized during inventory searches. For example, the court in *People v. Ortiz*, 147 Cal.App.2d 248, 249, 305 P.2d 145, 147 (1956), acknowledged the inventory search procedure and described the law enforcement agency holding the property as "the temporary storage bailee." 147 Cal.App.3d at 349, 305 P.2d at 147.

North Carolina similarly recognizes as an "involuntary bailee" the police officer who seizes property during an inventory search. *State v. Phifer*, 39 N.C. App. 278, 286, 250 S.E.2d 309, 314 (1979).

The Washington Supreme Court recently acknowledged the status of "temporary storage bailee" for the law enforcement agency that seizes property during an inventory search. *State v. Peck*, 449 P.3d 235, 239, 194 Wash.2d 148, 155–56 (2019).

Other cases recognizing that a law enforcement officer who seizes and inventory property becomes a temporary bailee include *Heffley v. State*, 83 Nev. 100, 103, 423 P.2d 666, 668 (1967); *St. Clair v. State*, 1 Md. App. 605, 615, 232 A.2d 565, 570 (1967); *State v. Wallen*, 185 Neb. 44, 47, 173 N.W.2d 372, 374, (1970); and *People v Robinson*, 36 A.D.2d 375, 378, 320 N.Y.S.2d 665, 669 (1971).

Respondent City of Chicago stands alone in its "sell or destroy" policy. For example, the New York City Police Department will retain arrestee property for at least "120 days after the termination of criminal proceedings." *Smith v. New York City Police Dep't, Prop. Clerk Div.*, No. 121CV3239AMDLB, 2022 WL 4648417, at *6 (E.D.N.Y. Sept. 30, 2022). The same policy of holding arrestee property until the termination of criminal proceedings is followed by all municipal police departments in California. California Gov. Code § 26640; *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 520 P.2d 726, 731 n.5 (1974).

IV. The abandonment theory relied on by the Seventh Circuit should not deter the Court from resolving the conflict presented in this case

The Seventh Circuit held in this case that respondent was free to sell or throw away petitioner's personal property because he had not retrieved it while being held as a pretrial detainee. (App. 3a.) As Justice Frankfurter urged in *Griffin v. Illinois*, 351 U.S. 12 (1956), quoting the famous aphorism of Anatole France,[9] the Court

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

should refuse to "sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State." *Id.* at 23 (Frankfurter, J., concurring).

"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). Petitioner did not "intend" to be held as pretrial detainees for more than 30 days, and he did not intend to abandon his personal property. Petitioner's property, held 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 petitioner remained in custody as a pretrial detainee for more than 30 days. The Seventh Circuit's heartless abandonment theory should not deter the Court from resolving the conflict presented in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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