No. _____

In the Supreme Court of the United States

CITY OF LOS ANGELES,
Petitioner,

v.

TONY LAVAN; CATERIUS SMITH; WILLIE VASSIE; ERNEST SEYMORE; LAMOEN HALL; SHAMAL BALLANTINE; BYRON REESE, and REGINALD WILSON
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CARMEN A. TRUTANICH
CITY ATTORNEY
JANE ELLISON USHER
SPECIAL ASSISTANT CITY ATTORNEY
AMY FIELD
DEPUTY CITY ATTORNEY
Counsel of Record
LOS ANGELES CITY ATTORNEY'S OFFICE
City Hall East 600
200 North Main Street
Los Angeles, California 90012
(213) 978-6929
amy.field@lacity.org

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

In a divided opinion, the Ninth Circuit held that even in the face of a posted law expressly prohibiting such conduct, personal effects left unattended on the public sidewalk are constitutionally protected. Thus, the majority concluded when city employees dispose of these unattended items during a scheduled cleaning operation, the city commits both an unreasonable seizure in violation of the Fourth Amendment and a deprivation of procedural due process in violation the Fourteenth Amendment. The profound effect of this opinion is that a city can no longer fulfill its obligation to protect the public health. The interest in safe, clean, passable sidewalks has been supplanted. In its place, as the photographs in Appendix E illustrate, are public sidewalks that become home to mounds of tarp-covered items, often tagged with a sign reading "not abandoned." If a city wants to protect the public's health by removing this accumulation of stuff piling up on the sidewalk, yet not violate the Constitution, a city must dedicate resources to sort through these items for contamination, fend off lawsuits alleging illegal search, and then bag, tag, and provide the facilities to store the remainder for retrieval by their owner.

Do the protections of the Fourth Amendment and the due process clause of the Fourteenth Amendment extend to these personal effects intentionally left unattended by the owner on the public sidewalk in violation of an express law, such that city workers cannot dispose of these items during routine street cleaning without violating the Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OPINIONS BELOW

The opinions of the U.S. District Court, Central District of California, dated June 23, 2011, and the U.S. Court of Appeals for the Ninth Circuit, Dated September 5, 2012, and the order denying the Petition for Panel Rehearing and the Suggestion for Rehearing En Banc, dated November 30, 2012, are reproduced at Appendix A, B, and C, respectively. The district court's opinion was published in the official reporter at 797 F. Supp. 2d 1005 (C. D. Cal. 2011) and the Ninth Circuit's opinion was published in the official reporter at 693 F. 3d 1022 (9th Cir. 2012).

JURISDICTION

The Ninth Circuit filed its opinion on September 5, 2012, and denied the City of Los Angeles's Petition for Rehearing and Rehearing En Banc on November 30, 2012. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions involved are the Fourth Amendment to the United States Constitution and the due process clause to the Fourteenth Amendment to the United States Constitution. The relevant statutory provision is 42 U.S.C. § 1983. Pursuant to Supreme Court Rules 14.1 (f), these constitutional and statutory provisions are reproduced verbatim at Appendix D.

STATEMENT OF THE CASE

1. The Background Facts.

In the area of downtown Los Angeles commonly known as "Skid Row," which hosts the highest concentration of homeless persons in the City, there is an excessive accumulation of unattended property on the sidewalks. The source of this accumulation is varied; some of it is left there by the homeless, but it is also commonplace for well intentioned church groups to leave bags of clothing, blankets, and food on the City sidewalks, hoping it will fall into the hands of those who need it most; and it is also common for people who do not reside in the area to haul their unwanted stuff and discard it on the streets of Skid Row. Left on the sidewalks, this accumulation of property presents significant health and safety problems. The sidewalks become impassable for pedestrians; the accumulations provide a nesting ground for vermin; and biohazards like human urine and feces, used condoms, discarded drug paraphernalia, and rotting food quickly accumulate underneath the covering tarps. Street cleaners cannot wash down the sidewalks, which literally reek from the smell of these accumulations.

In the Skid Row area, "the City posted approximately 73 signs throughout the area . . . warning that street cleaning would be conducted Monday through Friday between 8:00 a.m. and 11:00 a.m. and that any unattended property left at the location in violation of [Los Angeles Municipal Code section 56.11] would be disposed of at the time of the clean-up." Los Angeles Municipal Code section 56.11 provides that "No person shall leave or permit to

remain any merchandise, baggage or any article of personal property on any parkway or sidewalk." (A-25.) "[T] here is a warehouse in Skid Row open to the public during regular business hours, which is sponsored by the Business Improvement District in the Central Division. This warehouse provides a location for people to store their personal belongings free of charge." (A-25-26.) "During the scheduled street clean-ups, the City workers and police escorts make an effort to remove only items that appear to have been abandoned, such as items that have remained in the same location for several days or items that pose a health and safety hazard, including rotting food, human fecal matter, and drug paraphernalia." (A-26.) The City's street cleaning efforts in the Spring of 2011 sparked this lawsuit.

2. Plaintiffs Allege That Removal and Disposal of Their Unattended Personal Property From the Public Sidewalk Violated Their Constitutional Rights and Filed A Class Action Lawsuit For Injunctive Relief.

A street cleaner's system for determining which things on the sidewalk are abandoned versus temporarily unattended, and in trying to separate items that pose a health and safety hazard from the items that do not, are imperfect. Given the nature of the things that are left on the sidewalks, there is an inherent risk that things that the owner may never have intended to abandon will be thrown out, and personal items that do not pose a health and safety hazard and may be of great personal value to their owner, but are intermingled or buried under things

that do pose a health and safety risk, will likewise be inadvertently thrown out. The plaintiffs are eight homeless persons living on the streets of Skid Row in Los Angeles and this is what they claim happened to them – things that they never intended to abandon, but admittedly did leave unattended on the public sidewalk, and that were of great value to them, were thrown out during routine street cleaning.

It is undisputed that Plaintiffs leave their personal property unattended on the City sidewalks – Plaintiffs fully admit this and at the heart of this lawsuit is their contention that they have a constitutionally protected right to do so. (A-5.) The majority opinion repeatedly emphasized that personal property is left only 'momentarily,' or 'temporarily.' (A-4, A-15, A-21.) Plaintiffs, who identify themselves as homeless, say that they leave their personal possessions unattended on the public sidewalk, long enough for them to "perform necessary tasks such as showering, eating, using the restrooms, or attending court," or to "obtain medical care and other private and government services, and go to work." (A-6, A-26.) These allegations are not inherent in the unattended items. City street cleaners have no clock for divining the length of time items have been stored on the public sidewalk, nor can they discern with any accuracy whether the owner is homeless or considers the unattended property to be trash. The reality is that accumulations of items are left on the sidewalks of the City for days.

Plaintiffs alleged that on several days in February and March of 2011, "the City removed and immediately destroyed [their] personal property that was not

permanently abandoned but was temporarily unattended." (A-26.) Plaintiffs claimed that they kept their belongings in shopping carts, or other storage containers, provided to them by local charities and that tucked within the items that were thrown away were personal identification documents, birth certificates, medications, family memorabilia, toiletries, portable electronics and other things of value to them. (A-5.)

Plaintiffs filed the instant class action lawsuit for injunctive relief pursuant to 42 U.S.C. § 1983 charging that the City of Los Angeles by seizing and immediately destroying their personal property that they had not permanently abandoned, but had only left temporarily unattended on the public sidewalk, violated their Fourth and Fourteenth Amendment rights.

3. Finding A Constitutionally Protected Right of Privacy Under the Fourth Amendment as well as a Property Interest Encompassed Within the Due Process Clause of the Fourteenth Amendment, The District Court Ordered A Preliminary Injunction.

In April 2011, the district court issued a temporary restraining order enjoining the purportedly unconstitutional practices and ordered the parties to show cause why a preliminary injunction should not issue. (A-43.) Although the City sharply disputed that it was summarily disposing of property that was clearly un-abandoned and presented counter-evidence to demonstrate the efforts City workers had gone to only dispose of property that appeared to be abandoned, or appeared to pose a health and safety threat, on June

23, 2011, after weighing the conflicting evidence before it, the district court found that Plaintiffs had clearly shown that they will likely succeed in establishing that the City seized and destroyed property that it knew was not abandoned and that seizure and destruction of Plaintiffs unattended property violated both the Fourth Amendment and the due process clause of the Fourteenth Amendment.

The district court acknowledged that the abandonment inquiry "should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search of seizure, *U. S. v. Nordling*, 804 F. 2d 1466, 1469 (9th Cir. 1986)," and that "[s]uch determination is 'to be made in light of the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of property. [*Id*.]" (A-51-52.)

However, although Plaintiffs had undoubtedly relinquished physical possession of their property, the district court found there was objective evidence that they had not denied ownership of it, in other words, they had not abandoned it. "[T]he fact that [plaintiffs'] carts were neatly packed objectively suggests ownership: '[T]he homeless often arrange their belongings in such a manner as to suggest ownership--e.g., they may lean it against a tree or other object or cover it with a pillow or blanket; [] by its appearance, the property belonging to homeless persons is reasonably distinguishable from truly abandoned property.' *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S. D. Fla. 1992)." (A-54.)

In a published opinion, the district court issued a preliminary injunction barring the City from:

> 1. "Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health and safety, or is evidence of a crime, or contraband, and
>
> 2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.
>
> Defendant City, its agents and employees, is further directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner." (A-66-67.)

The district court found that plaintiffs would likely succeed on the merits of the Fourth Amendment claims. "Plaintiffs have a legitimate expectation of privacy in their property and the Fourth Amendment's protections against unreasonable searches and seizures applies." (A-46.) The district court said its conclusion was based on "abundant authority," when in fact it was based on one published district court decision, *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1235 (E.D. Cal. 2009); two unpublished district court decisions, *Justin v. City of Los Angeles*, CV 00-12352 LGB AIJ, 2000 WL 1808426, at *9 (C. D. Cal. December 5, 2000) and *Kincaid v. City of Fresno*, CV 06-1445 OWW SMS, 2006 WL 3542732, at *35-37 (E. D. Cal. 2006); and an

inapposite United States Supreme Court opinion pertaining to plaintiff's legally parked mobile home: *Soldal v. Cook County*, 506 U.S. 68, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992). (A-46-47.)

The district court stated that, given language recited by this Court in *Soldal v. Cook County*, 506 U.S. 56, 68, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) regarding a mobile home seized from private property, its "conclusion is not necessarily altered by the fact that the City may have found the property in a public place." (A-47.) In making this leap, the district court relied on a single sentence in *Soldal v. Cook County*, that says "an officer who happens to come across an individual's property in a public place could seize it only if Fourth Amendment standards are satisfied – for example, if the items are evidence of a crime or contraband." (A-47, quoting *Soldal v. Cook County, supra,* 506 U.S. at p. 68.)

The district court found that removing the property from the City sidewalk constituted a seizure, and the City's destruction of Plaintiffs' unattended property "on the spot" rendered the seizure unreasonable and a violation of the Fourth Amendment. (A-58.) "It should be noted that an otherwise lawful seizure "at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" (A-58, quoting *United States v. Jacobsen,* 466 U.S. 109, 124, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).)

With regard to Plaintiffs' due process claim, the district court relied on *Fuentes v. Shevin,* 407 U.S. 67, 84, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), for the proposition that "the government must provide notice and a meaningful opportunity to be heard in cases where common household goods are seized." Then, likening Plaintiffs' personal possessions – which included birth certificates, family photos, medications, and portable electronics – to the household goods in *Fuentes,* the majority concluded that Plaintiffs' unattended personal property on the public sidewalk "must be considered property for purposes of this due process analysis." (A-59.) "As such, before the City can seize and destroy Plaintiff's property, it must provide notice and an 'opportunity to be heard at a meaningful time and in a meaningful manner . . .'" (A-59) quoting *Mathews v. Eldridge,* 424 U.S. 319, 339-43, 96 S. Ct. 893, 47 L. Ed 2d 18 (1976).)

4. In A Divided-Opinion, The Ninth Circuit Found Plaintiffs Retained A Protected 'Possessory Interest' (But Not A Privacy Interest) Under The Fourth Amendment In Their Unattended Property As Well As A 'Property Interest' Encompassed Within The Meaning Of The Due Process Clause Of The Fourteenth Amendment And Denied The City's Appeal.

The City confined its appeal to questions of law that did not require resolution of the factual disputes. For purposes of appeal, the City accepted as true Plaintiffs' contention that during street cleaning efforts, the City was summarily disposing of unattended, but not abandoned, property left on the public sidewalk. (A-4,

fn. 2.) The City focused its appeal on whether the district court's grant of preliminary injunction reflected a misapprehension of the law on the two pivotal issues – legal issues that did not turn on the disputed facts: Whether an individual retains an objectively reasonable expectation of privacy deserving protection under the Fourth Amendment in their effects when they intentionally leave them unattended on the public sidewalk in clear violation of a municipal ordinance; and whether an individual's interest in their personal property intentionally left unattended on the public sidewalk in violation of a municipal ordinance are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property' so that the court need even decide what procedures constitute 'due process of law.' (A-10-11.)

A. The Fourth Amendment.

The majority reasoned that because this case involved a 'seizure' not a 'search' of plaintiffs' effects, "[t]he reasonableness of appellees' expectation of privacy is irrelevant . . ." (A-11.) The Ninth Circuit said the applicable constitutional standard in this 'seizure' case is set forth in this Court's recent decision in *United States v. Jones,* 565 U.S. ___ , 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012), as well as *Soldal v. Cook County, supra,* 506 U.S. at 63-64 and *United States v. Jacobsen*, *supra,* 466 U. S. at 113, and that standard is "whether there was 'some meaningful interference' with Plaintiffs' possessory interest in that property." (A-12.) The majority stated that "[T]he City meaningfully interfered with Appellees' possessory interest in that property" when it removed that property from the public sidewalk during street

cleaning, thus 'seizing' it within the meaning of the Fourth Amendment. (A-17.)

Having found a 'meaningful interference' with Plaintiffs' 'possessory interest' in this property left on the public-right-of-way, the majority concluded that by collecting the property and disposing of it on the spot the City acted 'unreasonably' and violated the Fourth Amendment: "The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable." (A-18.)

The dissent described the majority opinion as "impermissibly stretch[ing] our Fourth Amendment jurisprudence to find that Plaintiffs had a protected interest in their unattended property." (A-24.) The dissent stated that "[n]o circuit court has expanded the right to be free from unreasonable searches and seizures to the right to leave unattended property personal property on public land in violation of a law prohibiting that conduct" and said that the majority's reliance on *Jones* and *Soldal* was misplaced. (A-30-33.)

According to the dissent, "[n]o circuit has expanded the right to be free from unreasonable searches and seizures to a right to leave unattended person property on public land in violation of a law prohibiting that conduct. The few cases that have addressed similar issues lead to the conclusion Plaintiffs lacked an objective expectation of privacy that society recognizes as reasonable." (A-30), citing *Church v. Jacobs*, 30 F. 3d 1332, 1345 (11th Cir. 1994) ("the Constitution does not

confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands."); *United States v. Ruckman*, 806 F. 2d 1471, 1472 (10th Cir. 1986) (reasoning that a trespasser living in a cave on federally-owned land did not have an objectively reasonable expectation of privacy and thus the search of the cave and the seizure of his belongings did not infringe on personal and societal values protected by the Fourth Amendment); *Amezquita v. Hernandez-Colon*, 518 F. 2d 8, 11-12 (1st Cir. 1975) (concluding that squatters who unlawfully camped on public land did not have an objectively reasonable expectation of privacy for Fourth Amendment purposes and thus any search or seizure could not be an unreasonable one, which is all the Fourth Amendment prescribes); and *Zimmerman v. Bishop Estate*, 25 F. 3d 784, 787-88 (9th Cir. 1994) (concluding that a trespasser on private state property did not have an objectively reasonable expectation of privacy).

The dissent had this to say about the majority's reliance on *Jones*: "The Supreme Court in *Jones* clarified that while individuals have a protected property interest in their personal property, the interest still must be 'recognized and permitted by society.' See *Jones*, 132 S. Ct. at 949-52." (A-30.) By leaving their property unattended in violation of the City's Ordinance and in the face of express notice that the property would be removed during the scheduled clean-ups, Plaintiffs forfeited any privacy interest that society recognized as objectively reasonable. (A-32-33.)

With regard to *Soldal*, the dissent said: Nor does *Soldal* "support Plaintiffs' professed expectation of

privacy because Plaintiffs took actions that are, at a minimum, inconsistent with our society's reasonable expectations of privacy." (A-32.) In *Soldal*, the plaintiff's mobile home was seized while it was parked on mobile home park property, but because there was not yet a judicial order of eviction, it was parked there legally. *Soldal*, *supra,* 506 U.S. at 60, 67-68. Thus, as a matter of law, the plaintiff had yet to take any action that might relinquish his reasonable expectation of privacy. *Id.* However, here, Plaintiffs chose to leave their property unattended on public sidewalks despite being warned that their property would be seized during the limited hours of regularly scheduled street-cleanings. *Soldal* concerned the seizure of personal property that was *legally* parked in a mobile home area; whereas here, Plaintiffs left their property unattended in violation of the Ordinance prohibiting them from doing just that. In doing so, their expectation of privacy diminished below the level of privacy that society recognizes as reasonable." (A-32-33.)

B. The Due Process Clause of the Fourteenth Amendment.

The majority found that plaintiffs had "a protected property interest in the continued ownership of their unattended possessions" encompassed within the Fourteenth Amendment's protection of 'life, liberty, and property.' (A-19.) The majority recognized that to determine whether the asserted individual interest is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,' a court must look to "'existing rules or understanding that stem form an independent source such as state law-rule or

understandings.' *Board of Regents v. Roth*, 408 U.S. 564, 577 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)," but then found a constitutionally protected interest in this unattended property based on nothing more than the fact plaintiffs had not relinquished ownership of their property, or in other words, based on the fact that they had not abandoned it.

The majority said that provisions of the California Civil Code which recognized "the right of ownership of personal property, a right this held by '[a]ny person , whether citizen or alien.' Cal. Civ. Code §§ 655, 663, 671," provided the "existing rules" establishing a property interest encompassed within the Fourteenth Amendment's protection of property. (A-20.) Because it is undisputed that Appellees owned their possessions and had not abandoned them; therefore, Appellees maintained a protected interest in their personal property. (A-20.)

Having found a protected interest in this unattended property left on the public sidewalk, the majority proceeded to the second inquiry and concluded: "Because homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them. *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 48, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993)('Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.')" (A-22.)

The dissent, however, was unwilling to find a property interest protected under the due process clause in Plaintiffs' property that they illegally left on the City sidewalks: "[B]ecause no constitutionally protected property interest is implicated by the City's purported conduct," the Court should not have proceeded to the second due process inquiry. (A-37.) "Much like the objective reasonableness analysis under the Fourth Amendment inquiry, protected property interests under the due process inquiry 'are defined by existing rules or understandings' of our society, and 'unilateral expectations[s] are insufficient to create a protected interest. See *Bd. of Regents*, *supra,* 408 U.S. at 577. There is thus an objective element to the standard. However, the majority has not identified "an existing rule or law creating or defining this protected property interest.' See *Id*." (A-37.) "[I]n this case, there do not appear to be any 'existing rules or understandings' that provide Plaintiffs with an objectively protected interest that allows them to leave their belongings unattended on public sidewalks, even if temporarily." (A-38.)

In fact, the dissent believed that existing rules and law cut against, not in favor of, a property right encompassed within the meaning of the due process clause: California Penal Code section 647c, which provides that cities have the power to "regulate conduct upon a street, sidewalk, or other place in a place open to the public," while not definitive, "does suggest that California's 'existing rules or understandings' weigh in favor of the City. *Bd. of Regents*, 408 U.S. at 577." (A-38.) "This is particularly the case where, as here, the preliminary injunction effectively prevents the City from carrying out its normal function of cleaning its

sidewalks without risking liability. The courts should be reluctant to find a protected property interest where, as here, the result has far-sweeping implications for cities across the county, including their basic responsibility for health and safety." (A-38.)

5. The Court Denied The City's Petition for Panel Rehearing and Rehearing En Banc.

The City petitioned for panel rehearing and rehearing en banc. That petition was denied on November 30, 2012. Judges Kim McClane Wardlaw and Stephen R. Reinhardt voted to deny the Petition for Panel Rehearing and Suggestion for Rehearing en banc, Judge Counsuelo M. Callahan would granted the Petition for Panel Rehearing and Suggestion for Rehearing en banc, and the full panel having been advised of the petition for rehearing en banc, no judge requested a vote on whether to rehear the matter en banc. (A-68.)

REASONS FOR GRANTING THE PETITION

1. This opinion has "far-sweeping implications for cities across the country, including their basic responsibility for health and safety."[1]

If ever there was a case that presents an issue of extraordinary public importance, this case is it. The opinion announces an unprecedented expansion of the

---

[1] (*Lavan v. City of Los Angeles*, 693 F. 3d 1022, 1039 (9th Cir. 2012) Callahan, dissenting.)

right to be free from unreasonable searches and seizures and the right to procedural due process of law, to a right to leave unattended personal property on the public right-of-way. The far-sweeping implication of this opinion is that if individuals are allowed to use the public sidewalks as a place to deposit mounds of personal belongings, covered under tarps, the public sidewalks will present a health and safety disaster. This public health disaster is the new normal on Skid Row. With no limit on the amount of personal property that can be left unattended on the public sidewalks in the wake of this opinion, the sidewalks of Skid Row have become home not to an occasional duffle bag or bedroll placed against a building, but to mounds of personal property, on the ground or in overflowing shopping carts, covered by tarps and blankets. The presence of this unattended property makes it impossible to clean the sidewalks, leads to an accumulation of human waste and rotting food around and underneath, that in turn provides a breeding ground for vermin and bacteria. In short, the sidewalks are no longer available for their intended purpose – a public right-of-way – but have deteriorated to the point where no one's best interest is served, not the homeless or the others that live and work here.

As Judge Callahan stated in her dissent, "the majority opinion focuses on the interests of the homeless in Skid Row who leave their property unattended and does not acknowledge the interests of the other people in Skid Row – homeless or otherwise – who must navigate a veritable maze of biohazards and trash as they go about their daily business." (A-26, fn. 1.) The reality is that this opinion has profound public health and safety implications for any city in

Ninth Circuit. By finding that personal property left unattended on the public sidewalk is protected by the Fourth and Fourteenth Amendments of the Constitution, a city can only remove this property from the public sidewalk if the City is also prepared to provide storage for the property and a system for retrieval by the owner. However, before a city can even think about storing these items, a city's workforce is left to sift through accumulations of property, separating out the biohazards and contaminants for safe disposal. Not only does this create unreasonable health risks for those employees and place an incredible drain on municipal resources, but no matter how careful a city street cleaner is in sorting through these mounds of personal property, the threat of endless litigation over whether the items disposed of were a health and safety threat or were instead the personal property that the majority found deserving of constitutional protection, remains.

After the district court issued the preliminary injunction, while awaiting a decision from the Ninth Circuit, the City of Los Angeles scrambled to meet its obligation to maintain health and safety standards, without violating the terms of the injunction. Emboldened by the preliminary injunction, however, there was a drastic uptick in the amount of personal property accumulating on the public sidewalks covered by tarps, and often with a note saying something to effect of "mine" or "not abandoned." Marked in this manner, this property was unquestionably not abandoned, and under the terms of the injunction, the City could not remove it. This accumulation of personal property on the public sidewalk created a real and significant public health and safety hazard.

Although the majority opinion emphasized that the injunction "does not allow hazardous debris to remain on Skid Row," (A-4, fn. 1) as the dissent recognized, separating the items that pose a health and safety hazard from the personal belongings that did not, is not as easy as it sounds:

> "While the majority notes that Plaintiffs' carts might have contained personal identification documents, medications, and cell phones, and other important personal items (citation omitted), these items – when they exist – are often comingled with soiled clothing, dead animals, drug paraphernalia, and other hazardous materials, which pose health and safety problems. It is unduly burdensome on the City workers to have to separate out the potential health and safety hazards from the non-hazardous items." (A-35, fn. 7.)

In the late spring and early summer of 2012, having lived under the terms of the preliminary injunction for approximately one year, and still awaiting a ruling from the Ninth Circuit on its expedited appeal, the City struggled to strike a balance between its obligation to protect public health and safety, yet not violate the district court's preliminary injunction. With each passing day, the sidewalks of Skid Row grew dirtier and dirtier with human waste and rotting food accumulating around and beneath this unattended property. Reverend Andrew Bales, who heads the Union Rescue Mission, which provides shelter and other services to the homeless, had this to say about the deteriorated conditions on Skid Row: "It makes you sick to walk down the street." (A-109.)

At the City's request, the Los Angeles County Department of Public Health conducted an inspection of Skid Row and issued a formal Notice of Violation to the City, finding human waste, injection needles, condoms, and a rat infestation in violation of county and state health codes." (A-110.) The county's top public health official said that the sidewalks and streets in the inspection area, southeast of City Hall, needed to be power-washed weekly and health conditions monitored closely. (A-108.) "Unsanitary living conditions and crowding in the camps have increased the risk of spreading communicable diseases such as meningitis, which was diagnosed in four Skid Row residents in March, according to the county inspection report." (A-108.)

In response to the ongoing public health concerns, the City launched a major street and sidewalk cleaning in Skid Row. During one clean up, "the City removed 278 hypodermic needles, 94 syringes, 60 razor blades, 10 knives, 11 items of drug paraphernalia," and "[t]wo 5-gallon buckets of feces." (A-27, fn.1, A-124 .) But just as Judge Callahan cautioned in her dissent, the personal items that no one wants to see thrown out were so "comingled" with the biohazards that sorting through these accumulations to determine what posed a health and safety hazard and could be thrown out, and what did not, and needed to be stored was no small task. "Tyvek-suit wearing inspectors with Watershed Protection, a division of the Bureau of Sanitation, combed the sidewalks for "sharps," their term for hypodermic needles, razor blades, and other hazards. They carry long rods with pincers at the end to pick through piles of clothes and overflowing trashcans." According to one of the inspectors, "[p]retty much when

something is in contact with the ground and its near urine and feces, it's a health hazard, so its trash." (A-120.)

For example, the inspectors encountered an unpitched tent on the sidewalk and because the sidewalks were covered with urine and feces, the tent posed a health hazard. But before the inspectors could discard the tent, they needed to pick through it to ensure that they were not throwing out things that were not a health and safety threat that might be tucked inside the tent. In this instance, the inspectors retrieved an identification card and medication – items that were not health and safety threats – and delivered them to a storage facility. (A-120.) The street cleaners, however, described their efforts as little more than a band-aid. "On Monday, as crews cleaned San Julian south of Sixth Street, they could see that trash and encampments were already piling up one block north, where they worked three days before." (A-120.)

After the County's Department of Public Health issued the Notice of Violation on May 21, 2012, inspectors returned to Skid Row on June 5, 2012, for a re-inspection. (A-112.) The inspectors found partial compliance. Just days after a major street cleaning effort, there was a reduction of feces and urine on the streets, sidewalks, and storm drain inlets; the previously noted presence of hypodermic needles found on the sidewalks, streets, and gutter had abated, and there was a reduction in the amount of garbage, trash, and debris deposited on the sidewalks, streets, and gutters. The City's street cleaning efforts, however, did not make an even temporary dent in the rodent infestation. (A-113-114.) The report explained that to

address the rodent infestation, the food sources and rodent harborages needed to be eliminated. The County Health Inspectors made the following recommendation: "Where items are stored directly on streets/sidewalks they must be elevated 18 inches off the ground or moved daily so as to prevent rodent harborage." (A-115-116.) The problem is the judicial ruling finding a constitutionally protected right to leave unattended property on the public sidewalk, prevents the City from honoring these standards. Even after the City's street-cleaning efforts, the post-injunction conditions remain deplorable. The photographs that appear in the Appendix at pages 73-77 were taken the week of February 11, 2013 in Skid Row and are illustrative of the current conditions on Skid Row.[2]

A. The Impact of The *Lavan* Opinion Has Already Swept To The Venice Beach Area of Los Angeles.

It did not take long for the district court's *Lavan* opinion to impact other areas beyond Skid Row. The impact swept approximately 17 miles, from Skid Row to the Venice Beach area of the City of Los Angeles. On April 9, 2012, with the appeal from the preliminary injunction in *Lavan* pending before the Ninth Circuit, 13 claimants filed claims for damages pursuant to the

---

[2] Within the past week, according to a Los Angeles Times article of February 21, 2013, these conditions on Skid Row led to a dispatch of scientists from the Centers for Disease Control and Prevention to Los Angeles. Federal, state and county public health officials are now seeking to determine the cause and cure for the current outbreak of tuberculosis on Skid Row that may have exposed more than 4,500 people to the disease.

California Government Tort Claims Act, claiming that on March 7, 2012, the City had "seized the property of homeless individuals who stay on 3rd Street nightly," and despite repeated notice that "the property was not abandoned, City employees took the property and trashed it." (A-79-80.) The claimants attached a copy of the district court's preliminary injunction in *Lavan* to their government tort claim and incorporated it as the legal basis for the claim for damages. (A-81.) These government tort claims are the precursor to a lawsuit that, once filed, will undoubtedly be controlled by the Ninth Circuit's *Lavan* decision.

B. The Impact of the Lavan Opinion Has Already Swept North To Fresno, California.

These issues are not unique to the City of Los Angeles, consequently the *Lavan* decision impacts not only the City of Los Angeles, but sweeps to any city in Ninth Circuit. Right now, more than 30 lawsuits are pending against the City of Fresno that arise out of the City's efforts to clean-up homeless encampments in Downtown Fresno in late 2011 and early 2012. (A-82.)[3] Like the *Lavan* lawsuit in Los Angeles, at the heart of these Fresno lawsuits is the claim that during the clean-ups, the City removed from the sidewalks and then immediately destroyed admittedly unattended personal property belonging to the plaintiffs. The

---

[3] Petitioner has included only selected pages from the district court's 53-page order granting in part, and denying in part the City of Fresno's Motion for Judgment on the Pleadings in *Sanchez v. City of Fresno. Case No. 12-00428*, Eastern District of California in the appendix.

district court has allowed plaintiffs' Fourth Amendment claims and their procedural due process claims to go forward under the authority of the *Lavan* opinion: "[T]he City's immediate destruction of homeless individuals' personal property constituted an unreasonable seizure under the Fourth Amendment, . . ." (A-91.) With regard to procedural due process under the Fourteenth Amendment, the district court had this to say: "If there has ever been any doubt in this Circuit that a homeless person's unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, that doubt was put to rest by the Ninth Circuit's September 2012 Decision in *Lavan v. City of Los Angeles*, 693 F. 3d 1022, 1032 (9th Cir. 2012)." (A-94.)

C. The Impact of the Lavan Opinion Has Already Swept Across The Pacific Ocean To Honolulu, Hawaii.

On December 12, 2012, just three months after the Ninth Circuit decided *Lavan,* "De-Occupy Honolulu," a group that does not even claim they are homeless, but rather describes themselves as "an unincorporated association comprised of a wide range of people from widely varying economic, social and ethnic backgrounds,," whose stated "purpose is to condemn, protect and advocate against social injustices, including legal, governmental and social policies victimizing the houseless population of Honolulu and throughout Hawaii," filed a complaint for injunctive and declaratory relief against the City and County of

Honolulu, Hawaii. (A-101.)[4] The plaintiffs claim they live in "the De-occupy encampment," located at "Thomas Square" at the "southeast corner of the intersection of Ward and Beretania Streets." (A-101.)

Just as the *Lavan* plaintiffs in Los Angeles's Skid Row, and the Venice Beach tort claimants, and the Fresno plaintiffs in *Sanchez*, a focus of the De-Occupy plaintiffs' complaint is that the government violated the Fourth Amendment and the due process clause of the Fourteenth Amendment by seizing and disposing of their personal property left on the public right-of-way. (A-103.) Plaintiffs assert that the government "conducted raids upon the encampment of De-Occupy Honolulu," and "[d]uring those raids, numerous items of Plaintiffs' personal property have been seized and stolen by Defendants, and or immediately destroyed while city officials were on the scene." (A-99.) In their prayer for declaratory and injunctive relief, plaintiffs quoted verbatim the language of the preliminary injunction in *Lavan*, as well as from *Kincaid v. City of Fresno*, No. 06-1445, 2006 WL 3542732, the same unpublished opinion relied on by the district court when it ordered the injunction. (A-105.)

---

[4] Petitioner is including only selected pages from the 41-page complaint in *De-Occupy Honolulu v. City and County of Honolulu, Case No. 12-00668, District of Hawaii* in the appendix.

2. The Majority Misapprehends Supreme Court Doctrine And The Opinion Conflicts With Other Circuit Court Opinions.

The majority's reliance on *United States v. Jones, supra,* 132 S. Ct. 1022; *Soldal v. Cook County, supra,* 506 U.S. 56, and *United States v. Jacobsen, supra,* 466 U.S. 109, to find such a protected Fourth Amendment right, reflects a complete misperception of Supreme Court doctrine. Not one of these opinions dispenses with the requirement that the expectation of a protected privacy interest or a protected possessory interest in property be one that society is willing to recognize as reasonable. When plaintiffs left their property on the public sidewalk, they took an action that is wholly inconsistent with either a privacy interest or a possessory interest in property that society is willing to recognize as reasonable. In *California v. Greenwood,* 486 U.S. 35, 40, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) this Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home. This Court concluded that by placing their garbage bags curbside, the Greenwoods "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection." *Id.* "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* Although the *Lavan* plaintiffs did not place their personal belongings on the sidewalk "for the express purpose of having strangers take it," "[c]ommon sense and societal expectations suggest that when people leave their personal items unattended in a public place, they understand that

they run the risk of their belongings being searched, seized, disturbed, stolen, or thrown away. In other words, their expectation of privacy in that property is not one that 'society [is] willing to recognize . . . as reasonable.'" (A-36 quoting *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).)

The circuit opinions that have addressed similar issues have uniformly concluded the right to leave personal property on public land in violation of a law prohibiting that conduct is not a right that society is willing to recognize as reasonable. See *Church v. Jacobs*, *supra,* 30 F. 3d at 1345; *United States v. Ruckman*, *supra,* 806 F. 2d at 1472; *Amezquita v. Hernandez-Colon*, *supra,* 518 F. 2d at 11-12; and *Zimmerman v. Bishop Estate*, *supra,* 25 F. 3d at 787-88. *Amezquita* and *Ruckman* both involved a 'seizure' of property and both the Fourth and the Tenth circuit courts respectively, determined that the plaintiffs lacked a 'reasonable expectation of privacy' under the *Katz v. United States,* 389 U. S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)(Harlan, J. concurring) formulation.

Regardless of whether the claim is analyzed under the *Katz* 'reasonable expectation of privacy' test, or the 'meaningful interference with a possessory interest in property' test in *Soldal*, at its' core the Fourth Amendment inquiry focuses on whether the government's intrusion infringes upon a privacy or possessory right that society is willing to recognize as reasonable. Thus, while an individual may subjectively believe that by covering their property with a tarp or placing a sign on it that says "mine" they retain a possessory interest or a privacy interest in that

property when they leave it unattended on the public sidewalk, this expectation is not one that society is willing to recognize as objectively reasonable. Likewise, in the absence of "an existing rule or law creating or defining" a protected property interest allowing plaintiffs to leave their belonging unattended on the public sidewalks, even temporarily, plaintiffs' unilateral expectations are insufficient to create a protected property right encompassed within the meaning of the due process clause. Accordingly, the Ninth Circuit erred in finding this property was deserving of constitutional protection.

CONCLUSION

Homelessness is a heartbreaking and complex societal problem. No one wants to see a homeless person's precious family mementos, important personal identification papers, or medications thrown away, but that does not mean that a Court is at liberty "to write into the constitution its own abstract notions of how best to handle" such a deep and pressing problem. *Robinson v. California,* 370 U.S. 660, 689, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (White dissenting) [Warning against judicial interference with a state's right to deal with its social problems as it sees fit, cautioning that it is inappropriate for the court "to write into the constitution its own abstract notions of how best to handle the narcotics problem, for obviously it cannot match either the States or Congress in expert understanding.] Here, the Ninth Circuit's unprecedented expansion of both the Fourth Amendment and the due process clause of the Fourteenth Amendment deserve a second look in the name of public health and safety. Accordingly, the City

of Los Angeles, respectfully requests this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Carmen A. Trutanich
City Attorney
Jane Ellison Usher
Special Assistant City Attorney
Amy Field
Deputy City Attorney
Counsel of Record
Los Angeles City Attorney's Office
City Hall East 600
200 North Main Street
Los Angeles, California 90012
(213) 978-6929
amy.field@lacity.org

Counsel for Petitioner