No. 12-1073

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAROL ANNE SOBEL
Counsel of Record
carolsobel@aol.com

3110 Main Street
Suite 210
Santa Monica, California 90405
(310) 393-3055

PAUL L. HOFFMAN
Hoffpaul@aol.com

CATHERINE E. SWEETSER

SCHONBRUN DESIMONE SEPLOW HARRIS HOFFMAN & HARRISON LLP

723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Attorneys for Respondents

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QUESTION PRESENTED FOR REVIEW

Did the district court err when it issued a preliminary injunction preventing the City of Los Angeles from immediately destroying the momentarily unattended property of homeless persons without adequate notice or any post-deprivation hearing opportunity in the absence of adequate evidence that doing so is required to maintain any proffered government interest and in the absence of evidence that such property was abandoned, where state law recognizes a property interest in all tangible personal property and imposes a mandatory obligation to preserve unattended property?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondents are eight individuals. None has a relationship to any corporation.

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STATEMENT OF THE CASE

Petitioner City of Los Angeles ("City") seeks review from an order of the Ninth Circuit, affirming a preliminary injunction entered by the district court in favor of Respondents. Respondents are eight homeless individuals whose personal belongings were seized by Petitioner without warning and instantly and irretrievably destroyed on site in three incidents in early 2011 when they left it unattended momentarily to perform such basic functions as use a public toilet, fill water bottles, get a meal, or receive social services. Petitioner's Appendix 6 (" Pet. App.").

The Ninth Circuit relied on the substantial evidentiary record and factual findings by the district court. This record established that the City's blanket and immediate destruction of the property of homeless individuals in Los Angeles was not justified by any showing of health risks to the public, or that the property in question was reasonably believed to be abandoned. The petition for certiorari cites to purported evidence that is not in the record below and evidence conclusively discredited in the district court, while ignoring the extensive evidence relied on by the courts below to support the injunction.[1]

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[1] Petitioner's Appendix includes several newspaper articles about Skid Row. As the County Department of Health has indicated, serious issues exist about the City's conduct in creating those conditions by removing trash bins and restricting garbage collection after the entry of the injunction, as well as the failure to provide adequate sanitation facilities on Skid Row, knowing there is a large number of homeless persons on the

The preliminary injunction is based on well-established law. There should be no question that personal belongings do not lose all constitutional protection because individuals are homeless and must step away from their property temporarily to attend to normal bodily functions. There is no dispute about the fact that the Constitution applies to the property of the poor, as well as the more fortunate in our society. The decisions below do no more than recognize this basic truth.

This Court has repeatedly instructed that courts should look to state law in the first instance to decide whether a protectable property interest exists. The lower courts followed this rule and found that California has explicitly provided such protection. The California Supreme Court has emphasized the broad protections for all personal property by statute and in the state Constitution. There is no national urgency to grant review on this basis.

The City has identified no conflict between the decisions below and decisions of this Court or any split between the circuit courts on any issue in this case. Nor has the City identified any issue of national importance or urgency caused by the decisions below. The City simply disagrees with the decisions and the lower courts' rejection of the City's factual assertions. There is no reason for this Court

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sidewalks each day, with no other place to be. Pet. App. 114-116. An estimated 4,500 homeless people are on Skid Row in the day, with 75% of them filling the shelters at night.

to review the decisions below or supervise the manner in which the lower courts have evaluated the current factual record in this procedural setting.

Respondents filed this as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2), seeking injunctive relief for the class and damages for the individual named plaintiffs. A temporary restraining order was issued on April 22, 2011. The court entered a preliminary injunction on June 23, 2011. No class certification motion has been filed.

1. The Nature of the Case and the Petitioner's Policy

Respondents' property was demolished when they stepped away from it momentarily to use public restrooms, fill water bottles, shower at a nearby shelter, and engage in similar personal tasks. Yet, even as they immediately returned and pleaded to spare their property, Petitioner destroyed everything while the police physically restrained Respondents or threatened several with arrest if they attempted to prevent the destruction. Petitioner admitted to a policy of "on-the-spot destruction," Pet. App. 61 and n.8, and that the City provided neither pre- nor post-deprivation due process. Pet. App. 62.

2. The Evidence Regarding Respondents' Property

Petitioner presented no argument or evidence below that the property of any Respondent was seized

and destroyed because it presented a health risk. Three Respondents had their personal property neatly packed in distinctive red shopping carts provided by the Catholic Worker hospitality center[2] on Skid Row. Pet. App. 55 (Slip Opinion, citing Morris Decl. ¶5). The property of fou r Respondents was contained in small wheeled structures called EDARs ("Everyone Deserves a Roof"),[3] that hold property during the day and unfold to an off-the-ground sleeping platform at night. Pet. App. 5–6. Respondents Lavan and Smith were given EDARs by Richard Riordan, the former mayor of Los Angeles, at a press conference at the Union Rescue Mission on Skid Row in November 2010. Pet. App. 5-6 n.4.

Plaintiffs have an interest in preserving vital personal effects such as birth certificates, identity cards for public assistance, irreplaceable family photographs, medical records, and medications while this litigation is pending. There was no evidence presented below that the City's immediate destruction policy was required to protect public health. Moreover, the preliminary injunction allows the City to take action if the public health is actually threatened. If the City now believes that it has new evidence, it is free to move in the district court, by noticed motion, for a modification of the order.

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[2] The Catholic Worker facility is commonly referred to as the "Hippie Kitchen" as referenced in the district court opinion.

[3] One plaintiff, Mr. Ballantine, had his property neatly placed between two EDARs at the site of the Lavan incident.

3. The Evidence of Lack of Abandonment of Respondents' Property

Plaintiffs demonstrated that they and other persons were present at these events, explained to City employees that the property was not abandoned, and implored the City not to destroy it. The City "took it and destroyed it nevertheless." Pet. App. 53-54. The district court found that "the City seized and destroyed property that it knew was not abandoned," finding that Petitioner's evidence to the contrary was not credible. Pet. App. 52, 55.

The City's primary evidence consisted of the declaration and supplemental declaration of John Duncanson, the Public Works supervisor at each incident. Pet. App. 52-54. Duncanson averred that he never took property unless it had been in the same location for "at least a day, if not longer," *Id.* at 54 n.3, and that he was sure that the property of Lavan and the others with him had been in the same place for at least two days and was, therefore, reasonably believed to be abandoned. *Id.* His certainty was based on his claim that he takes notes and photographs to document unattended property.

Petitioner presented no notes or photographs to support Duncanson's statements. In fact, the City submitted a declaration from a police supervisor directly contradicting Duncanson and stating that, the prior afternoon, he told Lavan and the others to move their EDARS to the location where they were

then destroyed.[4] Pet. App. 54 n.3. Based on all of the evidence, the district court correctly concluded that "the City did in fact know that at least some of the property seized was not abandoned." Pet. App. 52.

The district court also found that the evidence showed that the City knew that the property of Respondents Hall and Reese was not abandoned when it was seized and destroyed outside the Catholic Worker facility. Declarations from Hall, Reese, and members of the Catholic Worker who were present at the site proved that Hall and Reese returned before their property was thrown into the trash truck and demolished. Pet. App. 53-54. The court also found that Respondents' evidence "objectively suggested ownership" based on proof that their carts were "lined up in a row on the sidewalk . . . there was not a pile of trash in the street . . . [and t]he carts were neatly packed up." Pet. App. 54-55.

The City's evidence at this incident was the Duncanson declaration, averring that Petitioner would never destroy "medications, legal paperwork ... or other forms of identification," would never seize and destroy property in a Catholic Worker cart, would never prevent a person from retrieving his property so long as it had not yet been put in the trash truck, and that no one showed up and claimed

[4] Respondent Smith submitted a declaration stating that he was threatened with arrest when he attempted to recover his property before it was destroyed. He also averred that he advised the police that someone was in one of the EDARs just before City employees were about to destroy it.

the property before it was destroyed. Pet. App. 53. Two of the police officers present at the scene also filed declarations stating that they never saw anyone restrain Respondent Hall as he tried to save his possessions and that, had this occurred, it would have been a violation of LAPD policy.

The court relied on Respondents' declarations and photographs of this event, establishing that the City's evidence was false. One photograph showed Duncanson standing in front of the trash truck with an empty Catholic Worker cart. The two police officer declarants were shown standing on either side of Respondent Hall, physically restraining him as his property was strewn on the ground in front of him. Pet. App. 53-54; Pet. App. 55.

4. The Evidence of Lack of Notice and Due Process

Addressing Petitioner's claim that it provided adequate pre-deprivation notice through identical signs posted throughout Skid Row, advising that unattended property could be taken during sidewalk cleaning Monday through Friday pursuant to Los Angeles Municipal Code § 56.11, the trial court found this claim was not true. Specifically, the court relied on multiple photographs submitted by Respondents of signs taped over, obscured by foliage and, in the case of the incident outside the Catholic Worker facility, posted at a second-story level, advising only of possible sidewalk cleaning at certain times. Pet. App. 60. The property of Respondents Hall and

Reese was destroyed outside of the posted times[5] as they stepped away momentarily to use services at the Catholic Worker and the public toilet. In light of this evidence, Petitioner was forced to concede that its notice that the property might be seized and destroyed was "inadequate." Pet. App. 60.

To defend against Respondents' claim that the City's immediate destruction of their property violated their due process rights and California Civil Code §2080, Petitioner claimed that it kept property which was "seized *and* objected to at the time of seizure" for 72 hours, but only if a person approached Inspector Duncanson to assert ownership. Pet. App. 58 n.8. The district court found that, even if the City had such a policy, it was not following it. The court made this finding based on the unrefuted evidence that Respondent Reese, in the incident outside the Catholic Worker kitchen, went to the City dump to reclaim his property, as directed when he objected on site to its seizure, but was told when he got there just a few hours after his property was seized that it had already been "trashed." Pet. App. 58, 60.

The district court also found the City's purported policy of preserving property for 72 hours insufficient since it only applied if someone was present and objected as the seizure occurred. App.61. The court also held that Petitioner's policies, particularly § 56.11, "conflict[ ] with California Civil

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[5] Pet. App. 52–54.

Code §2080[.]" App.57–58 (quoting *Candid Enters. Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal.3d 578, 885 (1985)(local ordinance that conflicts with a state statute is void). At oral argument, Petitioner also contended that it has a "bag-and-tag" program providing post-deprivation due process. Pet. App. 61 n. 7. Again, the district court found this assertion irrelevant in light of the lack of any evidence that the policy was utilized and the overwhelming evidence of seizure and immediate destruction. *Id.*

Petitioner had multiple opportunities over several months to submit evidence to counter Respondents' evidence that their property was neatly stored, not abandoned, only momentarily unattended, and summarily destroyed without notice while City employees physically restrained and/or threatened Respondents with arrest as they attempted to save their possessions. Pet. App. 44 n.1. As the district court noted, after Respondents filed their reply, Petitioner filed an unauthorized Supplemental Declaration but did not attempt to refute Respondents' evidence. *Id.*

5. The Preliminary Injunction

The Preliminary Injunction contains two provisions. It enjoins Petitioner from:

> 1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to

public health or 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.

Pet. App. 66–67.

The injunction gives Petitioner "great leeway ... to protect public health and safety[.]" Pet. App. 3. The district court held that "The City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction ... merely prevent[s the City] from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard." Pet. App. 3.

Based upon a substantial factual record, the lower courts enjoined Petitioner from enforcing its admitted policy of seizing and immediately destroying, on site, the personal property of homeless individuals absent an objectively reasonable belief that the property was abandoned or that it presented a health or safety concern. The preliminary injunction was properly entered and affirmed.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted in this appeal from a preliminary injunction. The law is settled in this area; the government may not summarily seize and destroy personal belongings without, at a minimum, post-deprivation notice and an opportunity to reclaim the property. There is no conflict among the circuits and there is ample Supreme Court precedent confirming this fundamental due process right, even when the property is alleged to violate a city ordinance or be evidence of a crime or contraband.

The Circuit applied the correct principles to determine, in the first instance, that Respondents had a protectable property interest. Both lower courts found that California law provides explicit statutory and constitutional guarantees protecting the societal interest in continued ownership of personal property so long as it is not "intentionally abandoned." The preliminary injunction rests on well-established interests and substantial and unrefuted facts. No issue of national importance or urgency warrants granting the Petition.

The City has identified no urgent basis to grant review from a preliminary injunction. Nothing in the injunction prevents the City from carrying out its public health responsibilities in the community. The injunction expressly excepts property objectively believed to be abandoned and items which are an immediate threat to public health and safety. The injunction has been in place for over two years. If there is some reason to consider modification of the

injunction, the district court can evaluate the evidence in the first instance on a full record.

I. THE DECISION OF THE CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OR ANY CIRCUIT REVIEWING WHEN AND HOW THE GOVERNMENT MAY SEIZE AND DESTROY PERSONAL BELONGINGS

A. No Conflict Exists Between the Societal Interest in Protecting Personal Property Recognized in *Lavan* and the Decisions of This Court or Other Circuits

This Court has long instructed that the starting point for any analysis of whether there is a protected property interest in personal possessions requires the court to look to "'existing rules or understandings that stem from an independent source such as state-law rules or understandings." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Both lower courts faithfully applied this principle to hold that California has repeatedly recognized a strong societal interest in protecting all personal property. Pet. App. 20.

Through the state's Constitution and statutory provisions, California has expressed such an interest even when some might consider the property to be "undesirable" as "junk." California "recognizes the right of ownership of personal property, a right that

is held by '[a]ny person, whether citizen or alien.' California Civil Code §§ 655, 663, 771." Pet. App. 20. *See also* California Civil Code § 669 ("All property has an owner."). The foundation for this right is found in Article I, §7 of the California Constitution, which establishes the fundamental "guarantee that government may not deprive an individual of 'life, liberty, or property' without due process of law.'" *Traverso v. Dep't of Transp.*, 6 Cal.4th 1152, 1160, 864 P.2d 488 (1993). *Traverso* noted with approval protected property interests "in personal possessions as 'undesirable' as junk cars." *Id.* (citing *Propert v. Dist. of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991) and *Price v. City of Junction, Tex.*, 711 F.2d 582 (5th Cir. 1983)).

The societal interest in protecting personal property is also codified in Civil Code §2080. Respondents' App. 1 ("Resp. App.") Section 2080.1 requires unattended property to be given to the police if the owner is not known or readily found. Resp. App. 2. "If within 90 days after receipt of the property by the [police] department, the owner appears, proves ownership, and pays all reasonable charges, the department must restore the property to him or her." Civ. Code §2080.2. Resp. App. 3. The only exception is for "intentionally abandoned" property. Civ. Code §2080.7. Resp. App. 8. Civil Code §2080.4 permits local entities to enact an ordinance addressing found property, but it must provide that the "property shall be held by the police department ... for a period of at least three months[.]" Resp. App. 4.

No precedent of this Court, and no decision of any other circuit, conflicts with the determination of the lower courts in this case that California law recognizes a strong societal interest in protecting Respondents' possessory interest in their belongings.

B. There is No Conflict With the Circuit's Decision that Personal Property Interests are Protected Even When the Property is Alleged to Evince a Violation of a Municipal Ordinance, Contraband or a Crime

Petitioner contends that *Lavan* presents a conflict in the law because, even if Respondents' property was not abandoned, the City could nonetheless seize and immediately destroy it as evidence of a crime: to wit, a violation of Los Angeles Municipal Code ("LAMC") §§ 56.11 and 41.45.[6] Both this Court and every circuit to consider the issue have rejected the argument that a protected property right and all due process guarantees are automatically extinguished merely because the property is alleged to be evidence of a crime.[7]

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[6] Section 56.11 prohibits leaving any "merchandise" or personal property on a sidewalk; section 41.45 proscribes leaving a shopping cart taken from "'the owner's premises' in a public place." Pet. App. 57. It was unnecessary to address Petitioner's claim of a § 41.45 violation because all the carts involved were from the Hippie Kitchen. Pet. App. 57, n.4.

[7] This argument has also been rejected by the California Supreme Court. Both that "court and the state's appellate

"Violation of a City ordinance does not vitiate the Fourth Amendment's protections of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment." Pet. App. 15–16.

This Court has recognized a protected interest even in contraband. *See United States v. Jacobsen*, 466 U.S. 109, 124–25 (1984) ("by destroying a quantity of the powder [cocaine the government] converted what had been only a temporary deprivation of possessory interests into a permanent one");[8] and *Walter v. United States*, 447 U.S. 649, 658–59 (1980) (Fourth Amendment expectation of privacy in contraband property was not vitiated by unintended discovery of it by third party).

The decision of the Ninth Circuit also accords with those of other circuits to have considered this issue. *See e.g., Maldonado v. Fontanes*, 568 F.3d 263, 270 (1st Cir. 2009) (tenants had a Fourth Amendment right against immediate seizure and destruction of their pets even though pets in public housing violated a municipal law); *Lawrence v. Reed*,

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courts have likewise recognized a protectable interest in tangible personal property, including property subject to seizure and/or destruction pursuant to local ordinances or statute." *Traverso*, 6 Cal.4th at 1160 (citations omitted).

[8] In *Jacobsen*, the Court ultimately found no violation of the Fourth Amendment because the contraband was discovered by a private carrier first. 466 U.S. at 117.

406 F.3d 1224, 1233 (10th Cir. 2005) (municipal ordinance authorizing removal and disposal of personal property as a "derelict vehicle" without any pre- or post-deprivation hearing violates due process); *Propert*, 948 F.2d 1327 (same); *Price*, 711 F.2d at 590 (same); *Mattias v. Bingley*, 906 F.2d 1047, 1052, amended 915 F.2d 948 (5th Cir. 1990) (destruction without notice to owner of property seized pursuant to a criminal investigation violated due process); *Huemmer v. Mayor of Ocean City*, 632 F.2d 371, 372 (4th Cir. 1980) (impound ordinance that provided for no hearing is "manifestly defective"). *See San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) (destruction of property by government is "as much of a threat, if not more, to people's right to be secure in their effects as does the physical taking of them").

The property at issue here is not contraband or evidence of a crime. It is the personal property of homeless persons. There can be no serious dispute that this property is protected by the Constitution.

C. No Conflict Is Created by the Appeals Court's Application of *Soldal*

Petitioner contends that *Lavan* conflicts with the decisions of this Court and other circuits because it did not follow Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), to require that Respondents show evidence of both a subjectively and objectively reasonable expectation of privacy in their

personal belongings to support a Fourth Amendment violation. Petition at 16. The court below correctly held that the privacy interest addressed in *Katz* was independent of, and irrelevant to, the question of "whether the Fourth Amendment protects Appellees' unabandoned property from unreasonable seizures." Pet. App. 27–28.

This Court has repeatedly held that the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. at 113. If there is any meaningful interference with a possessory interest, the Fourth Amendment applies. *Id.* These cardinal rules apply "even when privacy rights are not implicated." *Soldal v. Cook County*, 506 U.S. 56, 63–64 & n.8 (1992). Most recently, in *United States v. Jones*, 132 S.Ct. 945 (2012), the Court reiterated this principle, holding that "*Katz* ... established that 'property rights are not the sole measure of Fourth Amendment violations,' but did not 'snuf[f] out the previously recognized protection for property.'" *Jones*, 132 S.Ct. at 951, quoting *Soldal*, 506 U.S. at 64.

In support of its argument, Petitioner contends that *Lavan* also conflicts with the Court's decision in *California v. Greenwood,* 486 U.S. 35 (1988). Petition at 26. There is no conflict with *Greenwood* for two critical reasons. First, *Greenwood* held that there was no privacy interest in the seizure of *intentionally* abandoned property placed outside the curtilage of a home as garbage. *Id.* at 40–41. Petitioner concedes,

as it must, that Respondents "did not place their personal belongings on the sidewalk 'for the express purpose of having strangers take it,'" Petition at 26, and there is no credible evidence that their property was abandoned. Second, *Greenwood* did not raise Fourteenth Amendment due process concerns, no doubt because the items seized were not destroyed immediately, as here, but retained for use in obtaining a search warrant in a criminal investigation.

Every circuit to decide this issue after *Soldal* has similarly held that Fourth Amendment protection applies to property interests independent of privacy interests. *See United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998) ("protection afforded by Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished"); *Lenz v. Winburn*, 51 F.3d 1540, 1550 n.10 (11th Cir. 1995) ("possessory interest is all that is needed for the Fourth Amendment's reasonableness requirement to apply to a seizure"); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (lack of expectation of privacy at the search did "not affect our conclusion that Bonds has standing to challenge the seizure of her property").

The four cases Petitioner contends create a circuit conflict are all inapt. All involve a trespass

action; there is no issue of trespass here.[9] All four cases provided considerable pre-deprivation notice through the criminal and civil trespass proceedings.

Zimmerman v. Bishop Estate, 25 F.3d 784, 787-788 (9th Cir. 1993) found no reasonable expectation of privacy under the Fourth Amendment in a warrantless arrest for criminal trespass on private property. *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986), involved a trespass and the warrantless search of a cave, leading to a conviction for "unlawful possession of destructive devices." Applying *Katz*, *Ruckman* found the *search* lawful because there was no reasonable expectation of privacy in a cave. *Id.* at 1473.

Amezquita v. Hernandez-Colon, 518 F.2d 8, 9 (1st Cir. 1975), involved a trespass on publicly-owned farmland and the destruction of buildings illegally erected by a squatter community. Applying *Roth*, 408 U.S. at 577, the First Circuit concluded that state trespass law did not create a protectable property interest. 518 F.2d at 13. Analogizing the plaintiffs to "a car thief," the court held that the plaintiffs were stealing the use of the land by building unpermitted structures. *Id*. at 12.

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[9] As the Ninth Circuit noted, Respondents were on the sidewalk pursuant to a settlement agreement Petitioner voluntarily entered into. Pet. App. 5, citing *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) *vacatur entered by settlement*, 505 F.3d 1006 (9th Cir. 2007).

Significantly, the First Circuit has more recently held that people retain protectable interests in property even when it may violate a local law or a government regulation. *See Maldonado*, 568 F.3d at 270 (tenants had a Fourth Amendment right against immediate seizure and destruction of their pets even though they were violating a municipal law).

Finally, Petitioner cites *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994).[10] *Church* and *Lavan* both involve claims by homeless individuals, but the similarity ends there. *Church* involved trespass warrants issued to remove the plaintiffs from public property. The court held that the plaintiffs could not succeed on claims that their property was unlawfully seized because they could not prove a City policy pursuant to *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978), since they sued the wrong defendant. *Id.* at 1342-1343. The State of Alabama issued the warrants, not the City of Huntsville. *Id.* at 1344. Church's claims also failed because "the uncontroverted evidence ... was that these items are, and have always been, in the possession of the State, not the City." *Id.* at 1345.

In sum, there is no conflict with *Church* or any other decision cited by Petitioner. Violation of a local ordinance will not automatically deprive individual owners of any interest in their property. There is no circuit split that this Court must resolve.

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[10] Petitioner has erroneously cited this case as *Church v. Jacobs*, the name of the second plaintiff.

II. THERE IS NO CONFLICT WITH THE PRECEDENTS OF THIS COURT OR ANY CIRCUIT REGARDING DUE PROCESS REQUIREMENTS TO BE AFFORDED RESPONDENTS

This Court has held that "'[a]ny significant taking of property by the State is within the purview of the Due Process Clause.'" *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). The essential element of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Time and again, this Court has directed that "some form of hearing is required before an individual is finally deprived of a property interest." *Id.*

The Circuit relied on these precedents, as well as *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993), for the unremarkable proposition "that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." Pet. App. 19, 22. The "relative weight of . . . property interest[s] is relevant to the form of notice and hearing required by due process. . . . But some form of notice and hearing – formal or informal – is required before deprivation of a property interest. . . ." *Fuentes*, 407 U.S. at 90, fn. 21 (edits supplied). This Court has repeatedly warned that sufficient due process procedures are necessary to avert the "risk of erroneous

deprivation." *James Daniel Good Real Prop.*, 510 U.S. at 77, quoting *Matthews*, 424 U.S. at 335.

Following these well-established precedents, the appeals court held that "due process requires law enforcement 'to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.' *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999)." Pet. App. 21. *See also Nev. Dep't of Corrections v. Greene*, 648 F.3d 1014, 1019 (9th Cir. 2011). Otherwise, "the practice of on-the-spot destruction of seized property ... presents an enormous risk of erroneous deprivation[.]" Pet. App. 22–23, quoting *Lavan v. City of Los Angeles*, 797 F.Supp.2d 1005, 1017–18 (C.D. CA 2011).

No other circuit has held that simply posting a sign is adequate "pre-deprivation" notice such that a citizen's property may be immediately destroyed on site. Petitioners do not cite any cases to the contrary. In fact, even where a "junk" car is parked in violation of local law and pre-towing notice is given to the owner, due process requires post-deprivation notice to the owner, as well, before that car is destroyed. *Propert*, 948 F.2d at 1335 (finding that even where warning sticker does "give adequate *pre-towing* notice," post-deprivation notice is necessary). *See also Mattias*, 906 F.2d 1047, 1052, (due process violated where property seized in a criminal investigation was destroyed without notice to owner).

III. There Is No Ground to Grant Review Based on Speculative Harms

Petitioner alleges that the injunction has presented them with unexpected hardship. Petition at 18. They presented no evidence to support this claim in the months between the entry of the temporary restraining order and the preliminary injunction, or in the two years since. The order poses no threat to legitimate government functions or imposes any insurmountable burdens on the City. Under *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008), the district court has made the finding that the irreparable injury to Respondents (the immediate destruction of their property) outweighs the City's proffered interest. However, if Petitioner believes that the balance of equities has indeed changed, the appropriate manner in which to present new facts would be a noticed motion to modify the injunction in the district court. *See* Fed. R. Civ. P. 60(b); Wright & Miller, § 2961 Modification of Injunctions, 11A Fed. Prac. & Proc. Civ. § 2961 (2d ed.). That would provide an orderly process of review in which both parties have the opportunity to submit evidence to support their respective positions.

"[I]t is the function of the district court to exercise its discretion and delicately to balance the equities of the parties involved." *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999). This Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of

error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Equally speculative is Petitioner's claim that the preliminary injunction poses a "threat of endless litigation." Petition at 18. It has been over two years since the injunction was entered. In that time, the City has engaged in trash collection on Skid Row without subsequent litigation. Were Petitioner to raise this argument in the district court, Respondents believe that the evidence would show that, with adequate notice to the homeless community members who have no other place to be, the City was able to carry out its public health and safety functions.[11]

The preliminary injunction appropriately balances Respondents' property interests while expressly acknowledging the City's ability to remove property objectively believed to be abandoned, as well as property which presents an immediate health and safety concern, or is evidence of a crime or contraband. Petitioner admits that the injunction includes these exceptions but argues that it should be free of all constraints to destroy any "unattended" property it comes upon. Petition at 7.

The City has a means to address this concern while the case proceeds to final judgment. It can require Respondents and others to comply with the County Health Department's recommendations. Respondents have advised the district court they

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[11] Pet. App. 113–16.

would do so. Notably, even if these requirements were in force, Respondents' property would not have been seized and destroyed because the undisputed record proves that all of their property was elevated off the sidewalk in EDARs and shopping carts.

Finally, the prospect of future litigation in Los Angeles and elsewhere is not an imminent harm that requires immediate action by the Supreme Court. Not only must each case be decided on its own facts, but "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Just as "the expense and annoyance of litigation is part of the social burden of living under government," *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980), here it is necessary to ensure Respondents the opportunity to contest the seizure and destruction of their property before the City irrevocably destroys that right along with their meager possessions. Such speculative arguments as Petitioner makes, devoid of factual support in the record of this case, cannot be the basis for review in this Court.

IV. Conclusion

For all of the foregoing reasons, the Petition for Certiorari should be denied.

Dated: May 24, 2013 Respectfully Submitted,

Carol A. Sobel
Counsel of Record
Law Office of Carol A. Sobel
3110 Main Street, Suite 210
Santa Monica, CA 90405
(310) 393-3055
carolsobel@aol.com

Paul L. Hoffman
Catherine Sweetser
Schonbrun, DeSimone,
Seplow, Harris, Hoffman,
& Harrison
732 Ocean Front Walk
Venice, CA 90291
(310) 396-0731
hoffpaul@aol.com
catherine.sdshhh@gmail.com

Counsel for Respondents

California Civil Code § 2080

Any person who finds a thing lost is not bound to take charge of it, unless the person is otherwise required to do so by contract or law, but when the person does take charge of it he or she is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire. Any person or any public or private entity that finds and takes possession of any money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, shall, within a reasonable time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property. Any person who takes possession of a live domestic animal shall provide for humane treatment of the animal.

California Civil Code § 2080.1

(a) If the owner is unknown or has not claimed the property, the person saving or finding the property shall, if the property is of the value of one hundred dollars ($100) or more, within a reasonable time turn the property over to the police department of the city or city and county, if found therein, or to the sheriff's department of the county if found outside of city limits, and shall make an affidavit, stating when and where he or she found or saved the property, particularly describing it. If the property was saved, the affidavit shall state:

(1) From what and how it was saved.

(2) Whether the owner of the property is known to the affiant.

(3) That the affiant has not secreted, withheld, or disposed of any part of the property.

(b) The police department or the sheriff's department shall notify the owner, if his or her identity is reasonably ascertainable, that it possesses the property and where it may be claimed. The police department or sheriff's department may require payment by the owner of a reasonable charge to defray costs of storage and care of the property.

California Civil Code § 2080.2

If the owner appears within 90 days, after receipt of the property by the police department or sheriff's department, proves his ownership of the property, and pays all reasonable charges, the police department or sheriff's department shall restore the property to him.

California Civil Code § 2080.4

Notwithstanding the provisions of Section 2080.3 or Section 2080.6, the legislative body of any city, city and county, or county may provide by ordinance for the care, restitution, sale or destruction of unclaimed property in the possession of the police department of such city or city and county or of the sheriff of such county. Any city, city and county, or county adopting such an ordinance shall provide therein (1) that such unclaimed property shall be held by the police department or sheriff for a period of at least three months, and (2) that thereafter such property will be sold at public auction to the highest bidder, with notice of such sale being given by the chief of police or sheriff at least five days before the time fixed therefor by publication once in a newspaper of general circulation published in the county, or that thereafter such property will be transferred to the local government purchasing and stores agency or other similar agency for sale to the public at public auction. If such property is transferred to a county purchasing agent it may be sold in the manner provided by Article 7 (commencing with Section 25500) of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code for the sale of surplus personal property. If property is transferred to the local government purchasing and stores agency or other similar agency pursuant to this section, such property shall not be redeemable by the owner or other person entitled to possession. If the local government purchasing and stores agency or other similar agency determines that any such

property transferred to it for sale is needed for a public use, such property may be retained by the agency and need not be sold.

California Civil Code § 2080.6

(a) Any public agency may elect to be governed by the provisions of this article with respect to disposition of personal property found or saved on property subject to its jurisdiction, or may adopt reasonable regulations for the care, restitution, sale or destruction of unclaimed property in its possession. Any public agency adopting such regulations shall provide therein (1) that such unclaimed property shall be held by such agency for a period of at least three months, (2) that thereafter such property will be sold at public auction to the highest bidder, and (3) that notice of such sale shall be given by the chief administrative officer of such agency at least five days before the time fixed therefor by publication once in a newspaper of general circulation published in the county in which such property was found. Any property remaining unsold after being offered at such public auction may be destroyed or otherwise disposed of by the public agency. In a county having a purchasing agent, the purchasing agent may conduct such sale, in which case the provisions of subdivisions (2) and (3) of this section shall not be applicable. Such sale shall be made by the county purchasing agent in the manner provided by Article 7 (commencing with Section 25500) of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code for the sale of surplus personal property. If the public agency determines that any such property transferred to it for sale is needed for a public use, such property may be retained by the agency and need not be sold.

(b) "Public agency" as used in this section means any state agency, including the Department of General Services and the Department of Parks and Recreation, any city, county, city and county, special district, or other political subdivision.

California Civil Code § 2080.7

The provisions of this article have no application to things which have been intentionally abandoned by their owner.

CERTIFICATE OF SERVICE BY MAIL
(Declaration under 28 U.S.C. § 1746)

In Re: BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI; No. 12-1073
Caption: CITY OF LOS ANGELES, CALIFORNIA v. TONY LAVAN, et al.
Filed: IN THE SUPREME COURT OF THE UNITED STATES
(Pursuant to R. 29.2, 40 copies filed by third-party commercial courier on this date.)

I, E. Gonzales , hereby declare that: I am a citizen of the United States and a resident of or employed in the County of Los Angeles. I am over the age of 18 years and not a party to the said action. My business address is: 200 East Del Mar Blvd., Suite 216, Pasadena, CA 91105. On this date, I served the within document on the interested parties in said action by placing three true copies thereof, with priority or first-class postage fully prepaid, in the United States Postal Service at Pasadena, California, in sealed envelopes addressed as follows:

AMY JO FIELD
Deputy City Attorney
City of Los Angeles
200 North Main Street
City Hall East, Suite 600
Los Angeles, CA 90012
Telephone: (213) 978-6925
(Attorneys for Petitioner)

That I made this service for Carol Sobel, Counsel of Record for Respondents herein, and that to the best of my knowledge all persons required to be served in said action have been served. That this declaration is made pursuant to United States Supreme Court Rule 29.5(c).

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 24, 2013, at Pasadena California.

E. Gonzales