No. 12-1073

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

PETITIONER'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

1. The Case Presents An Issue of Widespread Importance

Respondents try mightily to avoid the far-reaching implications of this Ninth Circuit opinion, shifting the focus to their individual plight and confining their discussion to the specific facts of the underlying case – that of a homeless individual, living on Skid Row, whose personal effects were thrown away after they that "stepped away" (Brief in Opposition [OB], 3) only "momentarily" (OB, 3) from a "neatly packed," "distinctive red shopping cart," (OB, 4) to "attend to normal bodily functions" (OB, 2) such as using the restroom, filling a water bottle, showering, or other personal tasks. (OB, 3.)[1]

The problem is that while the district court's preliminary injunction may have been limited in scope to the Skid Row area and may have been responsive to such a confined set of facts, the rule of law set forth in the published *Lavan* opinion is not. The opinion is not limited to the homeless population, or to the geographic area of Skid Row, or to neatly packed shopping carts, or to items that are only momentarily unattended.

Rather, the rule of law set forth by the *Lavan* opinion broadly applies to unattended personal

---

[1] Although these facts were disputed in the district court, Petitioner has repeatedly made clear both in the Ninth Circuit and in this Petition, that for purposes of review, the City concedes these facts. Therefore, the legal question presented by this Petition is ripe for review and does not turn on disputed facts.

property left on any public property in the entire Ninth Circuit, no matter to whom it belongs, no matter whether it is in a tidy package or an overflowing strand of shopping carts, or whether it has been there five minutes or five days. The Ninth Circuit held that these personal effects left unattended on public property are constitutionally protected and that when City employees remove and dispose of these unattended items during a cleaning operation, the City commits an unreasonable seizure in violation of the Fourth Amendment and deprives the owner of procedural due process in violation of the Fourteenth Amendment.

With the Ninth Circuit's opinion intact, before a city can remove these accumulations – large and small – the city must dedicate the resources required to sort through the accumulation to weed out trash and contaminants for disposal, and then store the remainder for retrieval by their owner. Not only does this entail an incredible dedication of scarce public resources, but one look at the photographs included in the Appendix to this petition quickly reveals the difficulty a city employee faces when tasked with sifting through this stuff to determine what can be salvaged and must be placed in storage and what is appropriate only for disposal. The sorting process itself leaves a city vulnerable to endless claims that valuable items (family mementos, personal identification documents, medications) that are often comingled with the contaminated items were thrown out. This sorting process also leaves government vulnerable to claims

that the very act of sorting constitutes an unreasonable search under the Fourth Amendment.[2]

The issue of widespread importance triggered by the *Lavan* opinion is neither speculative nor imagined and is an issue that cannot be cured by returning the district court for modification of the injunction. As set forth in the Petition at pages 22-25, the impact of this opinion is already being felt in areas of Los Angeles beyond Skid Row, in other cities in California, and in other states within the Ninth Circuit. Since this Petition was filed, a new federal civil rights class action lawsuit was filed on April 11, 2013, based on a similar clean up of a large accumulation of unattended personal property on the sidewalks of Venice Beach, California. (Central District of California Case No. 13-02571) The outcome will undoubtedly be controlled by the *Lavan* opinion.

Respondents assert that the district court's preliminary injunction only recognizes a "basic truth" that "the Constitution applies to the property of the poor, as well as the more fortunate in our society," and that homeless individuals are no less deserving of constitutional protection than housed-individuals. (OB, 2.) The City does not dispute this 'basic truth.' But it is equally true that a homeless individual is likewise not entitled to any greater constitutional protection than the more fortunate in our society. If a

---

[2] The majority left this possibility wide-open: "Although this question is not before us, we notes that Appellees' expectation of privacy in their unabandoned shelters and effects may well have been reasonable." (Appendix p. 12, fn. 6.)

person with a modest home, versus a person with a more palatial home, no longer has the space to store their personal possessions, does the modest-home dweller retain a constitutionally protected possessory interest in their personal property if they chose to pile the overflow of personal belongings on the public sidewalk?[3] Respondents are unable to identify even one Supreme Court or circuit court opinion finding an individual – whether homeless or not – retains a privacy or possessory interest, protected under the Fourth Amendment or the due process clause of the Fourteenth Amendment, in personal property purposefully left unattended on the public sidewalk.

Moreover, as argued in the City's petition, Respondents' allegations of "homelessness" and a "momentary" storage of their personal effects on the public sidewalk so that they can perform "necessary tasks" are not inherent in the unattended items on the City's sidewalks. City street workers have no clock 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 trash. (Petition, p. 4.)

The photographs included in the appendix to the Petition at pages 73-77 illustrate the reality of the conditions on Skid Row – the reality is that the

---

[3] Cf. *Joel v. City of Orlando,* 232 F.3d 1353, 1357 (11th Cir. 2000) [Homeless persons are not a suspect class and discriminatory enforcement claims are subject to a rational basis test]; see also *D'Aguanno v. Gallagher,* 50 F.3d 877, 879, fn. 2 (11th Cir. 1995); *Kreimer v. Bureau of Police for the Town of Morristown,* 958 F.2d 1242, 1269, n. 36 (3d Cir. 1992).

unattended personal effects on the sidewalks of Skid Row are not present "momentarily" and the items are not confined to neatly packed distinctive red shopping carts. Rather, the *Lavan* opinion has opened the floodgates for long-term storage of personal property on the public sidewalks creating a health and safety disaster for everyone.

Although the immediate and pressing problem posed by the *Lavan* opinion is that the sidewalks have become impassable for pedestrians, that the accumulations provide a nesting ground for vermin, and that biohazards like human waste, used condoms, drug paraphernalia, and rotting food are accumulating underneath, the public safety concerns that explosives or other weapons might be concealed is a serious and valid concern for any responsible city.

That government, like any other property owner, has the right to control what occurs on its own property is really not a groundbreaking or novel concept. It is commonly understood that at any transportation hub in this country, the government retains the right to immediately remove and dispose of any unattended baggage without implicating the protections of either the Fourth Amendment or the due process clause of the Fourteenth Amendment. Judge Callahan noted this in her *Lavan* dissent: "Much like the cases involving unattended baggage in train stations and airports, the City has an interest in removing carts, bags, and other containers from its sidewalks that may conceal bombs, weapons, biohazards, or drugs. See e.g. *United States v. Gault*, 92 F.3d 990, 992 (10th Cir. 1996) (reasoning that the defendant's 'expectation was not objectively reasonable' where he 'left his bag unattended, with no

one there to watch it, or to protect it from being kicked or lifted')." (App. 34, fn. 6 of the dissenting opinion.)

The majority, however, was dismissive of the dissent's public safety concerns: "The dissent's analogy between the factual scenario presented by this case and that of a government official's seizure of a traveler's unattended bag in an airport terminal is inapt . . . As far as we are aware, Skid Row has never been the target of a terrorist attack, and the City makes no argument that the property it destroyed was suspicious or threatening." (App. 16, fn. 8 of the majority opinion.) Sadly, as the recent tragedy at the Boston Marathon illustrates, there is always a public safety concern inherent in any content-concealing container (be it suitcase, backpack, shopping cart, or cardboard box) when it is left unattended on public property. While there may not be anything inherently "suspicious or threatening" about backpacks left unattended on the public sidewalk, the government undoubtedly has a strong interest in removing and disposing of such property in the name of public health and safety.

The question presented by this petition is one of widespread importance: Do the protections of the Fourth Amendment and the due process clause of the Fourteenth Amendment extend to personal effects that an individual leaves unattended on public property? Or does an individual relinquish any reasonable expectation of privacy or a possessory interest in their property when the individual purposefully leaves the property unattended on public property, so that government can remove and dispose of that property without violating the Constitution?

2. Review Is Warranted As the Ninth Circuit's Opinion Reflects Both A Misapprehension of Supreme Court Doctrine And Is In Conflict With Other Circuit Court Authority

Respondents' assertions of "well-established" precedent and a lack of conflict among the circuit courts are unsupported. (Brief in Opposition [OB] 11.) Beyond the Ninth Circuit's published opinion in this case, there is no Supreme Court authority and no circuit court authority supporting a constitutionally protected right for an individual to purposefully place their personal effects on a public property, walk away from it, leaving it unattended, with the expectation that it will be free from government interference. The cases that Respondents offer mostly involve seizures of an individual's personal property from the owner's private property, not the seizure of property left unattended and illegally on public property.[4]

---

[4] For example, Respondents cite the following cases at pages 15-16 of their brief to demonstrate the majority opinion is line with a well-established body of Fourth Amendment jurisprudence. But with the exception of the junk vehicle cases discussed above, none of these cases involve personal effects left unattended on public property: *Maldonado v. Fontanes,* 568 F.3d 263, 270 (1st Cir. 2009)[Involving the seizure of pets from homes]; *Lawrence v. Reed,* 406 F.3d 1224, 1233 (10th Cir. 2005) [Involving the removal of 'derelict vehicles' from private property]; *Huemmer v. Mayor of Ocean City,* 632 F.2d 371, 372 (4th Cir. 1980) [Involving a vehicle towed from private property]; *San Jose Charter of Hells Angeles Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir. 2005) [Involving destruction of dogs in private residences during execution of search warrant].

The only exception is the handful of "junk vehicle" cases cited by Respondents such as *Propert v. District of Columbia,* 948 F.2d 1327 (D. C. Cir. 1991). But those junk vehicle cases shed no light on the issue at stake here. In *Propert*, the District of Columbia conceded that Propert had a protected property interest in his "properly licensed and registered vehicle," parked on a public street. *Id.* at 1331. Although there was no stated reason for the District of Columbia's "concession" of a constitutionally protected property interest in a properly licensed and registered vehicle, the concession seems entirely consistent with the teaching of *Board of Regents v. Roth*, 408 U.S. 564 (1972).

When the owner of a vehicle properly licenses and registers a vehicle, the owner "secures a certain benefit." *Bd. of Regents, supra,* 408 U.S. at 577. The benefit secured is that the owner is privileged to use the public streets and roadways to drive or park the vehicle. In other words, when a vehicle is properly licensed and registered, the owner of that vehicle has a protected property right to use that vehicle on the public streets for the intended purpose – driving and parking – and that right or benefit cannot be taken away without due process of law.

The District of Columbia's concession of a protected property interest in a properly licensed and registered vehicle parked on a public street, however, does not establish a parallel constitutionally protect property interest in personal effects that an individual illegally leaves unattended on a public sidewalk. In fact, in *Propert* the court clearly stated that the question of whether "D.C.'s policy violates the constitutional rights

of owners of unlicensed or unregistered vehicles identified as 'junk'" (items that are more similar to the property at issue here), was not before it. *Id.* at 1331.

Respondents assert that California Civil Code section 2080 provides the "existing rules or understandings" stemming from "state-law rules" (*Board of Regents v. Roth, supra*, 408 U.S. 577) establishing a protected property right in personal effects that an individual purposefully leaves unattended on the public sidewalk. (OB, 12-13.) But although this issue was fully briefed below, the Ninth Circuit did not find the protected property interest in Civil Code section 2080, nor should it have. In a nutshell, Civil Code section 2080 sets forth the duties of a finder of "lost property" and defines the steps the finder must go through to claim title to that property. This case is not about title to "lost property"; it concerns the misuse of public sidewalks as a place for individuals to store their personal property. Civil Code section 2080 does not create a protected property interest in personal items illegally left unattended on the public sidewalk.

The family pet cases also do not support Respondents' view that the law is well established that government violates the Fourth Amendment and the due process clause of the Fourteenth Amendment when it removes and disposes of unattended personal effects left on the public sidewalk. In fact, consistent with the *Lavan* dissent, the Fourth Circuit in *Altman v. City of Highpoint*, 330 F.3d 194, 205, 206 (4th Cir. 2003) had this to say about whether an individual retains a constitutionally protected possessory interest in a dog roaming unattended on the public streets: "[W]hile we

do not denigrate the possessory interest a dog owner has in his pet, we do conclude that *dog owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and unsupervised, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance*. This understanding is reflected in High Point Ordinance § 12-2-16, which provides that when a dog is running at large it may be tranquilized or even killed if it cannot be safely taken up and impounded." (Italics added.) Like the dog owner in *Altman*, the question presented by this Petition for Certiorari is whether individuals relinquish a constitutionally protected possessory interest in their personal effects once they purposefully leave those effects unattended on the public sidewalk?[5]

Respondents say that the circuit opinions that clearly conflict with the *Lavan* majority opinion[6] are distinguishable because those cases, which found no constitutionally protected interest in personal effects illegally occupying public property, all involved a trespass and here, Respondents were on the sidewalk

---

[5] Conversely, destroying an individual's pet that is on the owner's private property *Fuller v. Vines,* 36 F.3d 65 (9th Cir. 1994), or where the owners were known and available to take custody of the dog (*Brown v. Muhlenberg Township*, 269 F.3d 205, 211 (3d Cir. 2001)), does constitute an unlawful seizure under the Fourth Amendment.

[6] The conflicting opinions are *Amezquita v. Hernandez-Colon,* 518 F.2d 8 (1st Cir. 1975); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986); and *Zimmerman v. Bishop Estate*, 25 F.3d 784 (9th Cir. 1994), discussed at pp. 11-12, 27 of the Petition.

not as trespassers, but pursuant to a settlement agreement. (OB, 19, fn. 9.) That is simply untrue. That settlement was an agreement to halt enforcement of a local ordinance prohibiting sleeping and sitting on the public sidewalks between the hours of 9pm and 6am until a specified number of permanent supportive low-income housing units were built in the City of Los Angeles. The City never agreed to allow anyone to take up occupancy on the City sidewalks and most certainly never agreed to allow people to leave personal property unattended on the public sidewalk in clear violation of local law.

CONCLUSION

The Ninth Circuit's opinion, finding constitutional protection in personal effects left unattended on the public sidewalk, constitutes an unprecedented expansion of both the Fourth Amendment and the due process clause of the Fourteenth Amendment that undoubtedly impacts not only the streets of Skid Row, but also any public property in the entire Ninth Circuit. The opinion potentially subjects local government to liability for engaging in nothing more than a routine government function – keeping public rights-of-way safe, clean, and passable for all citizens. The City of Los Angeles respectfully requests this Court look closely at this opinion and give serious consideration to reversing the Ninth Circuit's ruling.

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