No. 12-1073

IN THE
Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,
Petitioner,

v.

TONY LAVAN, *et al.*,
Respondents.

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

BRIEF OF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

Kira L. Klatchko
Counsel of Record
Matthew K. Schettenhelm
Best Best & Krieger LLP
74-760 Highway 111, Suite 200
Indian Wells, CA 92210
(760) 568-2611
kira.klatchko@bbklaw.com

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Ninth Circuit's Decision Improperly Federalizes a Local Issue, Impeding a Critical Local Government Function. 4

II. The Ninth Circuit's Decision Impermissibly Expands the Fourth Amendment. 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Amezquita v. Hernandez-Colon,
518 F.2d 8 (1st. Cir. 1975) 11

Baillie v. Wallace,
24 Idaho 706 (1913) 6

California v. Greenwood,
486 U.S. 35 (1988) 10

Florida v. Jardines,
No. 11-564, slip op. (U.S. March 26, 2013) 9

Frisby v. Schultz,
487 U.S. 474 (1988) 5

Hanrahan v. Chicago,
289 Ill. 400 (1919) 6

Havre de Grace v. Fletcher,
112 Md. 562 (1910) 6

Hibbard v. City of Chicago,
173 Ill. 91 (1898) 6

J.M. Radford Grocery Co. v. Abilene,
20 S.W.2d 255 (Ct. App. Tex. 1929) 6

Katz v. United States,
389 U.S. 347 (1967) 9, 10

Mapp v. Ohio,
367 U.S. 643 (1961) 9

People v. Thomas,
38 Cal. App. 4th 1331 (Cal. App. 2d Dist.
1995) 12

Schneider v. State,
308 U.S. 147 (1939).....5

Soldal v. Cook County,
506 U.S. 56 (1992).....10

Sprint PCS Assets, LLC v. City of Rancho Palos Verdes Estates,
583 F.3d 716 (9th Cir. 2009).....5

United States v. Curlin,
638 F.3d 562 (7th Cir. 2011).....12

United States v. Hargrove,
647 F.2d 411 (4th Cir. 1981).....11

United States v. Jones,
132 S. Ct. 945 (2012).....9

United States v. Ruckman,
806 F.2d 1471 (10th Cir. 1986).....11

STATUTES

42 U.S.C § 1983.....3, 4, 8

OTHER AUTHORITIES

Black's Law Dictionary 1273 (8th ed. 2004) 9

INTEREST OF AMICI CURIAE[1]

Amici curiae represent local governments, and their attorneys, from across the nation. Their members have adopted varied policy approaches to the pressing and systemic problem of homelessness. Because their cities and counties are home to some of the largest homeless communities in the country, Amici also have a substantial interest in resolving the inconsistency created by the Ninth Circuit's Opinion (Petition Appendix ("Pet. App.") A), which federalizes local public health and safety concerns and expands the Fourth Amendment into a *de facto* right to leave unattended personal items on public land, in violation of local laws prohibiting that conduct.

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law

---

[1] No counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record have consented to the filing of this brief.

through education and advocacy, which includes providing federal and state courts with the collective viewpoint of local governments from around the country.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Founded in 1924, its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

SUMMARY OF ARGUMENT

Local governments know all-too-well that homelessness is a pervasive and often devastating problem—one with no easy solutions. Many members of our organizations deal with homeless individuals on a daily basis, and work diligently to balance their needs and those of other citizens to ensure a safe and healthy community for all. The Ninth Circuit's Opinion distorts that balancing act and jeopardizes local governments' ability to act for the benefit of *all* their citizens. Like other citizens, homeless individuals have a right to use and enjoy the public streets, but no one—homeless or not—has a federal constitutional right to leave items unattended on a public street to the detriment of other citizens, including other homeless individuals. As a practical matter, that is what the Ninth Circuit's Opinion creates: a right to use public streets as long-term storage facilities in contravention of local law.

The Ninth Circuit's Opinion ignores the practical problems associated with giving Fourth Amendment protection to items left unattended on public property. It takes a highly academic view of what qualifies for Fourth Amendment protection, and in so doing, it effectively prevents local governments from removing any property at all from the public rights-of-way without risking liability under 42 U.S.C § 1983. As Judge Callahan's dissent noted, "Although I sympathize with the plight of the homeless and believe that this is a problem that we must address as a society, a § 1983 action is not a proper vehicle for addressing this problem." Pet. App. 26 at n.1.

Local governments need to know when their attempts to create safe and healthy communities may subject them to liability. In this case, the City of Los Angeles posted signs notifying locals about upcoming street cleaning and warning them that abandoned property would be destroyed. 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.'" Pet. App. 26 at n.1. Before the Ninth Circuit released its Opinion, local public entities would not, and could not, have foreseen that noticed clean-ups of that type were improper or unconstitutional, particularly where, as here, the local government provided an available public space for homeless individuals to store their property during street sweeps.

Under the novel injunction and constitutional analysis here, however, this basic yet essential local government function *always* presents a Fourth Amendment question. That cannot be correct. Be-

cause public sidewalks are not constitutionally protected storage bins, and because a local government's mere movement of unattended items from this public space does not implicate the Fourth Amendment, this Court should grant the City's Petition and reverse the Ninth Circuit's decision.

ARGUMENT

I. The Ninth Circuit's Decision Improperly Federalizes a Local Issue, Impeding a Critical Local Government Function.

Although homelessness presents many difficult problems, in this context it does not present a constitutional problem, contrary to the Ninth Circuit's Opinion. The street-cleaning activities at issue here are a local matter best dealt with locally, through regulations that balance competing needs. The Ninth Circuit's constitutional approach to items left unattended on City streets effectively transforms public rights-of-way into constitutionally protected storage bins. And it imposes serious burdens on basic local government street-cleaning efforts.

Under the decisions below, when a city removes unattended items from its streets, it triggers a Fourth Amendment analysis, and may face liability under 42 U.S.C. § 1983. The Ninth Circuit made this finding in a case that did not concern an item left in a residence or home, attended to or on anyone's person, or specifically determined to be personal property. Rather, the case concerned only a local government that disposed of items left completely unattended in the public right-of-way, in vio-

lation of a local ordinance instructing that no person "shall leave or permit to remain any merchandise, baggage, or any article of personal property on any parkway or sidewalk," Pet. App. 25. Prior to this decision, no local government would have assumed that it could be held liable for damages if it removed both abandoned and unattended items from its streets on a noticed street-cleaning day.

This liability risk clashes directly with a local government's basic obligations to its citizens. Local governments serve as "trustees for the public" by "keep[ing] their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated." *Schneider v. State,* 308 U.S. 147, 160 (1939). Streets and sidewalks have long played an essential role in America's communities. They are critical to transit, to community-building, and to time-honored First Amendment expression. *Id.*; *Sprint PCS Assets, LLC v. City of Rancho Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). But public streets and sidewalks can only play this important role if local authorities maintain them. Accordingly, a local government may not allow any private individual to acquire any portion of that property for his own use:

> The municipal corporation can grant no easement or right therein not of a public nature, and the entire street must be maintained for public use. Hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. . . A permanent encroachment upon a public

> street for a private use is a purpresture, and is in law a nuisance.

J.M. Radford Grocery Co. v. Abilene, 20 S.W.2d 255, 257 (Ct. App. Tex. 1929) (quoting *Hibbard v. City of Chicago*, 173 Ill. 91 (1898)). Local governments that do not preserve streets and sidewalks for their intended purpose have long risked liability. *See, e.g., Havre de Grace v. Fletcher*, 112 Md. 562 (1910); *Baillie v. Wallace*, 24 Idaho 706 (1913); *Hanrahan v. Chicago*, 289 Ill. 400 (1919).

In the face of these long-established principles, the implications of the Ninth Circuit's constitutional rule and the accompanying injunction are significant. Under this new rule, a virtually limitless list of personal items can be left unattended on the public sidewalk: moving or examining the items at all triggers the Fourth Amendment. Pet. App. 66-67. Though the rule may have been fashioned to provide special protections to homeless individuals, the rule is not limited to the homeless: *anyone* may leave his items unattended in public spaces, confident that the Fourth Amendment restricts local governments' ability to remove or relocate them. *Id.*

The practical problem that rule presents should be obvious, but the outcome in this case provides ample evidence that a rule according Fourth Amendment protection to unattended items leads to a public health and safety nightmare. After the district court's ruling in this case, the City reports that there has been a "drastic uptick in the amount of personal property accumulating on the public sidewalks covered by tarps." Pet. 18. Accompanying this

property are a serious "rodent infestation" (Pet. 21) and conditions that are "deplorable." Pet. 22.

Because all unattended items are potentially subject to a Fourth Amendment analysis, a local entity cannot determine which items to dispose of without a subjective evaluation. Local government employees must carefully sift through each item, and in the City's case uncover many tarped items, to determine which items might be disposed of as garbage and which are personal property protected by the Fourth Amendment. That kind of cleaning process is not only convoluted and riddled with risk, it is also time consuming and an unnecessary drain on limited local government resources. For example, the injunction here *would* allow the City to remove items if it has an "objectively reasonable belief that [the item] is abandoned." Pet. App. 66. But how can the City, or any other local entity, make that determination? If a city worker finds a bag of unattended hypodermic needles, are those abandoned contraband or unattended medical equipment belonging to a diabetic person? If a city worker comes across an unattended, tarped mound, must he assume its contents belong to someone because the mound is covered, meaning it is not abandoned? As the City explained, "no matter how careful a city street cleaner is in sorting through these mounds of personal property," the decision below creates "the threat of endless litigation" for the City. Pet. 18.

In short, when a local government simply moves a personal item left unattended on public property it is not an act of constitutional import. To find otherwise risks undermining a critical local government

function and fundamentally changing the nature of streets and sidewalks in communities far beyond the City.

II. The Ninth Circuit's Decision Impermissibly Expands the Fourth Amendment.

The Ninth Circuit's Opinion not only causes serious practical problems, it also improperly expands the Fourth Amendment. As Judge Callahan explained in dissent: "No circuit court has expanded the right to be free from unreasonable searches and seizures to a right to leave unattended personal property on public land in violation of a law prohibiting that conduct." Pet. App. 30. The Ninth Circuit's decision impermissibly expands the Fourth Amendment's application to routine street cleaning. The logical implication is that the Fourth Amendment protects all items left unattended on City streets, in this context or in a criminal context. This new approach would vastly increase both the number of claims under 42 U.S.C. § 1983 against government entities and the number of motions to suppress criminal evidence found "unattended" in a trash can or public space. The Fourth Amendment does not compel that result.

The Opinion's analysis is rooted in an apparent assumption that individuals affected by the City's street cleaning retained some property interest in the items that they left unattended. The Ninth Circuit therefore found that it was irrelevant whether the homeless individuals retained a "reasonable expectation of privacy" that society would recognize as reasonable. Pet. App. 12-15. According to the court,

the Fourth Amendment applied because the disposal was a "seizure," and because, even for a search, "Fourth Amendment rights do not rise or fall with the" formulation in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *Id.* at 13 (quoting *United States v. Jones*, 132 S. Ct. 945 (2012)).

To be sure, this Court has recognized that *Katz*'s "reasonable expectation" test is not the exclusive measure of the Fourth Amendment's application, and that property law principles may also apply. *Jones*, 132 S. Ct. 945, 950 (2012); *Florida v. Jardines*, No. 11-564, slip op. at 3 (U.S. March 26, 2013). But a *per se* rule based on the possible retention of some narrow possessory interest makes little sense for items left unattended on City streets: "[T]here is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). That is particularly the case here. It does not involve a specific finding that the homeless individuals retained an ownership interest in the particular items that they left unattended. To the contrary, as explained *supra*, it involves items best considered a "purpresture," "[a]n encroachment upon public rights and easements by appropriation to private use of that which belongs to the public." Black's Law Dictionary 1273 (8th ed. 2004). Therefore, even if the lower courts correctly assumed that the homeless individuals retained some property interest in the items at issue at some point, it does not follow that the Fourth Amendment applied after they voluntarily elected to leave those items unattended on public property. That is particularly true where numerous signs warned that unattended property would be

"subject to disposal." Pet. App. 25. As the dissent explained, "[I]t is not sufficient to have a property interest. There must also be an objectively reasonable expectation of privacy in that property interest." Pet. App. 29-30. The signs warning about the coming street sweep negated any reasonable expectation of privacy. Pet. App. 32.

There is little difference between the items supposedly seized in this case and the garbage bags left by a defendant outside his home in *California v. Greenwood*, 486 U.S. 35 (1988), which this Court found were not protected by the Fourth Amendment. In *Greenwood*, the Court did not ask narrowly whether the defendant retained some property interest in items he left unattended at his curb, but whether society would accept that the defendant had an objectively reasonable expectation of privacy in items "left on or at the side of a public street." *Id.* at 39-40. The Court found that society was not prepared to accept that expectation of privacy as objectively reasonable because, among other things, the bags would be "accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40. The same could be said of items at issue in this case, which are now, per the Opinion, automatically protected by the Fourth Amendment. Although the Court has ruled that the "reasonable expectation of privacy" test under *Katz* has not "snuffed out the previously recognized protection for property," *Soldal v. Cook County*, 506 U.S. 56, 64 (1992), it does not follow that the mere movement or relocation of any item left unattended on public street in which a person retains a property interest, however slight, implicates the Fourth Amendment—especially when a

local law makes clear that items may not be left in public spaces.

The mechanical application of the Fourth Amendment to any item arguably claimed as "property" has also been rejected by other courts where an item was left on public land. In *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st. Cir. 1975), a governmental actor used bulldozers to destroy structures that a group of squatters had built on public land. The squatters claimed that, regardless of whether they could occupy the underlying public land, the structures' destruction violated the Fourth Amendment because the squatters "did own the homes which they built." *Id.* at 12. Although the court noted its doubts about whether the squatters owned the homes "in the property law sense," *id.* at 12 n.8, that issue was not determinative. The key was instead whether the squatters had a "reasonable expectation of privacy" in that setting. *Id.* at 11. The court found no such expectation: "[A] trespasser who places his property where it has no right to be has no right of privacy as to that property." *Id.* at 11 (quoting *State v. Pokini*, 45 Haw. 295, 315 (1961).

Amezquita does not stand alone. Courts have often asked whether individuals retained a reasonable expectation of privacy in items left where they should not be. *See also United States v. Ruckman*, 806 F.2d 1471, 1472-74 (10th Cir. 1986) (rights of trespasser on federal land not violated because he had no reasonable expectation of privacy); *United States v. Hargrove,* 647 F.2d 411, 413 (4th Cir. 1981) ("A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or

not they are enclosed in some sort of a container, such as a paper bag."). As the Seventh Circuit put it, "individuals who occupy a piece of property unlawfully have no claim under the Fourth Amendment." *United States v. Curlin*, 638 F.3d 562, 565 (7th Cir. 2011) (citing cases); *see also People v. Thomas*, 38 Cal. App. 4th 1331, 1334 (Cal. App. 2d Dist. 1995)("Although it is true . . . that the Fourth Amendment may protect a person's objectively reasonable expectation of privacy in a temporary or impermanent residence in a permissibly occupied area, that rule does not apply to a box illegally placed on a public sidewalk.") (internal citations omitted).

In sum, by ruling that a local government triggers the Fourth Amendment by so much as moving certain items left unattended on its sidewalks, the Ninth Circuit has charted its own constitutional path and impermissibly "stretche[d]" Fourth Amendment jurisprudence. Pet. App. 24 (Callahan, J., dissenting). The Opinion creates a new category meriting Fourth Amendment protection—personal items left unattended on City streets—and in so doing opens local governments to significant potential liability when they fulfill a basic and vital local function.

CONCLUSION

Local governments need certainty: they need to understand when and how their actions may subject them to liability. The Opinion potentially subjects local governments, for the first time, to liability for conducting routine government functions like street sweeping. That is particularly problematic because

their failure to keep the streets clean may also subject them to liability. The Court should grant the petition for writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

Kira L. Klatchko
Counsel of Record
Matthew K. Schettenhelm
Best Best & Krieger LLP
74-760 Highway 111
Suite 200
Indian Wells, CA 92210
(760) 568-2611
kira.klatchko@bbklaw.com

Counsel for Amici Curiae