No. 17-776

In the Supreme Court of the United States

THE CITY OF LOS ANGELES, ET AL.,

Petitioners,

v.

LAMYA BREWSTER,

Respondent.

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

BRIEF IN OPPOSITION

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STATEMENT

California has two separate statutes that authorize the impoundment of a vehicle when an officer determines that the driver of the vehicle has a suspended or revoked license. One provision establishes a 30-day mandatory impoundment penalty. The other provision does not. Officers have substantial discretion to determine, on an individualized basis, which statute to use.

Respondent, Lamya Brewster, lent her car to her brother-in-law. Police stopped him and, because his license was suspended, impounded respondent's car. Appearing before petitioners, respondent presented proof of ownership, registration, and a valid driver's license. Respondent, moreover, offered to pay all accrued towing and storage fees. Petitioners nonetheless refused to release respondent's car, claiming that they had chosen to subject it to the provision that imposes a mandatory 30-day impoundment.

Below, the court of appeals concluded that respondent states a valid Fourth Amendment claim. While the initial seizure of the car was justified by community caretaking, that exception dissipated upon respondent's demonstration of ownership and a valid license. Petitioners did not secure judicial process to maintain possession over the car, nor have they identified any exception to the warrant requirement.

Review is unwarranted. To begin with, the decision is correct. It comports with *Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017), which holds that the Fourth Amendment applies throughout the period of a pre-judicial-process seizure. It also is compelled by *Rodriguez* v. *United States*, 135 S. Ct. 1609, 1612

(2015), which confirms that a lawfully initiated seizure must end when the basis for the exception to the warrant requirement terminates. Petitioners' claim of a conflict among the circuits is hollow, moreover, because virtually all of their cases pre-date *Manuel* and *Rodriguez*.

While that is reason enough to deny review, this interlocutory petition should be denied for a more fundamental reason: the court of appeals specifically permitted respondent to add due process claims on remand. Respondent has since done so. Those claims remain pending, and no court has yet considered them. Resolution of these claims may well obviate the Fourth Amendment issue in this case; if respondent shows a due process violation, her separate Fourth Amendment claim is irrelevant.

What is more, the operation of the Fourth and Fourteenth Amendments likely intertwine in this case. Petitioners seem to agree: they point to state cases addressing earlier (and different) due process challenges to state impoundment laws. See Pet. 23-24. Because resolving the legality of petitioners' conduct requires consideration of due process, not just the Fourth Amendment, review now would frustrate the Court's ability to reach a fulsome, considered resolution of the legal question. That is especially so since the claims pose factual questions—including, for example, the conduct and practices of petitioners' employees—about which there is no record.

In sum, since no court has examined the due process claims in this case, this is an improper vehicle for review. If, upon final judgment, the question presented proves outcome-determinative, petitioners may request review then. Now, however, review is unwarranted.

A. Legal background.

California provides law enforcement officers two different mechanisms by which they may seize a car. Officers may generally elect which impoundment mechanism they will use in an individual case. See Pet. App. 9.

First, California Vehicle Code (CVC) Section 14602.6(a)(1) provides that, if a vehicle is operated by a person whose "driving privilege was suspended or revoked," a "peace officer may * * * cause the removal and seizure of that vehicle." "A vehicle so impounded shall be impounded for 30 days." *Ibid.*[1]

Second, California Vehicle Code Section 22651(p) authorizes impoundment of a vehicle when a "peace officer issues the driver of a vehicle a notice to appear for a violation" of certain enumerated provisions. One such enumerated provision, CVC § 14601, precludes an individual from driving a motor vehicle "at any time when that person's driving privilege is

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[1] This provision provides a skeletal hearing procedure, which is conducted by a police officer—not a neutral adjudicator. It authorizes a "storage hearing to determine the validity of, or consider any mitigating circumstances attendant to, the storage." CVC § 14602.6(b). But there is no right for individuals in respondent's position to obtain return of her vehicle; that much is proven by the fact that respondent's request for return was denied. Moreover, the statute does not describe what constitutes "mitigating circumstances," the adjudicator does not provide any reason why a request for release is rejected, and there is no right to judicial review. See *Navarro* v. *County of L.A.*, 2006 WL 1320895, at *1 (Cal. Ct. App. 2006) ("Impound hearings are informal and no written records are kept" and "[n]o notice is sent after an impound hearing stating the reasons for denial of release of a vehicle."). None of these issues, however, has been explored by the lower courts.

suspended or revoked." A vehicle impounded pursuant to Section 22651(p) "shall not be released to the registered owner * * * except upon presentation of the registered owner's * * * currently valid driver's license to operate the vehicle and proof of current vehicle registration." CVC § 22651(p).

Thus, when an officer tickets an individual for driving notwithstanding a suspended or revoked license, the officer may impound the vehicle pursuant to Section 14602.6(a)(1), which has a mandatory 30-day holding period, *or* Section 22651(p), which does not have any such mandatory holding period.

It is well established in California law that officers have discretion to select between these two options for vehicle impoundment. See *California Highway Patrol* v. *Superior Court*, 76 Cal. Rptr. 3d 578, 579 (Cal. Ct. App. 2008) (identifying Section 22651(p) and rejecting assertion that Section 14602.6(a)(1) imposes a mandatory impoundment duty on officers). Indeed, in 2012, the California attorney general concluded that "[a] police department has discretion to establish guidelines that would allow an impounded vehicle to be released in less than 30 days, under Vehicle Code section 22651(p), in situations where a fixed 30-day statutory impoundment period, under Vehicle Code section 14602.6(a)(1), may also potentially apply." 95 Ops. Cal. Att'y Gen. 1 (2012).

B. Factual background.

Respondent loaned her car to her brother-in-law, Yonnie Percy. Pet. App. 3. The Los Angeles Police Department (LAPD) stopped Percy, whose license was suspended. *Ibid.* Officers chose to seize the car pursuant to CVC § 14602.6(a)(1), which triggers a 30-day holding period.

Three days later, respondent appeared at an LAPD hearing, where she demonstrated that she owned the car and held a valid driver's license. Pet. App. 3-4. She also offered to pay all towing and storage fees that had accrued to date. *Id.* at 4. Petitioners nonetheless refused to release the car during the 30-day holding period. *Ibid.*

C. Proceedings below.

1. Respondent filed a class action lawsuit, alleging that the "30-day impound is a warrantless seizure that violates the Fourth Amendment." Pet. App. 4. The district court dismissed the claim. *Id.* at 11-27.

The court reasoned in the main that the impoundment was "an administrative penalty" and "thus not unconstitutional under the Fourth Amendment." Pet. App. 20. The court concluded that, when viewed this way, the Fourth Amendment governed only "the initial seizure of the car." *Id.* at 24. It found that "the thirty-day impoundment, analytically separated from the initial seizure by the storage hearing, is not an unconstitutional seizure; rather, it is an administrative penalty." *Id.* at 25.

2. The court of appeals reversed. Pet. App. 1-9.

The district court's "administrative penalty" analysis, the court of appeals explained, "is the wrong inquiry." Pet. App. 5. That is because this analysis is relevant only to whether "the seizure is a valid penalty or forfeiture under the Fifth and Fourteenth Amendments." *Ibid.* But, as the case reached

the court, it presented only a Fourth Amendment claim. *Ibid.*[2]

As to that claim, the court of appeals reasoned "that 'a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests.'" Pet. App. 5-6. Moreover, "[t]he Fourth Amendment doesn't become irrelevant once an initial seizure has run its course." *Id.* at 7. Because "[a] seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force," once that rationale dissipates, "the government must cease the seizure or secure a new justification." *Ibid.* Here, however, petitioners neither ceased the seizure nor provided a new justification once the basis for the original seizure—community caretaking—vanished. *Ibid.*

In reaching that conclusion, the court relied, in part, on *Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017). Pet. App. 7. In *Manuel*, the court explained, "the Fourth Amendment governed the entirety of [the] plaintiff's 48-day detention," and not just the initial point of seizure. *Ibid.*

The court of appeals denied a petition for rehearing *en banc*. Pet. App. 28. There is no indication that any judge called for a vote. *Ibid.*

3. In the district court, respondent has already amended her complaint to include due process

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[2] The court of appeals did not express a "view as to whether the 30-day impound is a valid administrative penalty under the Fifth and Fourteenth Amendments." Pet. App. 5 n.2. The court provided that, "[o]n remand," respondent "shall be given leave to amend the complaint to include any additional claims she may choose to bring." *Ibid.*

claims. See D. Ct. Dkt. No. 75. She asserts, for example, that the charge of a $1,400 fee constitutes an "administrative penalty," despite the fact that respondent has neither been charged with nor convicted of any crime. *Id.* at 16. In other words, petitioners breached respondent's due process rights by punishing her "without judicial or quasi-judicial review." *Id.* at 17. Respondent also asserts a takings claim, alleging that petitioners "physically took possession" of respondent's car, "ostensibly for a public purpose," without providing respondent any compensation. *Id.* at 18.

REASONS FOR DENYING THE PETITION

The petition should be denied. To begin with, respondent has already amended her complaint to include due process claims. But this petition, before the Court on an interlocutory posture, addresses only a Fourth Amendment question. Review is thus improper, both because the Fourth Amendment issue may become irrelevant to the ultimate disposition of this case and because the Court would be prevented from considering respondent's due process claims.

Apart from that, nothing about this case makes it a candidate for further review. The decision below is correct: when the initial basis for a warrantless seizure dissipates, officers must justify the seizure by means of either a warrant or another exemption from the warrant requirement. And there is no material disagreement among the circuits that warrants review, especially since the lower courts have had scant opportunity to assess the impact of *Manuel* v. *City of Joliet*.

A. Respondent's due process claims render review improper.

The Ninth Circuit addressed the only issue actually before it—respondent's Fourth Amendment claim. See Pet. App. 5 & n.2. Since that decision, however, respondent has amended her complaint to also include due process claims. See D. Ct. Dkt. No. 75. Neither the district court nor the court of appeals has opined on those theories.

As a result, review of the interlocutory petition—which presents only a Fourth Amendment question (see Pet. i)—is necessarily premature. Even if that question were resolved in petitioner's favor, the case would proceed regardless on respondent's due process claims. And, if petitioners' conduct is unconstitutional when measured against the requirements of due process, that would render the Fourth Amendment question petitioner poses here irrelevant.

There is substantial reason to conclude that respondent will ultimately prevail on her due process claims. Impoundment under Section 14602.6 is necessarily punitive. See, *e.g.*, Pet. App. 20 ("the Court is persuaded that the thirty-day impoundment period * * * is an administrative penalty"); Pet. 2 (identifying purpose as deterrence). And "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes* v. *Shevin*, 407 U.S. 67, 84-85 (1972). It is a deprivation, moreover, that individual police officers have the discretion to elect, given that officers may choose between impoundment under Sections 14602.6 and 22651. See pages 3-5, *supra*. This poses several due process defects.

First, there are no objective criteria delineating when officers may employ Section 14602.6 (and the 30-day impoundment) and when they should instead use Section 22651 (which does not set a minimum period of impoundment). Absent such objective criteria cabining law enforcement discretion to impose the 30-day impound penalty, the statutory structure—as well as its implementation—violates core due process principles. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").[3]

Second, this administrative penalty is undoubtedly punitive. See *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1643 (2017) ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'"). But there is no judicial or quasi-judicial proceeding to assess the penalty: the impoundment mechanism is solely a creature of the police department, adjudicated only by police officers. The punishment is thus illegitimate because it is doled out without adherence to

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[3] The contours of respondent's due process claim are not properly litigated here. That said, petitioner cannot point to the LAPD manual as establishing sufficient standards for these two provisions. Under the standards apparently proffered by the LAPD (see, *e.g.*, Pet. App. 47), LAPD *would have* released the car to respondent in this case. But they declined to do so, instead enforcing the entire 30-day impound. *Id.* at 3-4. Petitioners' actual, day-to-day practices—and whether they comport with any stated manual—are thus topics for discovery in the district court.

due process. See *Bell* v. *Wolfish*, 441 U.S. 520, 536 (1979).

Indeed, the lack of a neutral judge or adjudicator is alone likely fatal; a necessary aspect of due process—especially where, as here, the government gains pecuniary benefit by means of seizure—is "neutrality." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993). See also *Krimstock* v. *Kelly*, 306 F.3d 40, 67 (2d Cir. 2002) ("[W]e find that the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law requires that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer."). But the police-officer adjudicator, an employee of petitioner, is decidedly not neutral.

The process due here must also be measured against the substantial deprivation of one's vehicle for 30 days—a deprivation that may deny an individual the ability to work and to care for family. For many, access to one's car is an essential element of freedom. The hearing here—conducted by a police officer rather than a neutral, where there is no written record, no right of appeal, and no objective criteria to obtain a return of a car, among other deficiencies—cannot constitute the kind of process required.[4]

Third, the penalty is unconstitutionally excessive given that respondent herself engaged in no wrongful conduct. See D. Ct. Dkt. No. 75, at 9 (identifying Eighth Amendment claim). This separately undermines the impoundment structure. See *United States*

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[4] The Ninth Circuit did not opine on any of these issues in *Goichman* v. *Rheuban Motors, Inc.*, 682 F.2d 1320 (9th Cir. 1982), as that case did not address a 30-day impound provision.

v. *Bajakajian*, 524 U.S. 321, 328 (1998) ("The Excessive Fines Clause thus 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'").

Fourth, if petitioners attempt to avoid the constitutional implications that stem from characterizing the 30-day mandatory impoundment as a penalty, they would then run headlong into the constitutional prohibition against unconstitutional takings. See D. Ct. Dkt. No. 75, at 18-19 (identifying Takings Clause claim). Indeed, it is clear that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

For these reasons, at least, respondent's due process claims are substantial—but they have yet to be addressed. The Court should not grant review when it is now impossible to determine whether the Fourth Amendment issue presented here will ultimately matter to the outcome.

Moreover, the claims at issue here may ultimately turn on the intersection of Fourth and Fifth Amendments. Petitioners themselves point to state decisions deciding different due process claims relating to impoundment statutes. See Pet. 23-24. The posture at present would restrict the Court to only one facet of the case. Review now would thus substantially frustrate the Court, as it would be unable to address the full spectrum of issues implicated by petitioners' conduct.

That is especially so because the parties have yet to take discovery on petitioners' practices. In reply, petitioners may attempt to cite department policy

and the like in an effort to adjudicate, for the first time in this case, the due process claims here. But not only is this the wrong forum for any such dispute, respondent intends to take discovery to determine whether petitioners' real-world practices measure up to any policies that are on the books. For now, there is no way any court may resolve the due process claims.

In sum, if review were ever to be warranted, it would be against the backdrop of a fulsome record that presents the full panoply of legal claims at play.

In these circumstances, the Court generally denies interlocutory review—especially where, as here, nothing would bar petitioner from later seeking review of this issue following a final judgment, should this question ultimately prove outcome-determinative. See, *e.g.*, *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., respecting the denial of the petitions for writs of certiorari) (appropriate to deny certiorari where "no final judgment has been rendered" and the outcome of the proceeding remained "unclear"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

B. The decision below is correct.

Not only is this a poor vehicle for review, the decision below is correct.

1. *Rodriguez* v. *United States*, 135 S. Ct. 1609, 1612 (2015), compels the result reached below: when the basis for a warrantless seizure ends, police must either end the seizure or obtain a new, lawful basis to continue it.

In *Rodriguez*, the Court concluded that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Id.* at 1612. *Rodriguez* considered a seizure initially justified by a traffic violation. When the reason for that seizure dissipated, the Court held, the Fourth Amendment requires some *additional* basis for police to continue the seizure. *Ibid.* That is, "[a] seizure justified only by a police-observed traffic violation, therefore, 'becomes unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Ibid.* See also *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005).

That is the same theory adopted below: although the initial seizure was justified for reasons of community caretaking, "[t]he exigency that justified the seizure vanished once the vehicle arrived in impound and [respondent] showed up with proof of ownership and a valid driver's license." Pet. App. 6. Accordingly, "the government must cease the seizure or secure a new justification," but petitioners "have provided no justification here." *Id.* at 7.

2. The Court's recent decision in *Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017), moreover, guts petitioners' essential theory of the case—that once an initial lawful seizure occurs, the Fourth Amendment ceases to apply.

In *Manuel*, the Court held that an individual's entire 48-day period of incarceration is governed by the Fourth Amendment—not just his initial seizure. The Court explained that "the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." 137 S. Ct. at 920. See also *id.* at 919 ("Manuel stated a Fourth

Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention.").[5]

Manuel thus holds that the Fourth Amendment governs not just the initial moment a seizure is effected, but also throughout "pretrial detention." *Id.* at 919.

That holding is incompatible with petitioners' essential argument—"that the Fourth Amendment, by its own express terms, only applies to the actual seizure of property, and that, once lawfully seized, due process governs the continued possession and the timing and process for the property's return." Pet. i. See also *id.* at 1 ("[T]he term 'seizure' refers to the specific action of taking custody or control over a person or property, in contrast to the subsequent possession of that property.").

Indeed, petitioner's contention is the precise argument that the Seventh Circuit had rested on in *Manuel*: "When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." *Manuel* v. *City of Joliet*, 590 F. App'x 641, 643 (7th Cir. 2015). But this Court unconditionally rejected that assertion. See 137 S. Ct. at 919-920.

Given that the Fourth Amendment applies to "seizures" of "persons, houses, papers, and effects"

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[5] The dissent, by contrast, would have held that the "seizure" against which the Fourth Amendment is judged is "a single event" and "not a continuing condition." 137 S. Ct. at 927 (Alito, J., dissenting). The dissent thus disagreed with what it understood to be the majority's holding: "that every moment in pretrial detention constitutes a 'seizure.'" *Id.* at 926.

(U.S. Const. amend. IV), petitioners have no basis to contend that *Manuel*'s holding as to the scope of the Fourth Amendment applies differently to property.

Petitioners argue that *Manuel* is limited to circumstances in which only the *initial* seizure lacks probable cause. See Pet. 13. But nothing in the text of that decision—nor logic—suggests such a limitation. To the contrary, the Court made plain that the Fourth Amendment governs *until* there is a trial protected by due process. *Manuel*, 137 S. Ct. at 920 n.8 ("[O]nce a trial has occurred, the Fourth Amendment drops out."). And, as petitioner will show, there has been no adjudication here that complies with due process. See pages 8-12, *supra*.[6]

3. *United States* v. *Jacobsen*, 466 U.S. 109 (1984), and *United States* v. *Place*, 462 U.S. 696 (1983) confirm that the same basic Fourth Amendment framework applies to seizure of property.

In *Jacobsen*, federal agents lawfully seized a package based on information provided by a private parcel carrier. 466 U.S. at 118-119. Thus, the Court concluded that "the agents' assertion of dominion and control over the package and its contents did constitute a 'seizure,'" and, moreover, that the seizure was reasonable. *Id*. at 120-121.

Under petitioners' view, once seized, the Fourth Amendment would cease to apply to the property. Not so, this Court held. Rather, "a seizure lawful at

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[6] If petitioners attempt to argue in reply that the internal police proceeding—adjudicated by police officers—satisfies due process concerns, that will further confirm the linkages between the Fourth Amendment and due process issues. Because the due process claims have yet to be considered by any court (see pages 8-12, *supra*), review is necessarily premature.

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.'" 466 U.S. at 124. Thus, subsequent seizures of the property—including running a field drug test—independently trigger Fourth Amendment protections. *Ibid*.

Petitioners contend that *Jacobsen* did not address "potential return" of property. Pet. 13. But that misses the point: *Jacobsen* rejects petitioners' fundamental assertion that, once property is lawfully seized, all further challenges sound in due process. *Jacobsen* confirms that the Fourth Amendment continues to apply post-initial-seizure.

So too does *Place*. There, "the Court held that while the initial seizure of luggage for the purpose of subjecting it to a 'dog sniff' test was reasonable, the seizure became unreasonable because its length unduly intruded upon constitutionally protected interests." *Jacobsen*, 466 U.S. at 124 n.25. This holding is also incompatible with petitioners' contention that, following an initial, lawful seizure, the Fourth Amendment has no relevance.

Petitioners contend that, in *Place*, the Court found that there had been no lawful seizure. Pet. 13-14. But, as we have explained, this is an alleged distinction without a difference. And, in any event, petitioners are wrong in their description. See *Place*, 462 U.S. at 706 ("[W]e conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, pro-

vided that the investigative detention is properly limited in scope.").

The rule is thus clear, even in the context of property: "a seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its duration or for other reasons." *Segura* v. *United States*, 468 U.S. 796, 812 (1984) (plurality opinion).

4. Against all this, petitioners' attempt to find support for their limitation on the reach of the Fourth Amendment lacks merit.

Petitioners begin by invoking *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991), contending that it limited the Fourth Amendment to the point of an initial seizure. Pet. 10-11. But *Hodari D.* merely addressed what begins a seizure—not the scope of the Fourth Amendment after the basis for the initial seizure dissipates.[7] Anyway, petitioners' argument is the same one embraced by the dissent in *Manuel*. See 137 S. Ct. at 927. But the *Manuel* majority saw it differently. *Id.* at 919-920.

Petitioners' detour back in time with *Thompson* v. *Whitman*, 85 U.S. 457 (1874), fares no better. That case was a question of statutory construction as it related to a court's jurisdiction. It had nothing at all to do with the reach of the Fourth Amendment.

Petitioners' last salvo is *City of West Covina* v. *Perkins*, 525 U.S. 234 (1999). They contend that *Perkins* considers due process requirements on the return of seized property; in that decision, petitioners say, the Court did not separately consider the Fourth

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[7] So too with *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989).

Amendment. Pet. 11-12. We agree to a point: due process *does* have significant relevance here, which is precisely why review is premature since the due process issues have not been explored in this case. See pages 8-12, *supra*.

But the lesson that petitioners attempt to draw is simply wrong. *Perkins* addressed due process claims because that was the basis of the decision below. See 525 U.S. at 238-239.[8] The *Perkins* majority's silence on the Fourth Amendment does not mean that the Court rejected such a claim—it just means that it was not argued and thus was not decided. It would be hardly surprising if both due process and the Fourth Amendment provide overlapping protections. Indeed, in the years since *Perkins*, this Court has confirmed in *Manuel* and *Rodriguez* that the Fourth Amendment does reach beyond the initial seizure. And that is so, even though due process *does* govern some aspects of pre-trial seizure, such as conditions of confinement. See *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466 (2015).

C. There is no conflict among the circuits.

Review is additionally unwarranted because petitioners' assertion (Pet. 15-23) of a conflict among the circuits does not withstand scrutiny. In particular, the lower courts have had little opportunity to consider *Manuel*'s effect on the Fourth Amendment's scope. And none of the courts have addressed the impact of *Rodriguez* on the analysis.

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[8] Only Justice Thomas's concurrence (joined by Justice Scalia) addressed the Fourth Amendment. In their view, such claims have "been governed exclusively by the Fourth Amendment." *Id*. at 246. The majority did not reject the assertion that the Fourth Amendment may apply.

The issue below is a novel question of first impression. The court of appeals considered what happens to a vehicle *after* the community-caretaking exception to the warrant requirement dissipates—yet a municipality chooses to retain the vehicle as punishment. By contrast, the cases on which petitioners rely involved either a negligent or inadvertent failure to timely return property seized for criminal investigatory purposes, or a refusal to return the property pending payment of accrued fees. There is no conflict until another circuit considers a case materially like this one—and reaches a contrary result.

1. Petitioners begin with the Seventh Circuit's decision in *Lee* v. *City of Chicago*, 330 F.3d 456, 464 (7th Cir. 2003). But *Lee* differs factually and rests on a faulty foundation that *Manuel* has since swept away.

As a factual matter, *Lee* is not like this case. There, the police impounded Lee's car as it was evidence of a crime; Lee had no complaint against that impoundment. What Lee challenged was that police wanted him to pay the storage fees accrued while the police held the car or request a hearing. 330 F.3d at 469.

The court found that there was no Fourth Amendment claim because there was no seizure. *Id.* at 460-461. As the court put it, "[c]onditioning a car's release upon payment of towing and storage fees does not equate to a 'seizure' within the meaning of the Fourth Amendment." *Id.* at 471. That is, the Seventh Circuit found Lee *could* have obtained his car—if he had agreed to pay the fees. This case is quite different: respondent *tried* to pay the storage fee, yet petitioners nonetheless refused to give her car back.

To the extent that *Lee* could be read to reach beyond its facts, it rests on a premise rejected by *Manuel*. The court stated that once a seizure is "complete" and "justified by probable cause, that seizure is reasonable." *Lee*, 330 F3d at 466. But, as we have explained, *Manuel* rejects this contention that the Fourth Amendment is forever satisfied following an initial lawful seizure. See pages 13-15, *supra*.

Beyond that, *Lee* identifies due process as the touchstone for these claims. *Lee*, 330 F.3d at 466-471. And the contours of due process were at issue in that case. But they have not yet been decided here. Thus, until the lower courts decide the due process claim, there is no material, outcome-determinative conflict.

2. The other cases offered by petitioners do no better.

Denault v. *Ahern*, 857 F.3d 76 (1st Cir. 2017), also addressed a circumstance in which police seized property as evidence of a crime and offered it back to the individual—and the only question was payment of accrued fees, which is different than the case here. *Id*. at 80. Beyond that, the First Circuit considered only a Fourth Amendment claim, yet the plaintiffs made "no effort" to "explain why the alleged violation of their constitutional rights sounds in the Fourth Amendment." *Id*. at 83.

So not only did the plaintiffs there fail to articulate their theory (thereby functionally, even if not formally, abandoning their Fourth Amendment claim), but nothing in *Denault* has any bearing on respondent's due process claims that have yet to be considered. (To the extent *Denault* addressed the Fifth Amendment, it did so only regarding takings and not due process. *Id*. at 84.) Finally, *Denault* at-

tempts to draw a distinction between application of the Fourth Amendment to persons and property (*ibid.*)—but any such suggestion is at odds with *Jacobsen*, *Place*, and scores of other authority extending the same Fourth Amendment framework to property, in none of which the court considered that distinction.

Shaul v. *Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 181 (2d Cir. 2004), issued long before *Manuel*. It involved, at most, "negligence" (*id.* at 187), which is entirely unlike the purposeful conduct here. *Shaul*, moreover, underscored that a due process claim is likely cognizable—"[b]ut Shaul [did] not pursue such a claim." *Ibid.* As we have said, there is a due process claim here—it has just not yet been adjudicated.

In fact, the Second Circuit's law plainly supports the result reached below. Specifically considering vehicle impoundment under the Fourth Amendment, that court has concluded that "the probable-cause determination at the outset and the eventual civil forfeiture proceeding do not justify the interim impoundment of the vehicles for the months or years." *Krimstock*, 464 F.3d at 251. When the initial basis for the seizure disappears, the Fourth Amendment demands a new justification.

Fox v. *Van Oosterum*, 176 F.3d 342 (6th Cir. 1999), was also decided long before *Manuel*. The court there speculated that, as to both persons and individuals, only the initial seizure matters. *Id.* at 351. But *Manuel* has since proven this wrong.

Next, petitioners concede that the Eighth Circuit has not ruled on this question. Pet. 18.

Finally, *Case* v. *Eslinger*, 555 F.3d 1317 (11th Cir. 2009), was also decided before *Manuel*. It also supports respondent's contention that petitioner's conduct violates due process; "[a] complaint of continued retention of legally seized property raises an issue of procedural due process under the Fourteenth Amendment." *Id*. at 1330. The plaintiff in *Case* had not presented a due process argument; respondent has. *Id*. at 1331.

3. Petitioners next point to three cases purportedly holding "that after a lawful seizure/arrest was completed, the ongoing detention of individuals was governed by due process, not the Fourth Amendment." Pet. 20. But these cases predate *Manuel*, which holds otherwise.

4. Petitioners also cite a handful of California state intermediate appellate decisions addressing mainly due process challenges—different from respondent's here—to California's impoundment laws. Pet. 23-24. The relevance of these decisions to the question petitioners present is far from clear. The parties have not taken any discovery on the due process issues, and the courts in *this* case have not addressed any question of due process. As a result, resolution of those issues is certainly premature now. Petitioners can argue those cases to the district court, and respondent will oppose in due course. This is plainly not the forum to adjudicate these questions in the first instance.

That said, we do agree with petitioners' implicit admission: due process does play a role in the final resolution of this case. This is why review of this petition now, before a record is established and these claims are adjudicated, is improper. See pages 8-12, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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