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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

INTRODUCTION

The Opposition attempts to distract the Court from the fundamental issue raised by the Petition.

> Assuming that property is lawfully seized by a public entity in compliance with Fourth Amendment requirements, what constitutional standard applies for the continued possession of the property and for the timing and process of returning the property?

The Ninth Circuit, contradicting its sister circuits, reached its answer. The Ninth Circuit has chosen to expand the Fourth Amendment by redefining its terms – holding that a "seizure" under the Fourth Amendment includes *both* the initial taking of property *and* the retention of that property after it has been lawfully seized. That ruling is the law of this case and the governing law in the Ninth Circuit. The issue of whether the Fourth Amendment applies after the completion of a lawful seizure is as ripe now as it will ever be and has nothing to do with the separate issue of whether the related procedures and state remedies satisfy due process.

For the same reasons discussed in the Petition, the Opposition's reliance on *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) and *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) is misplaced. Neither case addresses the disposition of property after a lawful seizure. In *Manuel* the suspect was arrested without evidence of a crime and then held after a probable cause hearing based on fabricated evidence – there was never a lawful seizure of any kind. In *Rodriguez*, the police conducted a routine traffic stop and then attempted to use that

stop to further detain the driver without reasonable suspicion of wrongdoing. Neither case considered the extension of the Fourth Amendment beyond the completion of a lawful seizure of property.

The Opposition effectively concedes the existence of a circuit split by arguing that the split no longer exists following *Manuel*. However, *Manuel* does not resolve, or even address, the issue here – whether the Fourth Amendment continues to apply after the completion of a lawful seizure. The Ninth Circuit recognized the existence of a circuit conflict while also relying on *Manuel*. More explicitly, the First Circuit distinguished *Manuel* as inapplicable to the issue of returning lawfully seized property. The Opposition's attempt to nitpick at the circuit cases misses the forest for the trees. The details of how each seizure took place, or if or how the property was returned, are incidental to the primary issue running throughout these cases: does the Fourth Amendment apply to the disposition of property after the completion of a lawful seizure, or, as most circuits concluded, is that a question of due process.[1] Only the Court can resolve this issue.

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[1] Similarly, the Opposition's discussion of an alternative impound statute, not invoked or at issue here, is irrelevant. See Opp., 3-4. In either case, the issue of whether the Fourth Amendment applies after the lawful seizure of the property remains.

REPLY TO OPPOSITION

I. Brewster's Belated Due Process Claim is Irrelevant

Brewster argues that the Court should await the final litigation of her recently added due process claim before it resolves the circuit split created by the Ninth Circuit's published opinion on her Fourth Amendment claim. Not so.

Brewster's due process claim, added at the Ninth Circuit's invitation, is wholly irrelevant to the current Fourth Amendment issue. The Ninth Circuit's published opinion remains the final decision regarding the application of the Fourth Amendment. It will remain both the law of this case and the governing law in the Ninth Circuit unless corrected by the Court. Whether or not Brewster is pursuing a separate due process claim will have no impact on the application of the Fourth Amendment.

The Ninth Circuit recognized this and did not hesitate to make a final ruling on the Fourth Amendment in the absence of any due process claim or analysis, and without any contingency as to whether Brewster would add a due process claim, or the potential merits of such a claim. See, App. 5, n.2. Here, the circuit courts agree. Each circuit court that found due process, and not the Fourth Amendment, provided the governing standard for the disposition of property lawfully seized, also found that these were separate and distinct claims subject to separate adjudication. E.g., *Lee v. City of Chicago*, 330 F.3d 456, (7th Cir. 2003) (compare Fourth Amendment analysis, at 460-466, with due process analysis, at 466-468); *Case v.*

Eslinger, 555 F.3d 1317, 1330-1331 (11th Cir. 2009) (distinguishing claims under Fourth Amendment [improper seizure] and due process [failure to return]); Petition 16-22.

Brewster's examples of petitions rejected by the Court are unhelpful because those rulings were plainly incomplete. In *Mount Soledad Memorial Ass'n v. Trunk*, 567 U.S. 944, 945 (2012), the lower courts had not yet determined what remedies would apply to the religious memorial at issue. Similarly, in *Virginia Military Inst. v. United States*, 113 S. Ct. 2431 (1993), the lower courts had not yet determined what remedies were needed regarding an all-male military academy. In each, the Court would have been left to guess as to what alternative proposals it was evaluating. Here, the Ninth Circuit's ruling on the application of the Fourth Amendment is final, regardless of further litigation on separate issues.

While the Opposition spends considerable time providing a lopsided and often distorted view of the due process issues, the City agrees that these issues are not currently before the Court.[2] The merit, or lack of merit, of Brewster's due process claim regarding the return of her vehicle is wholly separate from whether the Fourth Amendment applies after the completion of an admittedly lawful seizure, as the Ninth Circuit held.

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[2] For example, Brewster never claimed she offered any mitigating circumstances toward her vehicle's early release, including whether she urgently needed the vehicle, or that she was unaware her brother-in-law had a suspended license. Petition 5-6 and 7. In addition, California courts have repeatedly upheld Vehicle Code section 14607.4 given the important public safety issues involved. Petition, 23-4.

II. The Meaning and Breadth of "Seizure" Remains Unresolved

The issue of whether the Fourth Amendment applies after completion of a lawful seizure of property remains unresolved by the Court. The Opposition primarily relies on *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) and *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) to oppose review. However, these Fourth Amendment cases do not resolve this question.

Brewster's discussion of *Manuel* plainly ignores the fundamental distinctions which make that holding inapplicable. See Petition, 13. First, in *Manuel* the suspect was arrested without any evidence of a crime and the probable cause hearing was based on deliberately fabricated evidence. *Manuel*, *supra*, 137 S. Ct. at 915. As a result, there was never any lawful seizure, meaning there was *never* a time in *Manuel* in which the Fourth Amendment was satisfied. This left open a potential Fourth Amendment claim based on the results of a plainly illegal seizure and legal process based on fabricated evidence – elements which the court specifically focused on. *Id*., at 919-20. This distinction was noted in *Jauch v. Choctaw County*, 874 F.3d 425, 429 (5th Cir. 2017), which cited *Manuel* as supporting a valid Fourth Amendment claim for detention following an *unlawful* seizure. At the same time, *Jauch* cited *Brothers v. Klevenhagen*, 28 F.3d 452 (5th Cir. 1994), among other cases, as concluding that only a due process claim applies to a detention following a *lawful* seizure. *Id*.[3]; and see Petition, 21. As

[3] The Seventh Circuit commented on a similar distinction, noting "in passing" that *Manuel* held the Fourth Amendment governed

a practical matter, *Manuel* had no opportunity to address whether the Fourth Amendment continues to apply after the completion of a lawful seizure.

Second, *Manuel* addressed the wrongful incarceration of a person, which invokes different liberty considerations then the seizure of property. The First Circuit distinguished *Manuel* on these grounds when holding that the Fourth Amendment did not apply after the lawful seizure of property. *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017). The Opposition attempts to dismiss any distinction between arresting an individual and seizing property, without any discussion or authority. Opp., 20-21. While the Fourth Amendment applies to both, there is a fundamental difference between taking a person's basic liberty of movement and interfering with a mere possessory interest. *United States v. La France*, 879 F.2d 1, 5-6 (1st Cir. 1989) ("the police . . . are subject to fewer restraining circumstances where they trammel no other recognized interest apart from that of possession alone."); *United States v. Place*, 462 U.S. 696, 708 (1983) ("*Place*") (accepting general premise that property seizures are less intrusive than seizures of persons, but rejecting distinction in that case because seizing luggage while travelling "can effectively restrain the person"); and *United States v. Licata*, 761 F.2d 537, 541, n.4 (9th Cir. 1985) (citing *Place* that

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"at least some claims for unlawful pretrial detention even after the legal process has begun," while the existing circuit rule was that such claims could only be brought under the Due Process Clause, citing a case of prolonged detention after a lawful arrest. *Ewell v. Toney*, 853 F.3d 911, 917 (7th Cir. 2017); citing *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014).

"seizures of property may be less intrusive than seizures of the person.").

Manuel addresses the application of the Fourth Amendment to proceedings which follow an illegal and unjustified arrest. These issues have no application here because the parties agree that the seizure of Brewster's vehicle was complete and constitutional before Brewster sought its return. Petition, 7. *Manuel* confirmed that a violation of the Fourth Amendment cannot be cleansed by a legal process based on fabricated evidence, but that holding has little application here. *Manuel*, *supra*, 137 S. Ct. at 919-20.

In *Rodriguez*, there was no dispute that the police properly conducted a traffic stop after observing a vehicle briefly driving on the highway shoulder. However, the police then further detained the driver without reasonable suspicion to provide time to summon a drug sniffing dog. *Rodriguez, supra*, 135 S. Ct. at 1613. Thus, *Rodriguez* addressed whether a traffic stop can be used as a pretense to further detain suspects, without reasonable suspicion, while the police investigate purported unrelated criminal activity. *Id*., at 1614. Like *Manuel*, *Rodriguez* involved the detention of a person, and so invoked different considerations of liberty not present in this case.

Rodriguez ruled that a traffic stop – like a *Terry* stop – is a discrete procedure which justifies only a short detention addressing the purpose of the traffic stop. *Rodriguez*, *supra*, 135 S. Ct. at 1614 ("a relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop . . . than to a formal arrest.") (Internal quotes deleted); citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). As discussed in the Petition, the

proper scope of a detention or traffic stop has no application here. Petition, 13-4. First, because such a stop is a specific exception to the general application of the Fourth Amendment which is not invoked here. Second, because the parties agree that the complete seizure of Brewster's vehicle was lawful, thus removing the primary issue addressed in those cases regarding their unlawful detentions. (See App. 6 and 18, n.1). Third, the issues in both *Rodriguez* and *Place* involved an attempt by police to invoke a specific procedure, the traffic or *Terry* stop, but then fail to comply with that procedure's defined conditions. See *Rodriguez*, *supra*, 135 S. Ct. at 1616; *Place*, *supra*, 462 U.S. at 709-10 (length and nature of intrusion disqualified search as a *Terry* stop). There is no corresponding event here, as Brewster's vehicle was legally seized, taken into custody, stored, and then released, all pursuant to state statute. Petition, 6-7.

The Opposition notes that *United States v. Jacobsen*, 466 U.S. 109 (1984) applied one Fourth Amendment analysis to the initial package seizure and a second for the subsequent destructive testing of a portion of the substance leaking from the package, but then extrapolates the wrong conclusion from this. *Jacobsen* recognized the difference between holding property for reasonable examination and the "additional intrusion occasioned" by the permanent destruction of a portion of that property. *Id*., at 122. Destructive testing was a separate and new level of intrusion, calling for a separate Fourth Amendment analysis. While that might apply here if the City had sought to destroy Brewster's vehicle, or committed any other "additional intrusion," no such event is alleged. The vehicle was maintained in custody until it was

returned, so there was no "additional intrusion" beyond the initial lawful seizure.

This discussion inevitably returns to the basic question the Opposition seeks to avoid: What is a seizure of property? Is it – as appears consistent with common usage – the specific act of taking possession, as described in *Thompson v. Whitman*, 85 U.S. 457, 470-71 (1873), *Cal. v. Hodari D.*, 499 U.S. 621, 624 (1991), and the majority of circuits? Petition, 10-1, and see 15-22. If so, this suggests there is no further role for the Fourth Amendment after a legal seizure is completed. Or, does "seizure" also incorporate the subsequent retention of the property, and therefore potentially govern its eventual disposition, presumably displacing due process as the primary framework for such procedures? Only the Court can resolve this issue.

III. As the Ninth Circuit Recognized, the Circuit Conflict Remains

There is a clear split among the circuits, and apparently among the justices of the Court, as to the application of the Fourth Amendment after the completion of a lawful seizure. Petition, 15-22 and 24-5. The Opposition attempts to dismiss this conflict by: (1) arguing that *Manuel* resolves the conflict; (2) attempting to distinguish some of the circuit cases by citing irrelevant circumstances; and, (3) ignoring the discussion in the concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994), and the warning in the *Manuel* dissent, *supra*, 137 S. Ct. at 926-927.

Petition, 24-5.[4] Despite these efforts, the circuit conflict persists and requires the guidance of the Court.

As discussed above, *Manuel* does not resolve, or even address, the application of the Fourth Amendment following the lawful seizure of property. *Ante*, 5-7; Petition, 13. However, by making this argument, the Opposition joins the Ninth Circuit in acknowledging the existing circuit conflict, which the Opposition mistakenly claims *Manuel* resolved. See Petition 9; Opp., 18-22. In fact, the circuit decisions implicitly reject *Manuel*'s application by repeatedly holding that the Fourth Amendment does not apply after the *lawful* seizure of property, and that continued possession thereafter does not constitute an additional seizure, a topic which *Manuel* does not address. E.g., *Fox v. Van Oosterum*, 176 F.3d 342, 351-352 (6th Cir. 1999); *Shaul v. Cherry Valley-Springfield Central School District*, 363 F.3d 177, 187 (2d Cir. 2004); and see Petition 15-22. Thus, the Opposition's observation that most of the circuit decisions predate *Manuel* can be disregarded.

The Opposition's attempts to distinguish the specific facts in some circuit cases miss the fundamental issue for review – does the Fourth Amendment apply to the continued possession and disposition of property lawfully seized? In each of the circuit cases, property was lawfully seized and the plaintiff later complained about its subsequent disposition. The specific circumstances of the type of property, why it was

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[4] The City apologizes for the error in the Petition, which refers to Justice Alito's dissent in *Manuel* as a concurring opinion. Petition, 25.

seized, or the nature of the plaintiff's complaint are presumably relevant to whether that disposition offended constitutional principles. However, the Opposition offers no reason why these circumstances should have any impact on the fundamental question of whether the Fourth Amendment applies at all following the completion of a lawful seizure. The issue is not the disposition on case-specific facts, but a determination of what constitutional provision governs the disposition of lawfully seized property. As such, the Opposition's observations about whether a given circuit opinion addressed due process concerns, and how that might affect Brewster's due process claim, are irrelevant. *Ante*, 3-4.

Finally, there remains uncertainty on the Fourth Amendment's application. Justice Ginsberg's concurring opinion in *Albright*, and the warnings in the *Manuel* dissent, take opposing views on the meaning and scope of "seizure," at least in the context of the pretrial arrest of a person. In that context, the concurring *Albright* opinion equated "seizure" with the continuing condition of being "seized," and would apparently extend "seizure" from arrest through the beginning of trial, regardless of whether the initial seizure was lawful or the suspect incarcerated. *Albright*, *supra*, 510 U.S. at 277-79. However, as applied to the legal seizure of property, most circuits have considered and rejected this proposition. Petition 24-5.

Conversely, the dissenting opinion in *Manuel* urges limiting the Fourth Amendment to its terms, noting that "seizure" has a specific meaning and context which refers to the act of taking possession. *Manuel*, *supra*,

137 S. Ct. at 926-27. While that dissent would have applied that limitation even to the unlawful arrest of an individual, which the majority rejected, the argument gains significant force when applied to an admittedly legal seizure of property. As most circuits have concluded, once the Fourth Amendment is satisfied by the legal seizure of property, it falls away and due process provides the constitutional framework for the property's disposition. Here, the uncertainty and division between the circuits require the Court's resolution of this Fourth Amendment issue.

CONCLUSION

The Court's guidance is needed to resolve a fundamental conflict over Fourth Amendment jurisprudence: is the seizure of property an event which occurs when taking possession, or is it a condition of being that persists until the final disposition of that property? It is undisputed that Brewster's vehicle was lawfully seized. Having satisfied the Fourth Amendment, the City, and most circuits, contend that due process provides the constitutional framework thereafter. However, the Court has not yet provided guidance on this basic issue and should do so now by granting this Petition.

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Respectfully submitted,

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