**No. 11-56253**
**District Case No. CV 1102874**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**TONY LAVAN, et al.**

**Plaintiffs-Appellees**

**v.**

**CITY OF LOS ANGELES**

**Defendant-Appellant**

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ON APPEAL FROM THE ORDER GRANTING A PRELIMINARY INJUNCTION
ENTERED BY THE CENTRAL DISTRICT OF CALIFORNIA
Hon. Phillip S. Gutierrez

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# APPELLEES' ANSWER BRIEF

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Whether homeless individuals lose all Fourth Amendment rights in their possessions when they momentarily leave them packed up on the sidewalk to attend to personal needs such as using a bathroom and getting water; and, even if the property may be removed, may it be destroyed on the spot without adequate notice and no post-deprivation opportunity to reclaim the property. May a City enact a local ordinance violative of a state statute requiring "found" property to be maintained by the police for a period of 90 days to permit the rightful owner to come forward and claim the property.

## II. STATEMENT OF THE CASE

Defendant appeals from a preliminary injunction, enjoining the City of Los Angeles from confiscating and immediately destroying the meager possessions of homeless individuals in the area of Los Angeles known as "Skid Row." The district court correctly applied the law to the facts in this instance when it found that the plaintiffs, eight homeless individuals living in the "Skid Row" area, made a "clear showing" of all the elements necessary to obtain a preliminary injunction. In opposition, defendant answered that "[w]hat is disputed in this case is that personal property even was taken and immediately destroyed." PER:91-92 (RT:11-12).[1] On

[1] The abbreviation "ER" refers to Appellant's Excerpts of Record, citing page numbers. "PER" refers to Plaintiffs/Appellees' Excerpts of Record.

appeal, defendant contends the lower court's ruling was clearly erroneous and that the City has the legal authority to seize and destroy the property of the homeless pursuant to a local ordinance, even though both the Fourth and Fourteenth Amendments, as well as California statutory law, hold otherwise.

In its opening brief, Defendant repeats the disingenuous arguments and evidence discredited by the district court. Appellant says that, for the purpose of this appeal, it is accepting the court's facts as true. AOB:9. Yet, the first thing Defendant then does is tell this Court that it violated no rights since the City had given adequate pre-deprivation notice, posting 73 identical signs throughout Skid Row, warning that property may be taken and "disposed" of if left on the sidewalk when street cleaning is scheduled, which is every day according to the sign described by Appellant. AOB:11.

As Defendant's counsel was forced to concede at the preliminary injunction hearing, this assertion about the signs and notice was simply not true. Based on plaintiffs' evidence, the Court found that the signs varied significantly. The signs near the Catholic Worker, where plaintiffs Hall and Reese had their property taken, were posted half way up the block and only gave notice of cleaning on Monday, Wednesday and Friday. Plaintiffs' property was taken on a Thursday. Also, as the district court noted, many signs were posted at second story height, above parking signs aimed at vehicle drivers. PER:96 (RT:16) (*see* fn. 13).

The district court correctly concluded that defendant's declarants had serious credibility issues and, on critical points, contradicted each other.[2] ER:10 n.3, 13-14 (Pre. Inj. at 8, fn 3; 11, fn 6; 12). A primary reason why the City's evidence failed was because all of the police officers and Public Works employees involved in the incident outside the Catholic Worker "soup kitchen" filed declarations swearing that what plaintiffs said happened had never occurred. They went the extra mile and said that, if these events had occurred – if they had taken and destroyed property from a person who came forward to claim it, or took property out of readily identifiable red shopping carts given to homeless persons on Skid Row by the Catholic Worker (known as the "Hippie Kitchen"), or restrained someone from saving his belongings – they would remember it. ER:9 (Pre. Inj. at 7)

Unfortunately, when defendant's agents signed those declarations, they had no idea that plaintiffs would locate photos of the incident directly contradicting the City's declarations. In fact, as the court found, the photos submitted in support of the

[2] "Other portions of Mr. Duncanson's declarations are similarly unsupported and even conflict with declarations offered by the City. For example, Mr. Dunancson [sic] avers that he knows when property is abandoned because, among other things, when no one round to immediately claim property in a public area, he will leave it 'there for *at least a day, if not longer* before it is cleaned up.' *Duncanson Decl.* ¶ 4 (emphasis added). ... Officer Joseph, whose declaration the City submitted, confirmed Plaintiff Vassie's account. *See Joseph Decl.* ¶ 8. ... The City relied heavily on this aspect of Mr. Duncanson's declaration at oral argument to establish that the city only disposes of abandoned property left unattended for at least a day. The Court, however, cannot simply take Mr. Duncanson's declaration at face value in light of the other evidence offered by both Plaintiffs and the City."

preliminary injunction showed plaintiff Hall being held back by the police, as Hall's declaration stated, while Public Works Inspector Duncanson stood just a few feet in back of him, an empty red Catholic Worker shopping cart a few feet to the side. The exhibits also showed property on the street in front of Hall, not yet in the skiploader and crushed. PER:54 (Lewis Declaration and Exhibits). In all, the photos confirmed plaintiffs' version of events and directly belied defendant's.

After argument, full briefing and voluminous evidence filed by both sides, the court issued a preliminary injunction, addressing each authority advanced in defendant's opposition and readily disposing of it. ER:4-16 (RT:2-14). Tellingly, Appellant includes not a single one of those authorities in its opening brief. That is because there is now a substantial change in defendant's argument.

In the district court, defendant's declarant John Duncanson, the Bureau of Street Services investigator assigned to Skid Row, averred that it is his job "to protect the property of the homeless." With that in mind, he makes evaluations regarding which items left on the public sidewalk should or should not be seized.[3] *See* ER:20-23 (Duncanson Decl. ¶¶1, 4-6). Now, defendant has taken a completely different tack. The City concedes that plaintiffs' personal possessions were taken and summarily

[3] According to Mr. Duncanson, "medications, legal paperwork, glasses, or other forms of identification" as well as property found in the Catholic Worker/Hippie Kitchen carts are left behind for their owners. *Id.* at ¶5. Plaintiffs evidence contradicted this assertion, as well. ER:9, n.4 (Pre. Inj. at 7, n.4)

destroyed, but contends that it may do so with impunity because plaintiffs have forfeited their Fourth Amendment rights by leaving their property even momentarily on the sidewalk. AOB:2-3, 15-22.

In response to the district court's finding that defendant did not argue that the property was contraband, Appellant now asserts that seizure and destruction is justified since, while not contraband, plaintiffs' belongings evince a crime: leaving property on a sidewalk in violation of LAMC §56.11, a misdemeanor.[4] ER:12 (Pre. Inj. at 10). So, without issuing a citation, defendant gets to be judge and jury on the street, executing a sentence on the spot, foreclosing any chance to contest the charge in court and permit plaintiffs to reclaim their possessions.

Of course, Appellant may make new arguments on appeal. *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). But such a complete departure only underscores the failure of Appellant's position. Now, characterizing homeless individuals as "squatters" and "trespassers" on public sidewalks[5] – the only refuge

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[4] A violation of LAMC §56.11 is a misdemeanor. LAMC § 11.00(m) ("Every violation of this Code is punishable as a misdemeanor unless provision is otherwise made, and shall be punishable by a fine of not more than $1,000.00 or by imprisonment in the County Jail for a period of not more than six months, or by both a fine and imprisonment."). A person charged with a misdemeanor is entitled to a jury trial. Cal Const, Art. I § 16 (2011); Penal Code § 689.

[5] AOB at 16-21.

some have in Los Angeles, where available shelter is woefully inadequate,[6] defendant argues that the lower court exceeded its authority in granting the preliminary injunction because it is "not the role of the court to decide for the City how it should deal with problems such as poverty and homelessness." AOB 2. Apparently, defendant has decided that it will permit homeless individuals to be present in the City, as it must (*Papachristou v. Jacksonville*, 405 U.S. 156 (1972)), but the price for exercising this fundamental right is forfeiture of all belongings.

The district court correctly concluded that Fourth Amendment protections against unreasonable seizure and Fourteenth Amendment guarantees of due process do not depend upon economic status. The legal principles applied by the district court are hardly novel. The preliminary injunction should be affirmed.

## II. STATEMENT OF FACTS

Plaintiffs/Appellees adopt the facts as set forth in the district court's order of June 23, 2011, granting a preliminary injunction.

### A. The Evidence Submitted Below

Plaintiffs are eight homeless individuals living in the City of Los Angeles's "Skid Row" area. ER: 3 (Complaint ¶¶1-6). They brought a class action for injunctive relief alleging claims under the Fourth, Fifth and Fourteenth Amendments

[6] *Jones v. City of Los Angeles*, 444 F.3d 1118, 1122 (9th Cir. 2006), vacated upon settlement of the parties, 505 F.3d 1006 (9th Cir. 2007)

to the federal Constitution, Article 1, §§7 and 13 of the California Constitution, California Civil Code §52.1, California Civil Code §2080, and common law conversion. ER:3; PER:1-16. Since February, the City of Los Angeles, through the Los Angeles Police Department and the Bureau of Street Services, has confiscated and destroyed the personal possessions Plaintiffs left in public spaces in order to use the restroom, eat a meal, or, among other things, appear in court. ER:3. The City seized plaintiffs' personal property – including California IDs, birth certificates, Social Security cards, family memorabilia, toiletries, cell phones, sleeping bags and blankets, when several of the plaintiffs had their belongings neatly packed in carts provided by the "Hippie Kitchen." ER:9 (Pre. Inj. at 7 (*See* Hall Decl. ¶¶3-5; Reese Decl. ¶¶2-6; Seymore Decl. ¶¶3-4)). The City claimed that "medications, legal paperwork, glasses, or other forms of identification" are never dumped, but left for the owner; the evidence was to the contrary. ER: 9-10 (Duncanson Decl. ¶5).

Appellant submitted the declaration of John Duncanson, an investigator for the Bureau of Street Services in charge of determining which items can be cleaned up and which must be left behind. ER: 10. Duncanson also averred that he did not recall anyone telling him that the property was not abandoned. *Id.* In addition to the declarations from Plaintiffs Hall, Reese and Seymore, "who either watched or had only left momentarily to get water or use the restroom," plaintifs submitted declarations from two people from the Catholic Worker, along with photo evidence

that "unequivocally" proved Appellant knew the property was not abandoned. ER:9 (*See* Morris Decl. ¶10-12; Lewis Decl. ¶¶4-7; Lewis Decl., Ex. 1-8).

Duncanson claimed he knew property was abandoned since, "when no one is around to immediately claim property he will leave it there for at least a day, if not longer before it is cleaned up." ER:10 (Duncanson Decl. ¶4). This averment was disproved by the declarations of Plaintiffs Vassie and Reese, ER:10, 13, as well as by defendant's declarant, Officer Joseph. ER:10 (See Joseph Decl. ¶8).

The City posts street signs indicating when sidewalk cleanups occur. ER:14. The district court found the signs inadequate as they are often posted a very high level with small print, obscured by foliage or taped over making it difficult to read. *Id.* The signs did not provide notice of either a pre or post-deprivation remedy. *Id.* The City conceded that it affords no pre or post-deprivation hearing, ER:15, and admitted that it has a practice of on-the-spot destruction of seized property. *Id.*

**B. The Temporary Restraining Order and Preliminary Injunction**

The district court entered a Temporary Restraining Order in the case on April 22, 2011. PER:38. The Temporary Restraining Order was substantially the same in all material aspects to the preliminary injunction entered on June 23, 2011. The preliminary injunction only prohibits the seizure of property if: (1) it is abandoned, (2) is an immediate threat to public health or safety, or (3) is evidence of a crime. ER:18. The district court also found that the City must comply with the legislative

scheme of Civil Code § 2080 et seq., and provide notice in a prominent place at the site "for any property taken on the belief it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner." ER:18. Between entry of the TRO and entry of the preliminary injunction, the City complied with the order and maintained the sidewalks of Skid Row. PER:63-80 (Dec. of Eric Ares and exhibits thereto, filed on June 14, 2011).

Appellant complains that the injunction is broader than just homeless persons. AOB at 1. This is necessary since "the City is seizing and destroying property that has been temporarily in public places by its owner, but not abandoned." It would be impossible to craft an effective remedy otherwise since "it would likely be impossible for the City to determine whose property is being confiscated." ER:16 (Pre. Inj. at 14), citing *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996).

## III. SUMMARY OF THE ARGUMENT

The district court applied the correct legal analysis in finding that Appellant had violated the Fourth and Fourteenth Amendment rights of homeless individuals on Skid Row by seizing and immediately destroying their property without proper notice and without any post-deprivation due process opportunity to reclaim property mistakenly or deliberately removed as "abandoned." Based on the evidence, the district court correctly found that, in fact, when plaintiffs' property was confiscated, defendant

knew or had strong reason to suspect the items were not abandoned. This included defendant's own statements, averring that it never took property in a distinctive red shopping cart, given to homeless by the Catholic Worker, a soup kitchen on Skid Row also known as the "Hippie Kitchen."

The district court correctly found that key evidence by defendant, including the declaration of John Duncanson, was not credible. It was contradicted not only by declarations and photographic evidence submitted by plaintiffs, but also by Duncanson's own contradictory statements and the declaration of Officer Joseph.

The court below also applied the correct legal standard to evaluate plaintiffs' claim of a Fourteenth Amendment violation. The court correctly concluded that defendant provided neither a pre nor post-deprivation remedy to plaintiffs and others whose property was taken from the public sidewalks. The court properly concluded that defendant's evidence of due process was woefully deficient and, again, contradicted by the photographic evidence submitted by plaintiffs. The court found that, even if defendant's assertions about various procedures afforded to reclaim property were true, the City submitted no evidence it actually followed these procedures. Moreover, the evidence submitted by plaintiffs proved that seized property was destroyed on the spot, so any purported post-deprivation remedies were meaningless.

Finally, the district court correctly found that Los Angeles Municipal Code

§56.11 was preempted by California Civil Code §2080, setting forth the responsibility for law enforcement and other public employees, to maintain found or abandoned property for a period of 90 days and to attempt to identify the rightful owner and give notice that the property was being held and could be reclaimed.

The preliminary injunction does no more than require the City to follow existing law. *See* PER:101-102 (RT: 20-21).

## IV. STANDARD OF REVIEW

An appellate court "subject[s] a district court's order regarding preliminary injunctive relief only to limited review"[,] unlike review of an order involving a permanent injunction, "where all conclusions of law are freely reviewable." *Walczak v. EPL Prong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (citations and internal quotation marks omitted; edits supplied). The granting (or denial) of a preliminary injunction by a district court is reviewed for an abuse of discretion. *Katie A. v. Los Angeles County*, 481 F.3d 1150, 1155 (9th Cir. 2007). Only if the district court applied an erroneous legal standard or ruled based on clearly erroneous findings of fact will abuse of discretion be found. *Id.* (citing and quoting *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004)).

"A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court

misapprehended the law with respect to the underlying issues in the litigation." *Walczak*, *supra*, at 730, citing *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Constitutional questions are reviewed *de novo*. *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010).

Appellant does not challenge the district court's factual findings. AOB 9. Nor does Appellant suggest that the court employed an inappropriate legal standard to support issuance of the preliminary injunction. (*Id.*) The sole contention on appeal is that the decision below rests on a erroneous legal standard in holding that plaintiffs' Fourth and Fourteenth Amendment rights were violated by the seizure and immediate demolition of plaintiffs' property. AOB 9-10.

## V. ARGUMENT

### A. The District Court Applied the Correct Legal Standard in Finding that Plaintiffs' Fourth Amendment Rights Were Violated Since They Have A Legitimate Expectation of Privacy in Their Property

Appellant contends that the district court erred in finding that plaintiffs have an objectively reasonable expectation of privacy in their personal property when it is left unattended even momentarily on public sidewalks. AOB 15-17. Defendant states that plaintiffs must have both a subjective and an objectively reasonable expectation of privacy to be protected by the Fourth Amendment under the rubric of *Katz v. United States*. 389 U.S. 347, 361 (1967) (Harlan, J., concurring). AOB 15-17. Citing to a number of cases, Appellant argues that, while plaintiffs may have subjective

expectations of privacy, those expectations are not objectively reasonable since plaintiffs live on the sidewalks at night. AOB at 17-22.

The district court rejected this argument and correctly held that homeless individuals have a legitimate expectation of privacy in their property and that Fourth Amendment protections apply. The starting point for the court's analysis was *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), reasoning that it does not matter whether the City encounters the property of homeless individuals in a public or a private place because, in either case, the Fourth Amendment must be satisfied before the property can be seized by the City. ER:8-9 (Pre. Inj. at 6-7). Appellant takes issue with the lower court's citation to *Soldal* to begin the Fourth Amendment analysis. There is no dispute here that "even where there is not an arrest ... or unlawful search ..., the seizure of an individual's property ... must nevertheless comport with the Fourth Amendment." AOB 25, *citing Soldal*, *supra*, at 68-69).

The district court quotes *Soldal* as an illustration of "objective reasonableness;" that is, where property in plain view is "evidence of a crime or contraband" it generally may be seized without running afoul of the Fourth Amendment. ER:6 (Pre. Inj. at 4), quoting *Soldal*, 506 U.S. at 68. The precise cite from *Soldal*, in turn, quoted from the decision in *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *Jacobsen* held that taking and destroying personal belongings constitutes a seizure but, like any Fourth Amendment claim, is only unlawful if unreasonable. Where property is alleged to be

evidence of a crime, seizures must still satisfy the Fourth Amendment and will be deemed reasonable only if the item's incriminating character is "immediately apparent." *Soldal*, 506 U.S. at 68, quoting *Horton v. California*, 496 U.S. 128, 136-137 (1990). Unlike drugs or a gun, the "evidence" seized and destroyed has no "criminal" character apart from an alleged violation of a municipal code prohibiting leaving property on a sidewalk.

"As is true in other circumstances, *the reasonableness determination will reflect a careful balancing of governmental and private interests*." *Soldal*, *supra*, at 71 (emphasis added, internal quotation marks and citation omitted). Nothing in the lower court's discussion of *Soldal* is contrary to an appropriate and "careful" balance of "governmental and private interests." To be sure, nothing in the decision below supports Appellant's bald assertion that "[p]resumably, the district court believed that if the property was not evidence of a crime or contraband, under the rule of *Soldal*, the property could not be removed or 'seized' without violating the Fourth Amendment." AOB: 23, citing ER:6 (Pre. Inj at 4).

In the district court, one of the City's principal arguments was that plaintiffs' possessions were "actually abandoned." ER:9 (Pre. Inj. at 7). Citing to the decision in *U.S. v. Nordling*,[7] the district court set out the test for abandonment. Whether

[7] 804 F.2d 1466, 1469 (9th Cir. 1986)(abrogated on other grounds by *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008), re right to counsel).

property is abandoned is determined "by the intent of the owner and the 'inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure.'" ER:9 (Pre. Inj. at 7) quoting *Nordling*, 804 F.2d at 1469). "Such a determination is 'to be made in light of the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property.'" *Id.* The City does not even discuss *Jacobsen* or *Nordling*.

In this instance there was no evidence of denial of ownership or physical relinquishment. To the contrary, in each instance, the plaintiffs claimed ownership and they, and others, made it absolutely clear that they had no intention of relinquishing their property in the few minutes they were gone. PER:39-40. As the court noted, there were also objective indicia of ownership from the fact that the property was neatly packed up, as is the general practice on Skid Row. ER:9, 10-11 (Pre. Inj. at 7, 8-9); *see e.g.*, PER:63-80 (Ares Declaration and Exhibits). "'[T]he homeless often arrange their belongings in such a manner as to suggest ownership - e.g., they may lean it against a tree or other object or cover it with a pillow or blanket; [] by its appearance, the property belonging to homeless persons is reasonably distinguishable from truly abandoned property.'" ER:11 (quoting *Pottinger*, 810 F.Supp. at 1559). There was no error here in the Court's application of these principles.

The district court followed the reasoning of multiple courts in this Circuit and

around the country which have reviewed similar factual allegations and held that homeless persons have a legitimate expectation of privacy in their property and that Fourth Amendment protections applied. *See* ER:11-12 (Pre. Inj. at 9-10), quoting from the Temporary Restraining Order issued on April 22, 2011 [PER:44 (TRO at 7)]). The authorities relied on below include *Justin v. City of Los Angeles*, 2000 U.S. Dist. LEXIS 17881, *27 (C.D. Cal., 2000) (enjoining Appellant from seizing and destroying the plaintiffs' property when it was left unattended momentarily).

*Justin* relied on this Court's decision in *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) and the decision in *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992) ("property of homeless individuals is due no less protection under the fourth amendment than that of the rest of society"). 2000 U.S. Dist. LEXIS 17881, * 29. Appellant acknowledges that *Gooch* recognized an objectively reasonable expectation of privacy for a person who pitches a tent on a public campground where s/he is legally entitled to camp. AOB 16. Nonetheless, defendant disputes that plaintiffs have a similar expectation of privacy to the tent dweller in *Gooch* because plaintiffs have taken up "residence" on public property without a permit or permission, unlike Gooch, who had a permit to camp on park land. AOB 16. Accordingly, defendant contends the lower court erred because the poor of Skid Row are simply "squatters," with no privacy rights on public land, *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11-12 (1st Cir. 1975), and their mere presence on a public sidewalk with their

belongings makes them trespassers, with no reasonable expectations of privacy, whether on public or private land. *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986) [public land]; *Zimmerman v. Bishop Estate*, 25 F.3d 784, 787-788 (9th Cir. 1994) [private property].

Plaintiffs are not squatters, as in *Amezquita*, nor trespassers, as in *Ruckman* and *Zimmerman*. They are individuals unable to afford a home, standing all day on a public sidewalk with their property neatly packed up in shopping carts, suitcases and other means of transport. Plaintiffs Lavan, Smith, and Vassie, kept their property inside an EDAR,[8] a small, collapsible mobile tent-like shelter presented to them by former Los Angeles Mayor Richard Riordan. They slept in the EDARs on the sidewalk at night pursuant to the settlement the City entered into in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), vacated upon settlement of the parties, 505 F.3d 1006 (9th Cir. 2007).

Significantly, defendant does not contend that plaintiffs are "storing" their possessions unlawfully on public property when they stand next to their property; rather, that the "objectively reasonable" expectation of privacy is completely eviscerated the moment plaintiffs step away from their possessions. *See* AOB at 17. *See also* ER:7 (Pre. Inj. at 7). Fourth Amendment rights are not so ephemeral that they

[8] "EDAR" is an acronym for Everyone Deserves a Roof. The EDARs were an effort to provide adequate shelter for individuals living on the sidewalks at night.

instantly vaporize when, as here, plaintiffs step away briefly to use a bathroom, get some water, take a shower at the Rescue Mission, or attend to other daily activities, especially when others present attest that the property is not abandoned. ER:8 (Pre. Inj. at 6).

The second case relied on below is the decision in *Kincaid v. City of Fresno*. 2008 U.S. Dist. LEXIS 38532 (E.D. Cal. 2008). *Kincaid* held that a Fourth Amendment violation may occur not only where there is a unreasonable search, but also where there is "some meaningful interference with an individual's possessory interest in property." *Id.* at 10-11 (citing *Soldal,* 506 U.S. at 63). Appellant urges that reliance on *Kincaid* was wrong since the defendant City of Fresno did not dispute the *Kincaid* plaintiffs' Fourth Amendment claims. *Kincaid* does not depend upon whether the defendant there contested the constitutional claim. It is entirely possible that the City of Fresno did not dispute the Fourth Amendment claim simply because, unlike Appellant, Fresno decided these arguments lacked merit.

In addition to *Justin* and *Kincaid*, the court cited to *Lehr v. City of Sacramento*, 624 F. Supp 2d 1218, 1235 (E.D. Cal. 2009). ER:6 (Pre. Inj at p.4). *Lehr* found the seizure and summary destruction violated Fourth Amendment and parallel California Constitution rights of homeless persons. *Id.* at 1235.

Appellant contends it was error to rely on *Justin*, *Kincaid* and *Lehr*, arguing at the hearing that these were each "result-oriented" decisions. PER:101 (RT:21,line 22-

24). Instead, defendant urges reliance on *People v. Thomas*, 38 Cal. App.4th 1331 (1995), where the court found that the seizure of contraband from inside a cardboard box residence on a sidewalk did not violate the Fourth Amendment since Thomas was violating LAMC §41.18(d), the same code section challenged in *Jones*, 444 F.3d 1118. AOB 21. *Thomas* is inapt for several reasons.

First, this is not a criminal case about suppressing evidence of contraband used for a prosecution, as in *Thomas*. *Thomas* "held only that a homeless man living in a cardboard box on a public sidewalk, in violation of a law expressly prohibiting him from doing so, did not have a reasonable expectation of privacy in the box." *People v. Houghton*, 168 Cal.App.4th 1062, 1069 (1998).[9] Neither *Thomas*, nor any case cited by defendant authorizes property seized as evidence of a crime to be destroyed before an individual has a right to appear in court and defend against the charges. That is the essence of due process.[10]

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[9] Defendant does not contend that plaintiffs were violating LAMC §41.18(d), nor could it since that provision only makes it unlawful for an individual to lie, sit or sleep on the public streets and sidewalks. Section 41.18(d) says nothing about property, only the bodily conduct of persons. No plaintiff was engaged in sleeping, sitting or lying on a public sidewalk when his property was seized and summarily destroyed.

[10] *See United States v. Colette*, 397 Fed. Appx. 292 (9th Cir. 2010), citing *Dusenbery v. United States*, 534 U.S. 161, 168-73 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without due process of law." (internal quotation marks removed)) (administrative forfeiture of a jet ski and trailer under a federal civil forfeiture statute).

Second, the criminal law defendant alleges strips plaintiffs of any expectation of privacy in their property, LAMC §56.11, only prevents anyone from leaving any "merchandise, baggage or personal property" on a public sidewalk, even though the City knows the property is not "abandoned."[11] ER:10-11 (Pre. Inj. at 8-9).

Plaintiffs submitted evidence of the widespread abeyance of this code section for anyone but homeless individuals to disprove defendant's bald claims of a government interest furthered by §56.11. The unrefuted evidence was that the City applies this ordinance only to homeless individuals, at least in Skid Row and adjacent blocks. Apparently, anyone else may pile Shipping boxes, five-feet high bird cages, rolling racks of bolts of fabric and other merchandise on sidewalks with impunity, even directly across from the police station, all in violation of LAMC §56.11.[12] PER:55-62 (Hamme Dec. and exhibits).

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[11] Defendant also contended below that plaintiffs were violating LAMC §41.45, which makes it illegal to possess a shopping cart which belongs to a private retail establishment. As the district court noted, "all the evidence presented suggests that the property taken in conjunction with" two of the incidents "came out of Hippie Kitchen carts, which are provided to homeless persons for the express purpose of keeping their belongings in them[]" ER:12 (Pre. Inj. at p.11, n. 4). Accordingly, the district court found it unnecessary to address this purported justification for seizing and destroying plaintiffs' property. *Id.*

[12] The second sentence of LAMC §56.11 makes clear that no one may leave boxes of merchandise on the public sidewalk, even for a short time for purposes of unpacking the merchandise, anywhere in the Central Traffic District, which includes all of the Central Bureau of the Los Angeles Police Department, including Skid Row.

For these reasons, *Thomas* does not strip plaintiffs of a reasonable expectation of privacy in their property.

### B. The District Court Correctly Held That the Due Process Clause of the Fourteenth Amendment Protects a Cognizable Property Interest in Plaintiffs' Momentarily Unattended Property.

Appellant's second argument is that the district court was wrong to conclude that plaintiffs have a constitutionally protected property interest in their belongings when they are left unattended on public sidewalks. AOB at 35. The court found that Appellant seized and destroyed plaintiffs' possessions, knowing it was not abandoned. ER:10-11 (Pre. Inj. at 8-9). While asserting that the property was "actually abandoned," Appellant argued below that it had fully complied with due process requirements by providing notice and a post-deprivation scheme for contesting the loss consistent with *Paratt v. Taylor*, 451 U.S. 527 (1981).

Now, Appellant argues that no due process is necessary here because there is no Fourth Amendment violation: plaintiffs have no expectation of privacy and, in any event, the property is abandoned and/or evidence of a crime. Appellant contends that the district court "glossed over" the first step of Fourteenth Amendment framework with a one-sentence analysis, so it was error to find that the City must afford any due process to plaintiffs. AOB at 36. Contrary to Appellant's assertion, the district court cited to several authorities to support its reasoning, beginning with *Fuentes v. Shevin*, 407 U.S. 67, 84 (1992).

*Fuentes* held that even items as mundane as household goods were within the protection of the Fourteenth Amendment. *Id.* ("the chattels at stake were nothing more than an assortment of household goods"). The deprivation in *Fuentes* was only temporary and theoretical. *Id.* By contrast, virtually all of plaintiffs' worldly possessions, but for the clothes they happened to be wearing and few other items, were seized and destroyed, a decidedly more permanent and non-theoretical deprivation. While the City goes to great effort to try and distinguish *Fuentes,* Appellant can point to no case that approved the seizure and destruction of personal property without at least some post-deprivation opportunity to contest the seizure before the property was irretrievably demolished.

The severity of the deprivation here cannot be gainsaid. As the district court noted, "a homeless person's property is generally all he owns; therefore, while it may look like 'junk' to some people, its value should not be discounted." ER:13 (Pre. Inj. at 11, quoting *Pottinger*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992)). The items seized and destroyed here were of great value to Plaintiffs: government issued identification cards, a birth certificate, Social Security cards, necessary medical records, medication, family memorabilia, toiletries, cell phones, and other personal possessions. ER:9 (citing *Hall Decl.* ¶¶ 3-5; *Reese Decl.* ¶ 2-6; *Seymore Decl.* ¶¶ 3-4). Some of Plaintiffs' personal effects were difficult, if not impossible, to replace.

The district court correctly applied the three-part test of *Matthews v. Eldridge*,

424 U.S. 319, 339-43 (1976). "[B]efore the City can seize and destroy Plaintiffs' property, it must provide notice and an 'opportunity to be heard at a meaningful time and in a meaningful manner,' ... except in 'extraordinary situations where some valid governmental interest is at stake that justifies the postponing of the hearing until after the event,' *United States v. James Daniel Good Eldridge*, 510 U.S. 43, 53 [ ] (1993)." ER: 13 (Pre. Inj. at 11). The three prongs are:

> (1) the private interest that will be affected by the official actions; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

*Matthews*, 424 U.S. at 321. ER: 14 (Pre. Inj. at 12).

The district court found that the City's claim of pre-deprivation notice through the posted signs, "often posted at a very high level with small print, obscured by foliage or taped over, is inadequate." The City acknowledged that the signs, while intended to provide notice, are "not placed in the best manner" and are inconsistent with one another.[13] ER:14 (Pre. Inj. at 12) Moreover, the court found that plaintiffs

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[13] "THE COURT: With regard to the signs. I saw the pictures of the signs ... The City claims that it provides notice by these signs; correct?

MS. SHAPERO: Yes.

THE COURT: The photographs that I saw -- maybe you can clarify for me. The signs are basically eye level to somebody on a second floor of a building; is that a misstatement?

"established the lack of either pre or post-deprivation opportunities to be heard." *Id.* and ER:14 n.7. The district court correctly concluded that "[t]he City's admission that it has a practice of on-the-spot destruction of seized property only bolsters Plaintiffs' Fourteenth Amendment claims" and confirms that the loss here is not the result of some "random and unauthorized act" by a City employee. ER:15 and n.8 (Pre. Inj. at 13 and n.8).

For this proposition, the district court relied on the decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) ("state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement") and *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991). ER:15 (Pre. Inj. at 13). While Appellant accuses the district court of "glossing over" the due process test, Appellant does not discuss any of the authorities cited by the district court, even to show why they are inapt.

*Propert*, relying on the due process analysis articulated in *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), held that it was a due process violation to seize and immediately scrap an automobile identified as "junk" by an officer pursuant to a local law, even though the vehicle had been illegally parked for weeks. *Propert*, 984 F.2d

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MS. SHAPERO: No. The signs are not -- they are not placed in the best manner. It was pointed out that there are some different signs ..."

PER:(RT:16).

at 1328-29. The District of Columbia"concede[d], as it must, that [the plaintiff] had a protected property interest in his automobile. So long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question of whether account must be taken of the due process clause." *Propert, supra*, at 1330, (quoting *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (internal quotation marks omitted).

> Although [the City] may have a strong interest in the prompt removal of supposed junk ... from the streets, its interest in the immediate destruction of such [junk] is far from apparent. On balance, the severity of the deprivation imposed on the [property]'s owner, combined with the potential vagaries of the enforcing officer's determinations, outweighs any government interest in the immediate destruction of [property] that has been identified as "junk" and **compels the conclusion that post-removal process is required**."

*Propert*, 984 F.2d at 1335 (emphasis supplied).

The *Propert* court rejected differential treatment of property viewed as "junk" and property viewed as "abandoned" and found that this false dichotomy revealed the "inadequacy" of the District of Columbia's policy.[14] *Id.* Abandoned vehicles were stored for 45 days and notice was made to the owner by certified mail and publication, as required by law. *Id.* "The apparent rationale for this disparate treatment is that abandoned autos may have value, whereas junk vehicles do not; however, the validity of that assumption hinges on the accuracy of the unilateral, unreviewed determination

[14] Under California law, even personal property with little or no value to anyone but its owner is protected. *See Kimes v. Grosser*, 195 Cal.App.4th 1556 (2011) ("[i]t [was] clear that the [lost] scrap books could have no market value but that they might be of great value to a literary man. It was therefore proper for Mr. Willard to testify regarding their value to him."). *Id.* at 1561.

of the enforcing officer." 948 F.2d 1335. The same is true with respect to the destruction of plaintiffs' property here.

*Propert* is not alone in finding that, at a minimum, post deprivation notice must be given following seizure of property. *See e.g.*, *San Jose Hell's Angels v. City of San Jose*, 402 F.3d 962, 977-78 (9th Cir. 2005) (Fourth Amendment forbids the killing of a person's dog, or the destruction of a person's property, when that destruction is unnecessary--i.e., when less intrusive, or less destructive, alternatives exist."); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) *("destruction* of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects' as does the physical taking of them," *overruled on other grounds, Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citation omitted) (dog); *Draper v. Coombs*, 792 F.2d 915, 923 (9th Cir. 1986) (towing law unconstitutional where no provision for hearing); and *Stypmann v. City of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (prompt post-towing hearing required).

Plaintiffs have the same significant private interest in medical records, Social Security cards, driver's licenses and other personal items of critical importance to obtaining the essential social services they need to live. There are many "less destructive" alternatives available. ER:14 and n.7 (Pre. Inj. at 12 and n.7). The problem is that, despite protestations to the contrary, the City does not follow these readily available "less destructive" alternatives.

### C. The District Court Correctly Held that LAMC §56.11 Must Yield to California Code of Civil Procedure §2080 et seq.

California Civil Code § 2080 creates an explicit expectation that property will be protected, even if believed to be "abandoned," and that the police will make every effort to locate and return the property to the rightful owner. Defendant attempts to undermine the district court's reasoning by suggesting that §2080 only applies to "lost" property; that title in property is ephemeral; that when property is left unattended and, as here, a local ordinance authorizes removal and disposal[15]

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[15] The City contends it has the authority to "dispose" of the property without due process based on LAMC §56.11. However, the Municipal Code contains a more specific set of regulations in LAMC §52.55, directing what the City is to do with abandoned property. This statute follows the 90-day retention requirement of Civil Code §2080. The sole exception to the 90-day requirement is for unclaimed bicycles, which still must be kept for at least 60 days before they can be transferred to specified programs designed to prevent juvenile delinquency. *See* LAMC §52.55(c). Plaintiff Vassie's bicycle was immediately destroyed, along with his shopping cart, all of its contents and his EDAR. ER: .

SEC. 52.55. POLICE DEPARTMENT RETENTION, USE, SALE OR DESTRUCTION OF UNCLAIMED PROPERTY. **(Amended by Ord. No. 151,354, Eff. 9/16/78)**

(a) For purposes of this section:

1. "**Unclaimed property**" shall mean any and all property of others in the possession of the Police Department and for which no claim or demand has been made nor owner found.

2. The Property Division of the Police Department is designated as the "**stores agency**" for purposes of retention, sale or destruction of unclaimed property.

(b) **(Amended by Ord. No. 166,322, Eff. 11/22/90.)** Unclaimed property shall be held by the Police Department for a period of at least three months

of that property, a person's title to the property somehow mystically evaporates.

At the June 20, 2011 Order to Show Cause hearing, the Court inquired of City why, if this were so, illegally parked cars could not be towed *and destroyed*, as happens to Plaintiffs' possessions.[16] The City had no answer for the district court's

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> before further disposition as herein provided, provided however that bicycles may be disposed of as set forth in Subsection (c). The Police Department is hereby authorized to thereafter cause such unclaimed property to be processed for public sale, retention or destruction as hereinafter provided:
>
> 1. The property may be sold at public auction to the highest bidder upon notice of sale given by the Chief of Police at least five days before the time fixed therefor by publication at least once in a newspaper of general circulation in the County of Los Angeles; or that such property is needed and is suitable for public use, it need not be sold. ...
>
> 2. In the event such unclaimed property is neither sold nor retained as above-provided, the stores agency may cause it to be summarily destroyed if it is in a dilapidated, deteriorated, or unsafe condition, or the possession thereof by the public is unlawful.
>
> (c) Unclaimed bicycles may be disposed of in accordance with Subsection (b) or, after they have been unclaimed for a period of at least 60 days may be transferred pursuant to Welfare and Institutions Code Section 217 to governmental and nonprofit organizations described in said code section for use in programs or activities designed to prevent juvenile delinquency. **(Added by Ord. No. 166,322, Eff. 11/22/90.)**

Notably, Plaintiff Vassie had a bicycle taken, which defendant claims it had to destroy because it could not be chained from Vassie's shopping cart and EDAR.

[16] THE COURT: Let's say … I drive up in a red convertible. I park where it is illegal to park because of street sweeping. The signs warn me if I leave my car there during street sweeping, it could be towed away and impounded. Clear sign. I ignore the sign. Instead of going into the Catholic Worker to get water, I go into Starbucks to get my latte and I use their WiFi. The City then comes to take the car. They can take the car, right, but they can't put it into a crusher and destroy it, can they?

inquiry, nor does it provide any authority in its opening brief explaining to this court how Plaintiffs' title in their property magically disappears if they are suspected to be in violation of a local statute.

There is no dispute that a city may "regulate conduct upon a street, sidewalk, or other public place . . ." AOB 39, quoting *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1109 (Cal. 1995). However, nothing in *Tobe* authorizes seizure and immediate destruction of property. *See Tobe*, *supra*, at 1081. To the contrary, *Tobe* talks about citations issued for "storing" personal property under the city ordinance. Section 56.11 is entirely different than the ordinance at issue in *Tobe*.

The district court correctly held that LAMC §56.11, as applied, conflicts with Civil Code § 2080, and confirmed that California law requires "any person or public entity or private entity that finds and takes possession of any ... personal property to make a reasonable effort to return it or turn it over to the police, who must notify the owner and hold it for at least 90 days." ER:12 (Pre. Inj at 10); *see Candid Enters. Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal.3d 878, 885 (1985) (discussing state law

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MS. SHAPERO: No, they can't. There are procedures that are available.

THE COURT: Why aren't those procedures available in this case?

MS. SHAPERO: What is disputed in this case is that personal property even was taken and immediately destroyed.

PER:96 (RT:11-12).

preemption). The district court also noted that public agencies may adopt their own similar ordinances in lieu of following § 2080, but must at a minimum hold property for "at least three months." ER:12, n.5 (Pre. Inj at 10, fn 5, citing Cal. Civil Code § 2080.6(a)).

The City does not address Civil Code § 2080 in any depth, other than to erroneously assert that the statute does not create property rights. AOB at 37-38. To get to this point, the City argues that Civil Code § 2080 does not apply because items left unattended by plaintiffs are not "lost." AOB 38. Appellant cannot have it both ways: either City workers seize un-abandoned personal property when owners are not present and thus the statute must apply (since the items *are* "lost" once they are seized and removed); or, alternatively, if the owners are present and claim their possessions, the City knows there is a possessory interest and, thus, due process is required. Otherwise, even if the initial seizure is justified, which it is not, defendant "turns what could be an otherwise lawful seizure into an unlawful one by forever depriving an owner of his or her interests in possessing the property without recourse, in violation of § 2080, and without a sufficient governmental interest." ER:12-13 (Pre. Inj. at 10-11).

## CONCLUSION

For all of the foregoing reasons, the district court committed no error of law in issuing the preliminary injunction in this instance. The law and the factual record support the district court's ruling.

Dated: October 6, 2011

Respectfully submitted,

LAW OFFICE OF CAROL A. SOBEL

/s/

By: CAROL A. SOBEL
Attorneys for Plaintiffs

## STATEMENT OF RELATED CASES

Pursuant to F.R.A.P. 28-2.6, Appellees advise that they are unaware of any related cases.

Dated: October 11, 2011

/s/
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## CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, appellee certifies that the foregoing brief was prepared with a proportionally spaced typeface of 14 points. The total words are 8,565.

Dated: October 6, 2011

/s/
CAROL A .SOBEL

Lavan v. City of Los Angeles
Cir. Case No. 11-56253

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