IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jevarreo Kelley-Lomax, individually and for a class, *Plaintiff*, v. City of Chicago, *Defendant*.	Case No.: 20-cv-4638 Judge John Z. Lee Magistrate Judge Jeffrey Cole

CITY OF CHICAGO'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Allan T. Slagel (ARDC No. 6198470)
aslagel@taftlaw.com
Elizabeth E. Babbitt (ARDC No. 6296851)
ebabbitt@taftlaw.com
Anne L. Yonover (ARDC No. 6321766)
ayonover@taftlaw.com
Adam W. Decker (ARDC No. 6332612)
adecker@taftlaw.com
Special Assistant Corporation Counsels
TAFT STETTINIUS & HOLLISTER LLP
111 East Wacker Drive
Suite 2800
Chicago, Illinois 60601
Telephone: (312) 527–4000

Plaintiff Jevarreo Kelley-Lomax ("Plaintiff") cannot establish that Defendant the City of Chicago ("City") violated his Fourth, Fifth, and Fourteenth Amendment rights because: (1) the destruction of Plaintiff's personal property does not amount to a seizure; (2) there are no allegations that Plaintiff's property was taken for a public use; (3) Plaintiff's property was lawfully taken pursuant to CPD's police powers; (4) Plaintiff received constitutionally sufficient notice and there are adequate procedures in place for Plaintiff to reclaim his personal property; and (5) there are state law remedies that exist to address Plaintiff's claim regarding the destruction of his property. The Amended Complaint should be dismissed.

ARGUMENT

I. Plaintiff's Fourth Amendment Claim Fails Because the Destruction of His Personal Property Does Not Amount to a Seizure.

Plaintiff admits that under the Fourth Amendment the City was authorized "to seize and inventory his belongings." Resp. at 3. He also acknowledges that the Seventh Circuit has repeatedly held that "the protections of the Fourth Amendment end when the property is seized." *Id*. at 3 (citing *Lee v. City of Chicago*, 330 F. 3d 456 (7th Cir. 2003), *and Bell v. City of Chicago*, 835 F.3d 736 (7th Cir. 2016)). Nevertheless, contrary to well-established Seventh Circuit precedent, Plaintiff asserts that the destruction of his personal property—after it had been lawfully seized—"was an unreasonable seizure in violation of the Fourth Amendment." *Id*. at 3. This was the same argument made in *Conyers v. City of Chicago* that Judge Tharp rejected after applying the holding in *Lee*. *Conyers v. City of Chicago*, No. 12 C 06144, 2015 WL 1396177, at *3 (N.D. Ill. Mar. 24, 2015). The plaintiffs in *Conyers* have appealed this issue to the Seventh Circuit in *Conyers v. City of Chicago*, No. 20-1934 (7th Cir. 2020), and the parties are currently briefing the appeal.

Unless or until the Seventh Circuit or the United States Supreme Court overrules *Lee*, Plaintiff cannot establish a Fourth Amendment claim because the initial seizure of his property

was lawful, and its subsequent destruction did not amount to a new, separate seizure subject to any Fourth Amendment protections. *Lee*, 330 F.3d at 466 ("Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable."). Thus, the Court should dismiss Plaintiff's Fourth Amendment claim.

II. Plaintiff Cannot Establish a Fifth Amendment Takings Claim Because His Property Was Not Taken for Public Use and Because His Property Was Taken Pursuant to CPD's Lawful Police Powers.

Like his Fourth Amendment claim, one of Plaintiff's arguments with respect to his Fifth Amendment Takings claim—that CPD's police powers do not allow it to sell or destroy arrestees' personal property—is also at issue on appeal in *Conyers v. City of Chicago*, No. 20-1934 (7th Cir. 2020). This Court may elect to forestall ruling on Plaintiff's Fifth Amendment Takings claim pending the Seventh Circuit's decision in *Conyers*. However, the City maintains that the Court should still dismiss Plaintiff's Fifth Amendment Takings claim, absent a ruling to the contrary from the Seventh Circuit in *Conyers*, because: (1) Plaintiff failed to allege that his property was taken for a public use; and (2) his property was taken pursuant to CPD's lawful police powers, rather than through the exercise of eminent domain.

A. Plaintiff's Amended Complaint lacks any allegations that his property was taken for some public use.

For Plaintiff to assert a valid Fifth Amendment Takings claim, he must plead, and eventually prove, that the government took his property and that there was some public purpose associated with its destruction. *Conyers v. City of Chicago*, No. 12-CV-06144, 2020 WL 2528534, at *11 (N.D. Ill. May 18, 2020) (citing *Kelo v. City of New London*, 545 U.S. 469, 480 (2005)). In response, relying upon *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), Plaintiff contends that a public use must be defined by a "legislative judgment," and no such judgment has been rendered here. Resp. at 4. However, Plaintiff misapprehends the law and misstates the holding of *Midkiff*.

At issue in *Midkiff* was a Hawaiian statute that allowed the state to condemn certain residential tracts of land and transfer ownership of the condemned property to existing lessees. 467 U.S. at 233. The statute was enacted to break up concentrated land ownership, which resulted in inflated land prices, and was determined by the legislature to be injurious to the public welfare. *Id.* at 232. In analyzing whether the statute was constitutional, the United States Supreme Court noted that "when the legislature has spoken, the public interest" has been conclusively decided. *Id*. at 239. The Court acknowledged that when the legislature has determined what constitutes a public use, the Court will defer to that determination, unless such a determination is unreasonable. *Id.* at 241. As such, where the legislature enacted the statute to combat concentrated land ownership, *i.e.*, the "public use," such determination was rational and could not be second-guessed by the judiciary. *Id.* at 244-45.

Midkiff did not hold, as Plaintiff attempts to argue, that a legislative judgment must be rendered to determine what constitutes a public use. Resp. at 4. Instead, the Court simply recognized that when the legislature has "made [a] public use determination," judicial deference is required. *Midkiff*, 467 U.S. at 244. Thus, *Midkiff* does not support Plaintiff's argument, nor does it cure the flaw in the Amended Complaint—there are no allegations that Plaintiff's personal property was "taken" for public use.

Next, Plaintiff cites to *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002), arguing that the City bears the burden of establishing the property was taken for a public use. Resp. at 5. The *Daniels* plaintiffs alleged the defendant violated their Fifth Amendment rights by taking their "property for private use," in order to rezone nearby properties for the development of a private shopping center. 306 F.3d at 450-51. *Daniels* is distinguishable because, as Plaintiff recognizes, the *Daniels* plaintiffs actually claimed that their property was not taken for

a "public use." *Id*. at 459. In contrast, here, Plaintiff does not allege that the City took his personal property for a private or public use.

While the City may bear the burden of demonstrating the existence of a public use for purposes of justifying a taking, that burden "is remarkably light." *Id*. at 460. And, that burden appears to be triggered only after a plaintiff has alleged that his property was taken for a private use. Thus, Judge Tharp's ruling in *Conyers*, which required the plaintiffs to "establish whether the destruction of arrestee personal property constitute[d] a taking for 'public use'" is consistent with *Daniels* because in the case before Judge Tharp there were no allegations that the property was taken for public use. *Conyers*, 2020 WL 2528534, at *11. As was the case in *Conyers*, in the instant matter Plaintiff has "entirely ignored the public use element of a Takings claim." *Id*. Unlike the plaintiffs in *Daniels*, Plaintiff (like the plaintiffs in *Conyers*) never alleged his property was taken for a private or a public use. Accordingly, Plaintiff cannot establish that destroying an arrestee's personal property after it has gone unclaimed for 30 days violates the Takings Clause. *Id*.

Finally, Plaintiff's argument that "[d]emonstrating a 'public purpose' is properly viewed as an affirmative defense" is unavailing in light of *Conyers*. The case Plaintiff cites for this proposition is inapposite, involving claims for unjust enrichment, vicarious liability for tortious conduct, aiding and abetting breach of fiduciary duty, and conspiracy, *not* a Takings claim. Resp. at 5 (citing *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 934 (7th Cir. 2012)). Plaintiff has failed to allege that his property was taken for some public use, and therefore, his Fifth Amendment Takings claim should be dismissed.

B. Plaintiff's personal property was lawfully taken pursuant to CPD's police powers.

Even if Plaintiff were to allege that his property was taken for some public use, his Fifth Amendment claim still fails because his property was lawfully obtained through the City's police

powers. Plaintiff argues that "[s]elling or destroying an arrestee's belongings while the arrestee remains in custody awaiting trial is not a valid exercise of police powers," and that *Singer v. City of Chicago*, 435 F. Supp. 3d 875 (N.D. Ill. 2020) is "factually distinguishable." Resp. at 6-7. *Singer*, however, is directly on point and demonstrates that Plaintiff's Fifth Amendment Takings claim fails because the destruction of his property resulted from "the government's exercise of its authority pursuant to some power other than the power of eminent domain." 435 F. Supp. 3d at 877.

1. This Court should follow the holding in *Singer v. City of Chicago*.

In *Singer*, while CPD executed an arrest and a search warrant at the plaintiff's home, officers seized "camera equipment, valuable pens and pencils, and rare, lawfully-possessed firearms." *Id*. at 877. The plaintiff never recovered this personal property, and he alleged that it was "destroyed, lost, or stolen." *Id*. The City moved to dismiss the plaintiff's Fifth Amendment claim, arguing that "the Fifth Amendment takings clause does not apply when the government seizes private property in the exercise of its police powers." *Id*. This is the same argument the City makes here for dismissal of Plaintiff's Fifth Amendment Takings claim.

Contrary to Plaintiff's assertion that the *Singer* court rejected the Takings claim "because the City had lawfully held the property during the pendency of the criminal case," Resp. at 7, the court instead rejected the Fifth Amendment Takings claim "for the straightforward reason that the takings clause does not apply when property is retained or damaged as a result of the government's exercise of its authority pursuant to some power other than the power of eminent domain." *Singer*, 435 F. Supp. 3d at 877 (internal citation and quotation omitted). Moreover, the plaintiff in *Singer* made essentially the same argument that Plaintiff makes here; that the "City's continued possession of his property . . . transformed an initially lawful seizure into the naked exercise of

eminent domain." *Id*. (internal citation and quotation omitted). The *Singer* court squarely rejected this argument, explaining that no authority had been put forth by the plaintiff to support it.

Like in *Singer*, Plaintiff's Fifth Amendment Takings claim should be dismissed because "the takings clause 'does not apply when property is retained or damaged as a result of the government's exercise of its authority pursuant to some power other than the power of eminent domain.'" *Id*. (internal citation omitted). Additionally, like the plaintiff in *Singer*, Plaintiff has put forth no case law to support his position that the retention and ultimate destruction of his property transformed the initial lawful seizure of his property into an unlawful taking. For these reasons, the Court should dismiss Plaintiff's Fifth Amendment Takings claim.

2. Plaintiff's attempts to distinguish the relevant case law presented by the City in its Motion are unavailing.

Plaintiff also challenges the City's police powers argument by asserting that, unlike the cases cited by the City, here, Plaintiff's personal property was not used for an improper purpose. Resp. at 9. But the use of the property is immaterial. Moreover, the argument fails given the holdings in *Bennis v. Michigan*, 516 U.S. 442 (1996), and *Kam-Almaz v. United States*, 682 F.3d 1364 (Fed. Cir. 2012), which demonstrate that a seizure arising from the government's police powers does not create a Fifth Amendment Takings claim based on the use of the property seized.

In *Bennis*, the plaintiff's car was seized after being used in the commission of a crime. 516 U.S. at 443-44. In addition to seizing the car, various personal property inside the car was also taken. *Id*. at 452. The Supreme Court found that because the property inside the car, though *not* used in the commission of a crime, was "lawfully acquired under the exercise of governmental authority other than the power of eminent domain," the government did not have to provide compensation for the property that was seized. *Id*. How the property inside the car was used was

irrelevant to the Court's analysis in determining whether the plaintiff could assert a Fifth Amendment Takings claim.

In *Kam-Almaz*, the plaintiff was detained by the United States Immigration and Customs Enforcement ("ICE"), and his laptop was seized. 682 F.3d at 1366. While in ICE's custody, the laptop's hard-drive failed and the plaintiff's business software was destroyed. *Id*. In asserting a Fifth Amendment Takings claim, the plaintiff argued that the seizure of his laptop was "a physical taking for public use, for which just compensation" was due, and that unlike *Bennis*, "a crime was not committed using the seized property." *Id*. at 1370. The court rejected both arguments and concluded that the laptop was seized and retained pursuant to ICE's police power. *Id*. at 1371. As such, the laptop was not taken for a "'public use' in the context of the Takings Clause." *Id*.

Bennis and *Kam-Almaz* demonstrate that the use of the personal property at issue has no bearing on the question of whether a Fifth Amendment Takings claim can be asserted.[1] Rather, courts consider whether the personal property was "lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis*, 516 U.S. at 452. Here, the seizure of Plaintiff's personal property occurred in connection with CPD's lawful enforcement activities, and not as a result of eminent domain. Thus, the Court should follow the holdings in *Bennis* and *Kam-Almaz* and dismiss Plaintiff's Fifth Amendment Takings claim because the Plaintiff's personal property, regardless of how it was used, was seized pursuant to CPD's lawful police powers.

[1] Plaintiff also cites to *Alde, S.A. v. United States*, 28 Fed. Cl. 26 (Fed. Cl. 1993), in support of his assertion that the use of the property impacts a Fifth Amendment Takings claim. Resp. 10-11. However, in *Alde*, the court examined whether the government action amounted to an exercise of its police powers, or action that amounted to a compensable taking, rather than whether the property was used for an improper purpose. *Alde*, 28 Fed. Cl. at 33-34. The court ultimately found that the government seized the plaintiff's plane pursuant to its governmental police powers, and thus, there was no compensable Fifth Amendment Taking. *Id*.

Plaintiff also tries to distinguish *Seay v. United States*, 61 Fed. Cl. 32 (Fed. Cl. 2004), by arguing that *Seay* is inapposite because the plaintiff's property was eventually returned. Resp. at 10. This reasoning is unpersuasive. Like Plaintiff, the plaintiff in *Seay* asserted a Fifth Amendment Takings claim based on events that occurred *after* the government properly seized his property, namely that his personal property was "damaged or destroyed during a criminal investigation." 61 Fed. Cl. at 32. This argument was rejected, and the court held that the subsequent destruction, sale, or damage to property did not "convert an otherwise proper seizure into a taking." *Id.* at 35; *see Tate v. District of Columbia*, 627 F.3d 904, 909-10 (D.C. Cir. 2010).

Plaintiff fails to recognize that unlawful government action and uncompensated takings are "two separate wrongs that give rise to two separate causes of action." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006) (quoting *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001)). As a result, the subsequent disposal of Plaintiff's personal property does not "convert an otherwise proper seizure into a taking," and therefore, the Court should dismiss Plaintiff's Fifth Amendment Takings claim. *Seay*, 61 Fed. Cl. at 35.

Plaintiff attempts to distinguish *Tate v. District of Columbia*, by arguing that, unlike *Tate*, where the court found the practice of auctioning an unclaimed vehicle was consistent with the forfeiture process approved of by the Supreme Court in *Bennis*, the same cannot be said of the City's practice of destroying unclaimed property because it violated Illinois law. Resp. at 9. Relying upon Section 720.25(h) of Title 20 of the Illinois Administrative Code, Plaintiff asserts that Illinois law requires the City "to return to arrestees all their property when arrestees are released, discharged, or transferred to the custody of the Sheriff of Cook County." *Id*. at 7. However, Section 720.25(h) only requires arrestee property be returned upon *release*, which includes "parole, mandatory supervised release, discharge[], or pardon[ ]." Ill. Admin. Code

Tit. 20, § 470.20. Section 720.25(h) does not address or require the return of personal property upon an arrestee's *transfer* to the custody of Cook County, or other municipal law enforcement agencies. For these reasons, the Court should dismiss Plaintiff's Fifth Amendment claim.

III. Plaintiff's Procedural Due Process Claim Should Be Dismissed, Because the City Provides Constitutionally Sufficient Notice and Adequate Procedures for Reclaiming Seized Property.

A. Plaintiff was afforded all of the process he was due, because he was given an opportunity to be heard at a meaningful time.

The City provides adequate notice and procedures for arrestees to reclaim their seized property, warranting dismissal of Plaintiff's procedural due process claim. As an initial matter, in the Response, Plaintiff effectively concedes he received adequate notice of the process to obtain his personal property. *See* Resp. at 11-13. Thus, Plaintiff's only contention is that the methods for an arrestee to acquire seized property, either in person or through a designee, are inadequate to satisfy procedural due process. *Id.* at 12-13; *see Gates v. City of Chicago*, 623 F.3d 389, 394 (7th Cir. 2010) (Fourteenth Amendment's due process clause requires: (1) adequate procedures for reclaiming property; and (2) adequate notice of those procedures).

When the government deprives an individual of property, the Fourteenth Amendment requires an opportunity for the person to be heard at a meaningful time, and in a manner appropriate to the needs of the case at hand. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). Yet, due process is not a technical concept divorced from practical considerations, but instead is "flexible" and only requires the procedural protections as the particular case demands. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Accordingly, where less is at stake, fewer procedural protections are due, *see Knutson v. Vill. of Lakemoor*, 932 F.3d 572, 577 (7th Cir. 2019), and litigants are not guaranteed "a hearing on the merits in every case." *Logan*, 455 U.S. at 437.

Plaintiff, like all arrestees, was given a meaningful opportunity to be heard at a meaningful time, *i.e.*, after his property was seized incident to arrest, but before its sale or destruction. *See id*.

Upon arrest, Plaintiff was issued a Notice to Property Owner form ("Notice"), which provided him with the appropriate contact information for CPD's Evidence and Recovered Property Section ("ERPS"). *See* Dkt. 15, 1-2, and Ex. B. The Notice also informed Plaintiff that he needed to retrieve his property within 30 days, either by picking it up himself, or sending a designee to ERPS with a copy of the property receipt and appropriate identification. *Id.*; *see Texaco, Inc. v. Short*, 454 U.S. 516, 538 (1982) (holding states may require property owners to take affirmative actions to protect their property interests). This procedure did not deprive Plaintiff of the opportunity to be heard before reclaiming his property, and was constitutionally sufficient. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 n.17, 14 n.15 (1978) ("The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances," especially when the relevant individuals are told "where, during which hours of the day, and before whom" they may challenge the deprivation).

Moreover, the City may establish a strict time frame in which arrestees must reclaim their property before it is deemed abandoned and disposed of accordingly, similar to statutes of limitation, which the Supreme Court has upheld as affording due process. *See Logan*, 455 U.S. at 437. Thus, Plaintiff was provided with all of the process he was due, and his procedural due process claim must fail.

B. The *Mathews* factors demonstrate that the City's policy satisfies due process.

Despite Plaintiff's assertion to the contrary, the City's policy withstands scrutiny under *Mathews*. There, the Supreme Court set forth a three-part balancing test for assessing whether notice and a pre-deprivation hearing are required to satisfy due process. 424 U.S. at 335. The three-part balancing test requires a weighing of competing interests:

> First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. Here, the *Mathews* factors illustrate that the City's policy satisfies due process.

The private interest factor weighs in Plaintiff's favor. Individuals have a protected interest in retaining their belongings. However, Plaintiff's interest is relatively small based on the value of the cellphone, charger, earbuds, and earrings that were seized, *see Knutson*, 932 F.3d at 577 ("[l]ess process is due where less is at stake"), and is outweighed by the remaining *Mathews* factors.

The second factor—the risk of erroneous deprivation and benefit of additional procedures—weighs in the City's favor. There is little risk of mistaken deprivation of arrestees' personal property, because, as is provided for in the Notice, they are able to obtain their property without a hearing, and by simply presenting their property receipt and photo identification to ERPS. Dkt. 15, Ex. B. In the event arrestees are unable to do so themselves, they may send designees in their stead with copies of the appropriate documentation. *Id.* Additional procedures would do little here, because arrestees and their designees are able to reclaim property without a formalized hearing under the current process.

The third and final factor—the government's interest and burdens of additional procedures—likewise weighs in favor of the City. The City is not required to repeatedly inform arrestees of the procedures for reclaiming their property, or to indefinitely keep track of miscellaneous items. Consequently, the City maintains an interest in enforcing Municipal Code Section 2-84-160 to dispose of unclaimed property, so as to promote efficient government administration. *See Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990) (acknowledging the "conservation of resources and administrative efficiency" were

"unquestionably" governmental interests). Moreover, Plaintiff fails to put forth alternative procedures that should be implemented. On the other hand, conducting individualized hearings for low-value, non-monetary personal property would place a substantial financial burden on the City, and would strain an already overburdened administrative system. *See Towers v. City of Chicago*, 979 F. Supp. 708, 716 (N.D. Ill. 1997) (third *Mathews* factor weighed in defendant's favor, where plaintiff failed to offer substitute procedures, and defendant had a "substantial interest" in enforcing municipal ordinance related to removing cars from city streets). Thus, the *Mathews* factors weigh in the City's favor, and demonstrate that the current policy satisfies due process.

Finally, Plaintiff argues that the allegations in the Amended Complaint are similar to those asserted by the plaintiff in *Wilson v. City of Evanston*, 14 C 8347, 2016 WL 344533 (N.D. Ill. Jan. 28, 2016) (Lee, J.), which the Court found sufficient to state a viable due process claim. *Id.* at *5. The City disposed of the issues presented by the *Wilson* case in its Motion, which are readily distinguishable from the instant case. *See* Dkt. 15, 14-15. In denying the motion to dismiss in *Wilson*, this Court found determinative the fact that designees had to provide the *original* prisoner property receipt to the Evanston Police Department's Property Bureau.[2] 2016 WL 344533, at *5. However, the designee was unable to do so because the receipt was taken from the arrestee upon transfer to the county jail. *Id.* As a result, reclaiming property through a designee was practically impossible, and violated due process. *Id.*

Here, however, Plaintiff has not alleged that his property receipt was confiscated from him upon transfer to the Cook County Jail. Nor has he alleged that the City somehow prevented him from providing a letter identifying the designee, a copy of his property receipt, and photo

[2] Unlike Evanston's procedures for reclaiming personal property, the City's policy does not have a similar requirement, but instead allows arrestees to "provid[e] a copy of your receipt and your photo ID to: Chicago Police Department, [ERPS] . . ." *See* Dkt. 15, 2, and Ex. B.

identification to ERPS, which is all that is needed in order for the designee to reclaim the property. *See* Dkt. 15, 1-2, and Ex. B. Plaintiff only alleges that he was "unable to secure a designee to retrieve his personal property from the City [ ] while in custody at the Cook County Jail." Dkt. 6, ¶ 15. Therefore, unlike *Wilson*, Plaintiff's inability to secure a designee is not a result of unreasonable obstacles imposed by the City, and cannot establish a violation of procedural due process. Plaintiff's claim should be dismissed accordingly.

IV. Plaintiff's Substantive Due Process Claim Must Fail Because Adequate State Law Remedies Exist to Cure the Alleged Deprivation of His Property Interest.

In the Response, Plaintiff argues this Court should depart from well-established jurisprudence requiring a plaintiff to demonstrate that "state law remedies are inadequate" when alleging a violation of substantive due process premised solely upon the deprivation of a property interest. Resp. at 13-14. Plaintiff asserts this is so, because this threshold requirement is supposedly based upon *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which was subsequently overruled in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). Resp. at 14. Yet, *Knick* spoke only to Fifth Amendment Takings claims, and did not discuss substantive due process under the Fourteenth Amendment. *See* 139 S. Ct. at 2167-68.

Further, the Seventh Circuit has consistently reaffirmed the requirement for establishing the inadequacy of state law remedies in the due process context, without relying upon *Williamson County*. *See GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 368-69 (7th Cir. 2019) (plaintiff alleging violation of substantive due process based upon deprivation of property right "must first establish either an independent constitutional violation or the inadequacy of state remedies to redress the deprivation.") (Internal quotation omitted); *Lee*, 330 F.3d at 467 (same);

Centres, Inc. v. Town of Brookfield, 148 F.3d 699, 704 (7th Cir. 1998) (same).[3] Notably, *Williamson County* is not cited to in the preceding authorities. Plaintiff's argument, therefore, is unfounded and provides no basis to abrogate established Seventh Circuit law.

In a last ditch effort, Plaintiff argues Illinois law does not provide an adequate state law remedy because the City would supposedly be immunized from suit, citing to Section 4-102 of the Local Governmental and Governmental Employees Tort Immunity Act,[4] Resp. at 14-15, which provides:

> Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee.

745 ILCS 10/4-102. Section 4-102, however, is inapplicable here, because it immunizes public entities and employees against *negligence* claims related to establishing a police department or providing protection services, *Doe v. Vill. of Arlington Heights*, No. 11 C 02764, 2012 WL 1068787, at *10-11 (N.D. Ill. Mar. 29, 2012), and does not concern allegations of "affirmative, deliberative acts[.]" *See Leichtenberg v. City of LeRoy*, Case No. 10-1253, 2011 WL 13217345, at *8 (C.D. Ill. Jan. 7, 2011); *see also Regalado v. City of Chicago*, 40 F. Supp. 2d 1009, 1018 n.13 (N.D. Ill. 1999) (Section 4-102 "concerns the adequacy of police protection, and not police

[3] *See also Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997) (same); *Polenz v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989) (same).

[4] A substantially similar argument based upon a different provision of the Tort Immunity Act was squarely rejected in *Wilson*, 2016 WL 344533 (Lee, J.). As this Court noted in *Wilson*, the Tort Immunity Act "does not appear to bar a tort claim under the theory of conversion or bailment against [the defendant] arising out of the destruction or sale of [the plaintiff's] personal belongings." *Id.* at *2.

misconduct toward an individual"). Here, Plaintiff has not alleged that his personal property was destroyed as the result of negligent conduct, but rather that CPD's actions were in accordance with "official policy." Dkt. 6, ¶ 9. Section 4-102 (or any provision of the Tort Immunity Act) would not immunize the City against Plaintiff's state-law tort claims, and cannot relieve him of the threshold burden to establish the inadequacy of state-law remedies to allege a substantive due process claim.

Finally, Plaintiff's reliance on *American Family Mutual Insurance Co. v. Tyler*, 68 N.E.3d 442 (Ill. App. Ct. 2016), to support his municipal immunity theory is misplaced. Resp. at 14-15. In *Tyler*, the plaintiff filed suit, and alleged that the City breached a constructive bailment contract by failing to return a recovered vehicle to him as the rightful owner.[5] *Id.* at 444. Finding that constructive bailment did not fit within the Tort Immunity Act's exception for claims arising from contracts, the court affirmed the trial court's dismissal of the plaintiff's claim. *Id.* at 447. *Tyler* did not hold that a plaintiff is barred from suing a municipality based upon the retention and destruction of property, but only that such a suit could not be premised upon a constructive bailment theory. *Id.* at 446-47. This leaves a plaintiff with other common-law tort claims such as conversion, which are not barred by the Tort Immunity Act. *See Heimberger v. Vill. of Chebanse*, 463 N.E.2d 1368 (Ill. App. Ct. 1984). Thus, Plaintiff's immunity argument is unavailing, and his substantive due process claim should be dismissed.

CONCLUSION

For the reasons discussed above and in its Motion to Dismiss, the City of Chicago respectfully requests this Court enter an order dismissing the Amended Complaint, and for such other and further relief that this Court deems necessary and just.

[5] Importantly, the *Tyler* plaintiff "expressly disavow[ed] any reliance on a tort theory in support of its claim against the City," so the court limited its analysis to the constructive bailment claim. *Id.* at 446.

Dated: December 10, 2020

Respectfully submitted,

MARK A. FLESSNER
Corporation Counsel of the City of Chicago

By: /s/ Allan T. Slagel
Special Assistant Corporation Counsel

Allan T. Slagel (ARDC No. 6198470)
aslagel@taftlaw.com
Elizabeth E. Babbitt (ARDC No. 6296851)
ebabbitt@taftlaw.com
Anne L. Yonover (ARDC No. 6321766)
ayonover@taftlaw.com
Adam W. Decker (ARDC No. 6332612)
adecker@taftlaw.com
Special Assistant Corporation Counsels
TAFT STETTINIUS & HOLLISTER LLP
111 East Wacker Drive, Suite 2800
Chicago, Illinois 60601
Telephone: (312) 527–4000

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