No. 18-35673

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW B. GRIMM,
Plaintiff and Appellant,
v.

CITY OF PORTLAND, et al.,
Defendants and Appellees.

Appeal from the United States District Court
for the District of Oregon
Case No. 3:18-cv-00183-MO
Hon. Michael W. Mosman

AMICI CURIAE THE CITY OF LOS ANGELES, CITY AND COUNTY OF HONOLULU, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, AND WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS BRIEF IN SUPPORT OF REHEARING EN BANC

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DISCLOSURES

No amicus on behalf of which this brief is filed is a corporation that issues stock. None are subsidiaries or affiliates of any publicly held corporation. Fed. R. App. P. 26.1(a), 29(a)(4)(A).

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and; no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund the preparation of submission of this brief. Fed. R. App. P. 29(a)(4)(E).

All parties consent to the filing of this brief. Fed. R. App. P. 29(a)(2); 9th Cir. R. 29-3.

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IDENTITY OF AMICI AND STATEMENT OF INTEREST

The City of Los Angeles is the second largest city in the United States and the largest city within the Ninth Circuit. Its city government is charged with maintaining the health, safety, and welfare of a large and diverse population. The services that Los Angeles provides its residents include parking enforcement. Los Angeles's interest in this case is straightforward: The case concerns the constitutionality of the notice given before cars can be towed from city streets. During fiscal year 2018–19, the Los Angeles Department of Transportation impounded 36,716 cars as a matter of parking enforcement.

The City and County of Honolulu is a consolidated city-county and the largest county in the State of Hawaii, with a population of 953,207 (2010). There are 706,036 motor vehicles registered in the county as of June 30, 2020.

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof,

as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The League of California Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or

nationwide significance. The Committee has identified this case as having such significance.

The Washington State Association of Municipal Attorneys ("WSAMA") is a non-profit organization of municipal attorneys who represent cities and towns in the State of Washington. Its members advise and defend their respective clients in all areas of municipal and constitutional law, meaning WSAMA has a vested interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Andrew Grimm left his car in hourly parking for nearly a week after his paid time expired. The City of Portland issued him a sheaf of parking citations, then had Grimm's car towed. Because it gave Grimm notice before towing his car, the question in this case is *not* (1) whether Portland was required to give pre-removal notice, but instead (2) whether the notice Portland gave was sufficient to satisfy due process. The district court looked to the tools meant to answer the first question rather than asking and answering the second one. All this Court needs to do to resolve this appeal is to say as much, and remand.

The panel opinion, however, does more. It also addresses the first question, holding that due process presumptively requires individualized pre-removal notice before an illegally parked car can be towed. As the panel did not need to address that question, well-worn principles of constitutional adjudication dictate that it should not have addressed that question.

In tackling the first question unnecessarily, the panel opinion declares that it is merely restating the settled law in this Circuit. If that were true, then its discussion of the issue probably would not have

occasioned this brief. But it is not true. For while the Circuit's dicta in this area, in cases like *Scofield v. City of Hillsborough*, 862 F.2d 759 (9th Cir. 1988) and *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008), go well beyond its holdings, none go so far as to render individualized pre-removal notice the settled rule before a government may tow an illegally parked car. Indeed, *Scofield* says the opposite.

Considering that it reflects a shift in the Circuit's law, the panel opinion calls into question municipal towing ordinances throughout the Circuit. And it puts daylight between this Circuit and several others, which have held that pre-removal notice is *not* required before towing illegally parked cars.

The panel could avoid both of those problems by amending its opinion to address the only question that it needs to address: Whether the district court erred in failing to ask if the notice Portland gave Grimm was reasonably calculated to apprise him that his car was going to be towed. If the panel does not amend its opinion, then the Court should grant the City of Portland's petition and rehear the case en banc to elucidate a caliginous area of the Circuit's case law—and to reckon properly with the prospect of a Circuit split.

ARGUMENT

I. The panel opinion decides a constitutional question unnecessarily, further confusing an already jumbled area of the Circuit's law.

A. Because the City of Portland undisputedly gave Andrew Grimm notice before towing his car, resolving this case required the panel only to announce the rule for determining the efficacy of that notice.

It is undisputed that the City of Portland gave Andrew Grimm some form of notice before towing his illegally parked car. (Slip Op. at 16.) Portland sent Grimm an electronic notice that his paid parking had expired, and a separate email receipt for the completed transaction. (2 ER 83 ¶¶ 27, 29.) Grimm left his car where it was. Over the course of the following week, Portland ticketed Grimm's car four times for illegal parking, twice for failing to display a current registration, and (finally) placed a "TOW" placard on it. (Slip Op. at 5; 2 ER 45, 47–61.)[1]

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[1] For anyone wondering how Grimm managed not to get the message: This case is "contrived." (Oral Arg. at 9:05–9:15.) Grimm is a director in a company that distributes a towing notification app, and on the same day that he left his car on Portland's street, the company emailed various Portland officials to tell them that their "current practices for notifying vehicle owners of a tow are unconstitutional." (SER 13; 2 ER 82 ¶¶ 17–23; SER 3–5, 13, 24.)

Because it is undisputed that Portland gave Grimm some form of notice before towing his car, the panel didn't need to answer the question, under *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), whether the Fourteenth Amendment required Portland to give notice. The only question the panel needed to answer was about the notice's form; that is, whether the notice Portland gave was "reasonably calculated, under all the circumstances, to apprise" Grimm that his car would be towed. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Or, even more narrowly: Whether the district court erred by failing to analyze the case under *Mullane* before entering summary judgment for Portland. (1 ER 17.) In either event, the panel did not need to opine on the separate question of whether due process required Portland to give individualized pre-removal notice in the first place. (Slip Op. at 7.)

If the panel did not have to opine on that constitutional question, then—axiomatically—it should not have opined on that constitutional question. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 197 (2009); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *see, e.g.*, *Sam Francis Found. v.*

Christies, Inc., 784 F.3d 1320, 1326 (9th Cir. 2015) (en banc) (Berzon, J., concurring in part) (observing that the other opinions in the case shouldn't have addressed constitutional questions they needn't have addressed). The panel should have instead assumed without deciding that notice was required—since Portland gave notice—and then addressed only the material constitutional issue: When notice is required, what standard determines whether the notice given is sufficient? *Cf., e.g.*, *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 619–20 (1992) (assuming without deciding the applicability of Fifth Amendment due process in order to analyze whether its strictures were satisfied).

By deciding more than that, the panel opinion risks problems that should be avoided.

B. By opining additionally on whether individualized pre-removal notice was required—rather than only on how to determine whether the notice given was effective—the panel declared a sweeping new rule, not "a settled principle."

One significant problem: Not only does the panel opinion unnecessarily address the question of when pre-removal notice is

required, but in doing so, it enters a fraught area of this Circuit's jurisprudence. The panel opinion holds that the Fourteenth Amendment presumptively requires individualized notice before a government can tow an illegally parked car. (Slip Op. at 7.) The panel describes that holding as "a settled principle." (*Id.*) But this Court has *never* held that much. At most, its dicta have orbited the issue, beginning with *Scofield v. City of Hillsborough*, 862 F.2d 759 (9th Cir. 1988).

Scofield, a case about whether a car can be towed for a long-expired registration, held that "due process does *not* require that a pre-towing notice be given to the owner of a vehicle which has been unregistered for more than one year from the date on which it is found parked on a public street." 826 F.2d at 764, italics added. To arrive at that conclusion, *Scofield* relied principally on a balancing of governmental and private interests, under *Mathews*, 424 U.S. at 334–35, that had already been undertaken by the Seventh Circuit in *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982).

Scofield read *Sutton* for the proposition that "[a]s to an illegally parked car," "pre-towing notice is not required." *Scofield*, 826 F.2d at

762–63. It then reasoned that "the governmental interest in towing unregistered vehicles" is like "the governmental interest in towing illegally parked vehicles," and concluded that the former, like the latter, does not require notice beforehand. *Id.* at 763–64. In dicta, *Scofield* distinguished cars that are "apparently abandoned," from unregistered cars and illegally parked cars, asserting that pre-removal notice *would* be required before towing an apparently abandoned car. *Id.* at 764.

Consequently, if a jurisdiction within the Ninth Circuit tried to order its towing regime after *Scofield*, it would have concluded that the Fourteenth Amendment does *not* require pre-removal notice before towing illegally parked cars or unregistered cars—and specifically that it doesn't require notice before removing cars with long-expired registrations. The same jurisdiction might also have decided, in line with *Scofield*'s dicta, to give notice before towing apparently abandoned cars. Or it might not.

Clement v. City of Glendale (*Clement II*), 518 F.3d 1090 (9th Cir. 2008), does little to change any of that. Even though *Clement II* says "the default rule is advance notice and the state must present a strong justification for departing from the norm," 518 F.3d at 1094, its

actual holding is much narrower than that proposition—a proposition that is a generalization about procedural due process, not a description of how due process applies to the public and private interests at stake in towing cases. *Clement II*'s holding is simply that "the government must attempt to notify the owner of a vehicle parked in violation of a valid PNO certificate"—a certificate that prevents a car from being operated publicly—"before the government may tow and impound it." 518 F.3d at 1095–96.

That narrow holding arises from an unusual set of facts. Virginia Clement's car was parked illegally, to be sure: It was in a publicly accessible lot, which violated a condition of its PNO registration. *Clement II*, 518 F.3d at 1092. But Clement lived in the hotel where the car was parked, so one might sensibly ask where else she should have parked her car while not publicly operating it. *Id.* The tow in *Clement II*, in other words, was functionally the same as removing someone's car from her driveway without giving her notice first. That's qualitatively different from towing a car that illegally occupies a finite public space. *See generally Clement v. City of Glendale* (*Clement I*), 132

F. App'x 147, 148 (9th Cir. 2005) (distinguishing Clement's car from other sorts of illegally parked cars).

Thus, a jurisdiction that had arranged its towing program to comply with *Scofield* would have had little to rearrange after *Clement II*. Before the panel opinion in this case, it was possible to read *Scofield* as setting out a general rule that individualized pre-removal notice is *not* required before towing illegally parked cars, with *Clement II* recognizing a specific exception that notice is required for cars with PNO registrations that are parked illegally because they are parked publicly. Befitting such a narrow reading of *Clement II*: Despite the overpowering terms in which it cast a government's procedural due process obligations generally—and the heavy weight it put on the private interests affected by towing—*Clement II*'s analysis begins with the caveat that "[t]he case here is close." 518 F.3d at 1094. That is not what one would expect if the starting point of one's analysis was the

presumption that pre-removal notice is the overwhelming rule in towing cases.[2]

Suffice it to say, this is an area of the Circuit's caselaw in which it is difficult to discern a broad "settled principle," let alone one that presumes individualized pre-removal notice before towing illegally parked cars.

II. By holding that the Fourteenth Amendment presumptively requires individualized notice before towing an illegally parked car, the panel opinion imperils towing regimes throughout the Circuit.

The panel's assertion that towing a car presumptively requires individualized pre-removal notice could have significant effects on jurisdictions throughout the Ninth Circuit—as one would expect from an opinion heralding a sea-change instead of offering a recapitulation of

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[2] *Clement II* also observed that abandoned cars ought not to be subject to pre-removal notice, 518 F.3d at 1094, a position that the panel opinion adopted here. (Slip Op. at 8.) But *Clement II* simultaneously claimed to "dovetail" with *Scofield*'s "holding" that pre-removal notice *should* be given before towing apparently abandoned cars, 518 F.3d at 1096.

existing law. Consider a small sampling of the ordinances that may not satisfy a presumption requiring individualized pre-removal notice:

The Los Angeles Municipal Code, with authority delegated expressly by the California Vehicle Code, allows Los Angeles to tow cars parked in the same place for more than 72 hours without pre-removal notice. L.A. Mun. Code § 80.77(a); Cal. Veh. Code § 22651(k); *compare* Cal. Veh. Code § 22651(k) (no pre-removal notice contemplated) *with id.* § 22651.9 (pre-removal notice required to tow a vehicle with a "for sale" sign).[3]

The Pasadena Municipal Code likewise restricts parking to 72 hours, after which a car is subject to towing with only post-removal notice. Pasadena Mun. Code § 10.40.250; *see id.* § 10.40.251 (requiring removal in compliance with California Vehicle Code sections 22850–22853); *see also* Cal. Veh. Code §§ 22850–22853 (prescribing only post-removal procedures). The same rule applies if one decamps from

[3] Even if Los Angeles tickets some such cars as a courtesy before towing them, *Lone Star Sec. & Video, Inc. v. City of L.A.*, 584 F.3d 1232, 1234 (9th Cir. 2009), the applicable ordinance doesn't require it.

Pasadena for neighboring San Marino. City Code of San Marino § 15.07.05. It also applies if one goes west from Los Angeles, instead. Santa Monica Mun. Code § 3.12.990.

These 72-hour rules aren't limited to Southern California. San Jose has one. San Jose Mun. Code § 11.56.020. Berkeley has one. Berkeley Mun. Code § 14.08.090(A). They're found throughout California, from Bakersfield to Crescent City; Bishop to Stockton. Bakersfield Mun. Code § 10.40.010; Crescent City Mun. Code § 10.08.090(A); Bishop Mun. Code §§ 10.28.220, 10.28.221; Stockton Mun. Code §§ 10.16.020, 10.16.030. And they make good sense, because having to give pre-removal notice defeats an obvious purpose of towing a car that's been in the same place for 72 hours: expeditiously freeing up public resources that are consumed by vehicles their owners are not regularly driving.

Elsewhere in the Circuit, with post-removal notice, the City of Boise tows cars left in its parking facilities for over 72 hours. Boise City Code §§ 6-10A-17(E), 6-10C-2. Without pre-removal notice, Seattle tows cars left in its city parks after closing. Seattle Mun. Code § 18.12.235(B); *see* Wash. Rev. Code § 46.55.240(1)(b) (a local ordinance

concerning impoundment of cars "*may* include a law enforcement notice of infraction or citation," italics added). And the City and County of Honolulu allows for towing, with only post-removal notice, of cars parked in permit-only residential areas. Rev. Ordinances of Honolulu §§ 15-13.9(a)(22), (b); *see id.* art. 29 (establishing restricted parking zones).

This is all to say that jurisdictions throughout the Circuit have ordered their affairs around a different pre-removal notice principle than the one that the panel opinion says is settled. For even if those jurisdictions provide pre-removal notice in some instances, *e.g.*, Cal. Veh. Code § 22651.9, they do not seem to have organized around the principle that it applies as a default constitutional rule.

III. Presumptively requiring pre-removal notice in towing cases risks a circuit split.

Finally, as Portland's petition observes, the panel opinion's holding that "[d]ue process requires individualized notice be given before an illegally parked car is towed unless the state has a 'strong justification' for not doing so" (Slip Op. 7) puts this Circuit in conflict with (for example):

- The Seventh Circuit: "We hold, therefore, that it is not a violation of the due process clause to tow an illegally parked car without first giving the owner notice and an opportunity to be heard with respect to the lawfulness of the tow." *Sutton*, 672 F.2d at 646.
- The Eighth Circuit: "It appears settled that municipalities authorizing towing of illegally parked cars are not required by the Constitution to establish pre-deprivation notice and hearing procedures." *Allen v. Kinloch*, 763 F.2d 335, 336 (8th Cir. 1985).
- The D.C. Circuit: "[W]e follow the Seventh Circuit's thorough analysis of this identical issue and conclude there is no right to pre-towing notice and hearing." *Cokinos v. District of Columbia*, 728 F.2d 502, 502 (D.C. Cir. 1983) (per curiam).

Given the prospect that it will open a circuit split by doing so, this Court should go en banc if it intends to commit to the position that the Fourteenth Amendment presumptively requires individualized pre-

removal notice before an illegally parked car can be towed. 9th Cir. R. 35-1.

CONCLUSION

Instead of addressing whether Portland was required to give pre-removal notice before towing Grimm's car, the panel should amend its opinion to answer only the narrowest constitutional question that this case presents: What test applies to determine the adequacy of the pre-removal notice that Portland undisputedly gave? That approach has the virtue of avoiding the due-process morass that has opened around the broader question of when pre-removal notice is required.

But if the panel does not amend its opinion, then the Court should grant the petition for rehearing en banc to clarify the law in this Circuit and to ensure uniformity among the courts of appeals on an issue of widespread importance: Whether and when the Fourteenth Amendment requires pre-removal notice before towing an illegally parked car.

Respectfully submitted,

Dated: October 29, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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