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Supreme Court of Texas.
City of Dallas, Petitioner,
v.
VSC LLC, Respondent.
No. 08-0265.
January 19, 2010.

Oral Argument

Appearances: Charles S. Estee, Dallas City Attorney's Office, Dallas, TX, for petitioner: City of Dallas.
Bill Davis, Office of the Attorney General, Austin, TX, for amicus curiae: The State of Texas, for petitioner.

Alexis F. Steinberg, Mosser Law, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the first case, 08-0265, City of Dallas vs. VSC.

MARSHALL: May it please the Court, Mr. Estee will present argument for the Petitioner. Mr. Davis will present argument for Amicus, the State of Texas. Petitioner has reserved five minutes for rebuttal. Mr. Estee will open with the first 10 minutes.

ORAL ARGUMENT OF CHARLES S. ESTEE ON BEHALF OF THE PETITIONER

ATTORNEY CHARLES S. ESTEE: May it please the Court, this case presents two basic issues that will impact state and local governments' effort to recover stolen vehicles and indeed stolen property. Those issues are, one, does VSC as a successor to a thief have a constitutionally-protected property interest

in stolen vehicles; and two, is a government's recovery of stolen vehicles a proper exercise of police power rather than a compensable taking?

JUSTICE NATHAN L. HECHT: Why hasn't this come up before or since or somewhere else?

ATTORNEY CHARLES S. ESTEE: I have no idea, Your Honor. I have not located any case that has this exact same fact set.

JUSTICE NATHAN L. HECHT: Is the practice still ongoing, does the City still seize vehicles like this?

ATTORNEY CHARLES S. ESTEE: Yes, it does, Your Honor, and it still is seizing. Whenever a stolen vehicle is recovered, wherever it is recovered, the City takes it and takes it to its City pound.

JUSTICE EVA GUZMAN: And do you have the owners not previously protested the fact that they were then not able to get their fees, or is there some sort of local regulation where they're paid? And in this case since it was so many, they just didn't?

ATTORNEY CHARLES S. ESTEE: As far as I am aware of, there have been no other complaints by any other vehicle storage facility. This is the only one that has brought any complaint.

JUSTICE EVA GUZMAN: In Dallas?

ATTORNEY CHARLES S. ESTEE: In Dallas.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would there be any other source of recovery for the towing company other than from the City?

ATTORNEY CHARLES S. ESTEE: Well, the towing company presumably has a contractual relationship with the vehicle storage facility rather than the City.

CHIEF JUSTICE WALLACE B. JEFFERSON: I meant the storage facility.

ATTORNEY CHARLES S. ESTEE: The storage, they could always, if they have a valid claim against the car owner, they could always pursue that claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what would be a valid claim when the vehicle is stolen? Would they -- is the owner of the vehicle whose car is stolen responsible for those-- the fees at the facility or not? I'm not clear on that.

ATTORNEY CHARLES S. ESTEE: The City's position is no, that there is absolutely no basis for which a car owner should be responsible for paying those fees of a stolen vehicle.

CHIEF JUSTICE WALLACE B. JEFFERSON: So these would just be nonrecoverable by the facility?

ATTORNEY CHARLES S. ESTEE: That is correct.

JUSTICE NATHAN L. HECHT: I'm not sure I understand that.

ATTORNEY CHARLES S. ESTEE: Well, let me --

JUSTICE NATHAN L. HECHT: I'm not sure I understand that though. I mean if the police order it towed and it's stolen, the owner is responsible?

ATTORNEY CHARLES S. ESTEE: I'm sorry?

JUSTICE NATHAN L. HECHT: If the police order it towed and it's stolen, the owner is ultimately responsible?

ATTORNEY CHARLES S. ESTEE: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Well, why not if somebody just sees it and it's stolen?

ATTORNEY CHARLES S. ESTEE: Well, Your Honor, because private property or a private owner or a private VSC or private tow company has no property interest in that particular vehicle and is not exercising any kind of police power. The City is seizing the vehicle to return it back to the owner.

JUSTICE NATHAN L. HECHT: But if the police are driving down the street and they see a vehicle parked on the highway and nobody around it and they order it towed and it turns out to have been stolen, the owner is responsible for the towing charge?

ATTORNEY CHARLES S. ESTEE: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And the storage charge?

ATTORNEY CHARLES S. ESTEE: Well, they could be responsible. The policy of the City of Dallas is not to charge them a storage fee or any other notification fees.

JUSTICE NATHAN L. HECHT: If it's at the police lot?

ATTORNEY CHARLES S. ESTEE: That's correct.

JUSTICE HARRIET O'NEILL: But now would this be covered under the standard automobile insurance policy? If somebody steals my automobile and I go take it -- if I hear that it's at a private lot like this and I go get it and have to pay a storage fee, is that something that is covered by the standard policy, do you know?

ATTORNEY CHARLES S. ESTEE: I really don't know, Your Honor.

JUSTICE HARRIET O'NEILL: Maybe that's why this hasn't come up much because maybe it's recoverable that way.

ATTORNEY CHARLES S. ESTEE: Well, and I think part of the reason it doesn't come up a lot is that most of these vehicles have indications that they have been stolen. They have either been stripped; they have damaged steering columns, busted out windows, stolen radios, so there are physical indications that they have been stolen. Additionally, when a tow company or a VSC or a vehicle storage facility acquires the vehicle, they're supposed to call in to the police department, and the police department will then run a check to see if the vehicle has been reported stolen at that time. If the vehicle has been reported stolen, they're not supposed to take possession of it. Now --

JUSTICE EVA GUZMAN: So is there--excuse me. Is there a difference then if they acquire the vehicle pursuant to some sort of police order versus gratuitously identifying and picking them up and storing them and just waiting for the police to come pick them up?

ATTORNEY CHARLES S. ESTEE: Yes, Your Honor. I think if they are directed by the police to take possession of the vehicle, then they're basically acting pursuant to our authority and our power, and so the car owner may be responsible for that charge.

JUSTICE DALE WAINWRIGHT: I wasn't clear on how many of the vehicles are stolen --

JUSTICE DAVID M. MEDINA: Why isn't this a proper exercise of police power?

ATTORNEY CHARLES S. ESTEE: We believe it is a proper exercise of police power.

JUSTICE DAVID M. MEDINA: Why is that?

ATTORNEY CHARLES S. ESTEE: Pardon me?

JUSTICE DAVID M. MEDINA: Why is that?

ATTORNEY CHARLES S. ESTEE: Your Honor, the obligation, one of the obligations of law enforcement is to try to ascertain, solve crimes and recover stolen property. There's hardly a more basic police power than seeking out and recovering stolen property and returning it back to the owner. Case after case that we've cited reference those basic law enforcement obligations.

JUSTICE HARRIET O'NEILL: So what happens if in the typical scenario, if the vehicle comes and the VSF thinks that it's been stolen, are they to call the police and then the police come take it and put it in their lot? Is that typically what happens?

ATTORNEY CHARLES S. ESTEE: That's what happened in this scenario. Generally is what happened is that the tow company would take the car and bring it to VSC, the VSC then would call the police department to ascertain the status of the vehicle. At that point in time, the City would learn that the vehicle had been reported stolen and issue, send out a police officer who then would also get it towed, get the vehicle towed to the City pound.

JUSTICE HARRIET O'NEILL: I thought that this was a situation where these vehicles had been there for a while and the police then went there and discovered them.

ATTORNEY CHARLES S. ESTEE: Those were the, I believe those were the fifty odd vehicles that were initially seized pursuant to warrant, the plaintiffs have all been disposed of and are no longer part of the case.

JUSTICE HARRIET O'NEILL: So the ones before us are ones where VSC actually called the police and said, "They're stolen, will you come get them"?

ATTORNEY CHARLES S. ESTEE: We've offered evidence of that and there's some of their pleadings indicate that. Now, whether all of these vehicles, that happened with all of those vehicles in this scenario, I can't make that

representation and that's not within the record before the Court.

JUSTICE DALE WAINWRIGHT: Well, in the plea to the jurisdiction, the City submitted evidence with its plea. The Respondents here today responded with an argument, briefing, but no evidence, correct?

ATTORNEY CHARLES S. ESTEE: That is correct.

JUSTICE DALE WAINWRIGHT: What does the evidence that was before the trial court show about the vehicles that were before the Court that were stolen, the number, and the vehicles that weren't, that are in this case today?

ATTORNEY CHARLES S. ESTEE: Originally VSC claimed that the City had seized 326 vehicles. We offered evidence indicating that there were approximately 20 that we never did seize and offered evidence that those weren't vehicles that we had seized. Another 47 of those vehicles were disposed of at -- well, were the ones that had been seized pursuant to warrant. Those were disposed of in Municipal Court hearings and so they're not before the Court. So there are, I think, believe 252 or 254. We have a disagreement on the math, and I apologize I have not gone back to figure out what who --

JUSTICE DALE WAINWRIGHT: About 250 vehicles that are not alleged to have been stolen or have the VIN altered; is that correct?

ATTORNEY CHARLES S. ESTEE: That's 250 that were- had been stolen or had altered VINs.

JUSTICE DALE WAINWRIGHT: I'm sorry. 250 that had been stolen or?

ATTORNEY CHARLES S. ESTEE: Had altered, there were two that had altered vehicle identification numbers.

JUSTICE DALE WAINWRIGHT: So all 250 there was a basis under the statute for seizure because there were reported to have been stolen or the VIN had been altered?

ATTORNEY CHARLES S. ESTEE: That is correct.

JUSTICE DALE WAINWRIGHT: VSC says only 36 were stolen. What's the basis for that statement? Do you know, or maybe that's a better question for them.

ATTORNEY CHARLES S. ESTEE: That may be a better question for them. I don't think there's -- as I understand it, there is no factual dispute that these vehicles all have been reported stolen or had an altered VIN and that it was the basis for the City's seizure, and I don't believe there's any dispute about how all that occurred.

JUSTICE DALE WAINWRIGHT: Okay. So to be clear then, what you've told us about the numbers is based on the only evidence in the case?

ATTORNEY CHARLES S. ESTEE: That is correct.

JUSTICE DALE WAINWRIGHT: Okay.

JUSTICE PAUL W. GREEN: Well, you say that they're reported stolen, but do we know that they were stolen or how many of these cars do we know that were reported stolen after they were towed? That seems to be at least a plausible

scenario for somebody whose car is in the wrong place.

ATTORNEY CHARLES S. ESTEE: Well, as a practical matter and as I've explained, in the scenario where somebody comes out and their car is gone and they believe that it was stolen, they'll --

JUSTICE PAUL W. GREEN: But my point is, I guess, aren't there some fact issues related to those cars?

ATTORNEY CHARLES S. ESTEE: No, Your Honor, I don't believe there are. We offered evidence that all 252 or 254 vehicles had been stolen.

JUSTICE PAUL W. GREEN: Okay, so it's enough to have just simply reported it as stolen, whether it was actually stolen or not under the statute?

ATTORNEY CHARLES S. ESTEE: Well, under the statute it is probable cause. We went beyond what the statute provided and offered evidence that they had been actually stolen through the police report summaries. Now the Court of Appeals created an evidentiary distinction involving reports that said that a report of an event is only a reporting of the event as opposed to evidence of the actual event. I've not been able to find any authority for that evidentiary distinction. VSC has not cited any authority for that evidentiary distinction, and the Court of Appeals didn't cite any authority for that evidentiary distinction. In case after case reports are repeatedly offered and are admissible and probative of events that are recorded in those reports. So the City's position is that we established that all those vehicles had been actually stolen. Now whether or not they, even if we didn't establish that they had actually been stolen, we established pursuant to 501.158 that they had been reported stolen, which was probable cause for us to seize those vehicles. And if there was probable cause for us to seize those vehicles, the statute provides that they are to be treated as stolen for purposes of disposition and custody. So either we have conclusively proved that they are actually stolen or they're supposed to be treated as actually stolen under the statute.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any other questions? Thank you, Counsel.

ATTORNEY CHARLES S. ESTEE: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the State of Texas as Amicus Curiae.

ORAL ARGUMENT OF BILL DAVIS ON BEHALF OF THE PETITIONER

ATTORNEY BILL DAVIS: May it please the Court. Assuming there's a property interest, I would like to focus my time on police power. And Justice Medina, if I could start by responding to your question about why this was a reasonable and valid exercise of police power. "Reasonable and valid" can certainly mean different things in different settings. Here we're in the law enforcement setting, which is a specific subset of police power in which property owners have different expectations than they do, say, in the zoning context. Now there aren't a lot of takings cases in this law enforcement setting, but we do have *Steele vs. City of Houston*, we have *Bennis vs. Michigan* from the U.S. Supreme Court, *State vs. Richards* from this Court, and two cases from the Federal Circuit, *Acadia* and *AmeriSource* that are cited in our brief. And taken together, these cases reflect that when the government

pursues a legitimate law enforcement objective in a way that does not unreasonably infringe on private property rights, there can be no takings claim.

JUSTICE EVA GUZMAN: This is a physical taking not a regulatory taking?

ATTORNEY BILL DAVIS: It's not, Your Honor. It couldn't be a physical taking for the simple reason that the only property interest claimed is a lien interest, which is an intangible right. But I should say that the cases in this specific category don't get into the distinction between physical and regulatory takings. It's not necessary to the analysis in any of these cases. And on the first point of the analysis --

JUSTICE EVA GUZMAN: Is the Steele vs. City of Houston case applicable to the analysis here?

ATTORNEY BILL DAVIS: It is, Your Honor. It's part of this body of takings cases in the law enforcement context. In Steele there was a legitimate law enforcement objective, trying to recapture escaped convicts. The problem was that the means of attaining that objective were unreasonable; they unreasonably infringed on private property rights.

JUSTICE EVA GUZMAN: But there the -- go ahead.

JUSTICE PAUL W. GREEN: But does it matter that in Steele and Bennis, as I understand, involve adjudications and this one has not?

ATTORNEY BILL DAVIS: VSC makes that point, Your Honor, and talks about those cases being forfeiture cases. We would direct the Court to the AmeriSource case from the Federal Circuit which rejected that argument and said that Bennis applies more generally to the law enforcement context not merely to forfeitures, not merely to contraband. So in our view the case can be decided based on the other decisions we have in this specific context. That said, the same conclusion should be reached if the Court broadened its view to look not only to law enforcement cases but also to other cases from the U.S. Supreme Court identifying broad general principles of takings analysis. So we have here Lucas vs. South Carolina Coastal Council, Penn Central vs. City of New York, Lingal [Ph.] vs. Chevron USA. Two touchstones that emerge from these cases applicable generally to takings analysis are the reasonable expectations of the property owner and the severity of the burden on private property rights. On the first point about reasonable expectations, licensed tow yards know that some of the vehicles they take in are going to be stolen, it's just part of the business.

JUSTICE EVA GUZMAN: But they take them in lawfully and when they take them in lawfully, they have an expectation that they will be paid or reimbursed for the storage cost; correct?

ATTORNEY BILL DAVIS: Well, their expectations are defined by the regulatory framework in which they operate. Part of that regulatory framework is Section 501.158 of the Texas Transportation Code which allows peace officers to come in and seize stolen vehicles. Another part which goes to the severity of the burden --

JUSTICE EVA GUZMAN: Does the valid exercise of police power, coming in and seizing them, excuse any duty to pay by the government? Is that always the case?

ATTORNEY BILL DAVIS: It's not always the case, but in this regulatory context it is, Your Honor, because VSC and any other interested person has the protection of Chapter 47 of the Code of Criminal Procedure which Section 501.158 triggers.

JUSTICE NATHAN L. HECHT: It says "right to possession," and does VSC have a claim of possession here?

ATTORNEY BILL DAVIS: Yes, it does, Your Honor. VSC doesn't claim -- as I understand it, VSC is not claiming to have an ownership interest in the cars, but it does claim a right to possession and says that not having possession either damages or destroys its possessory lien.

JUSTICE NATHAN L. HECHT: So I'll be clear, I think this is your position, that Chapter 47 would apply to someone like VSC?

ATTORNEY BILL DAVIS: It is. And I believe that the parties are in agreement that VSC would qualify as an interested person under article 47.01(a), someone able to file a petition seeking to enforce its rights to possession.

JUSTICE DON R. WILLETT: What about severity of the burden?

ATTORNEY BILL DAVIS: And, Your Honor, I believe that goes to the severity of the burden, even if the initial seizure completely destroyed the lien's value, the Court shouldn't look just at that act, but rather the totality of the regulatory scheme in which a party can protect its rights through Chapter 47, just as VSC did in other instances involving cars for which the City initiated the Chapter 47 process.

JUSTICE DALE WAINWRIGHT: So your position would practically mean that the licensed storage facilities would have the burden and probably act to check to see if there's any indication that the vehicle is stolen, not just take them all in. If the VIN has been altered or the license plate has been altered, they would say, "Well, we may not be able to get compensation here, we ought to call the police right away or not take it in." What about cars where there's no indication whatsoever that they may have been stolen or involved in a crime? And then they take them in without, even if they had a duty to check and the ability to know?

ATTORNEY BILL DAVIS: I believe there are reporting duties that apply, but I guess the important point for the analysis of this case would be what is the scenario that arises once the vehicles have been seized in terms of licensed tow yards that know what the rights are, that vehicles can be seized, and they also know that they can file petitions under Chapter 47. And so in that instance, in any of those scenarios, the tow yard would be able to protect its rights under Chapter 47.

JUSTICE DALE WAINWRIGHT: Does the storage facility get attorneys' fees if it wins under Chapter 47?

ATTORNEY BILL DAVIS: I do not believe there's an attorneys' fees --

JUSTICE DALE WAINWRIGHT: The storage fees might be 50 bucks or it might be 200 bucks or it might be more. Filing a lawsuit to get your 50 bucks is not very efficient, cost efficient.

ATTORNEY BILL DAVIS: That could be true. VSC has not challenged Chapter 47 on that basis. In fact, it has asked that it had notice of the Chapter 47 proceedings and an opportunity to participate in them, so presumably it's cost effective for them at least. And just a follow up on the notice point. VSC claims that, but that's really a due process claim. There's no due process claim in this case. The important point is that the vehicles were seized under 501.158, Chapter 47 exists to protect the tow yard's rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any other questions? Thank you, Mr. Davis. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Ms. Steinberg will present argument for the Respondent.

ORAL ARGUMENT OF ALEXIS F. STEINBERG ON BEHALF OF THE RESPONDENT

ATTORNEY ALEXIS F. STEINBERG: Chief Justice, may it please the Court, good morning. I represent VSC LLC, my name is Alexis Steinberg. I would like to, before I get into the body of my argument, address a few of the questions that you have already asked. Justice Hecht, I believe it was you that asked why now? Why are we doing this now? And I think if you look to page 164 of the record, you will find that the City actually came in and interrupted an auction of vehicles that VSC already had in its possession and had already accommodated the statute, provided the notice that was required and was disposing of those vehicles in order to cover the cost of the towing and storage fees. So I think that's the first part of why now, and the second part is this is really expensive to do this, to file these lawsuits and to prosecute all of this. So when one car is seized and you're out \$250, it's really hard to convince the vehicle storage facility guy or the tow truck operator that, hey, this isn't right and we need to stop it. But when they came in and stopped that auction and suddenly it was 200, 300 vehicles that were at issue in the course of that auction and later seizures, it suddenly became a much greater issue.

JUSTICE EVA GUZMAN: So going back to the why now, that the storage facility takes these vehicles, stores them, did they not notify the police in a timely manner, "By the way, we're accumulating hundreds and hundreds of cars and we intend to sell them at auction, and probably get a lot more for them than the storage fees"? Did they not do that? Were they just sitting on these cars?

ATTORNEY ALEXIS F. STEINBERG: There's no allegations in the record that they didn't follow all the notification procedures, which include notifying the vehicle owners, they include notifying the City, the tow truck driver notifies the City within an hour of towing the vehicle, and then the storage facility is bound to notify the City within two hours. In order to tow the vehicles, after they do all of this, they get a number assigned to the tow. If you look on pages 65 through 69 of the record, you can find where those numbers are. And they won't get a number if the vehicle is stolen, so the City knows at the outset whether or not the vehicle has been stolen.

JUSTICE EVA GUZMAN: So in a sense, the City is getting free storage if after they get notice they do nothing to remove those vehicles to their own lot?

ATTORNEY ALEXIS F. STEINBERG: Yes, ma'am. And some of them have been removed promptly, but some of them it took quite a while for them to get removed. And also there was a discussion, I'm sorry I don't remember who asked about it, but about, "Well, all these vehicles, were they stolen or not?" I think maybe

it was Justice Wainwright, you asked if that was the case.

JUSTICE DALE WAINWRIGHT: Yes. What does the evidence show about that?

ATTORNEY ALEXIS F. STEINBERG: That was a big question. We say that they were allegedly stolen and the City says that they were actually stolen. However, if you look to the record and I believe it's about page 126 through 134, the City created a spreadsheet which says the disposition of each vehicle. Some of them were reported stolen, a lot of them were actually unauthorized use of a motor vehicle, which while it's a crime is not a theft crime which doesn't trigger 501 and sequential, which are what allow the police to come in and seize these vehicles if they have been stolen or reported stolen. So it's questionable whether the bulk of these cars should have even been seized under 501 based on the fact that the crime that is alleged there is not a theft, it's actually an unauthorized use of a motor vehicle. So that gets to that question.

JUSTICE PAUL W. GREEN: So do you think that there are a lot of fact issues that are unresolved at this point?

ATTORNEY ALEXIS F. STEINBERG: Yes, Your Honor, I think there's a great deal of fact issues that are unresolved, which gets to the question of what we're here to decide today. Miranda tells us that a plea to the jurisdiction and the subsequent appeals to a plea to the jurisdiction should only be about the jurisdictional questions in this case, and what we're presenting to you here are fact issues. And if we're getting into a merits inquiry, well, were they really stolen, how many were stolen, how many were there hearings on, all these are perfect questions for the trial court to answer, they're not the appropriate place for a plea to the jurisdiction.

JUSTICE DAVID M. MEDINA: Well, let's talk about this property interest. Does it matter what type of property we're dealing with? Here we have vehicles, what if this is a U-Haul storage facility, and in that facility it's discovered that there's some valuable stolen art and then you put it up for auction, the police are trying to bust they're trying to bust some type of theft ring for art, is it any different?

ATTORNEY ALEXIS F. STEINBERG: I think that there's probably a couple answers for that. The most important one for this case is that it is different because we have an entire statutory scheme totally addressed to how we deal with this. Mr. Davis said that he's asking that you just apply the statutes as written, and we've got those. We have all the nonconsent towing statutes that don't say -- it doesn't ask whether the car was stolen, it doesn't ask whether it was used unauthorizedly, it's almost a strict liability statute in the sense that if a car is parked somewhere that it ought not be, as the Legislature has laid out, defined where it ought not be, then you may tow it.

JUSTICE DAVID M. MEDINA: So if you prevail on that issue, what about the exercise of proper police power to stop this type of thing from occurring?

ATTORNEY ALEXIS F. STEINBERG: I think that the police power there is a very important issue, however we're not contesting that there isn't a police right to come and seize vehicles, what we're contesting is how the vehicles are disposed of afterwards and how VCS is treated as a storage facility. The Texas Legislature has laid out very clearly, when you seize a vehicle, you will file a schedule with the Court under 47, I believe .03, to tell them you have the vehicle and to tell them that VSC has asserted a property interest

in that vehicle. In these cases they didn't file those schedules, at least there's no record and we don't know of any schedules being filed. So we are making sure that the police power is protected, they have the availability to do their job under the statutes. They seize the vehicle, they file a schedule under 47.03, VSC is notified as an interested party, a hearing is held. VSC comes, the owner comes, anybody who else thinks they might have an interest comes to that hearing and gets a chance to say, "Here's why I deserve an interest in the car or deserve the car."

JUSTICE NATHAN L. HECHT: Just so I'll be clear because this does seem to be your position in response to the State's brief that if Chapter 47 is followed, there's no taking.

ATTORNEY ALEXIS F. STEINBERG: If Chapter 47 is followed, there does not seem to be a taking.

JUSTICE NATHAN L. HECHT: And the principal dispute about Chapter 47 seems to be who has to initiate the proceeding; is that right? Whether you do or the City does.

ATTORNEY ALEXIS F. STEINBERG: That does seem to be one of the disputes, yes, Your Honor.

JUSTICE NATHAN L. HECHT: And if you do, that's sort of the end of the case?

ATTORNEY ALEXIS F. STEINBERG: No, Your Honor.

JUSTICE NATHAN L. HECHT: Okay, why not?

ATTORNEY ALEXIS F. STEINBERG: We still have all the issues on the declaratory judgment side, I believe.

JUSTICE NATHAN L. HECHT: Why don't they go away if you have an adequate remedy under Chapter 47?

ATTORNEY ALEXIS F. STEINBERG: I don't know. I'd have to get back to you on that, Your Honor. I'd have to think about it for a little while.

JUSTICE NATHAN L. HECHT: You say I was taken by this, you say, "The statutory framework as encapsulated by Chapters 47 and 59 offers ample protection to vehicle storage facilities if it is applied faithfully and correctly."

ATTORNEY ALEXIS F. STEINBERG: And I believe that to be true, Your Honor, I just don't want to give away the farm right here in oral argument.

JUSTICE NATHAN L. HECHT: Right. No, and it seems to me to be true, and so it seems to all pull down to who should have started it, and if you have the opportunity to start it and could have started it and should have started it, that seems to me that's kind of the end of the case.

ATTORNEY ALEXIS F. STEINBERG: I don't believe, though, that the way it is written it is incumbent upon us, nor do I believe that the Supreme Court's, as I mentioned in Mullane [Ph.], it says that in order for there to be notice and opportunity to be heard, you have to be apprised of your right to have that opportunity to be heard, and being apprised doesn't mean I have to go and request it, it means that the City via the schedule which it's required to file, that's not a permissive, it must file a schedule, notifies me that

that car is being disposed of. Otherwise I do think we run into some of the problems that Mr. Davis mentioned from AmeriSource and Acadia. There goods were seized and simply sat on, they were held and held and held and they weren't disposed of -- and or excuse me, they were eventually disposed of and they asserted a takings claim here. So they're already disposing of vehicles without the 47 hearing, they're giving them back to people without notifying us or giving us an opportunity to be heard. So if it becomes incumbent upon us to request that hearing, how do we know when to request it, how do we know where, how do we know what's happening to the vehicle, which magistrate it might be in front of? The due process requirements there I think are very well laid out by the Supreme Court that indeed they must actually appraise us of the hearing and give us the opportunity to be heard.

JUSTICE NATHAN L. HECHT: Well, but you've got the vehicle, right?

ATTORNEY ALEXIS F. STEINBERG: We have it when it's seized, yes, Your Honor.

JUSTICE NATHAN L. HECHT: And so is there any reason why you couldn't go down an hour later to the magistrate and initiate a Chapter 47 proceeding?

ATTORNEY ALEXIS F. STEINBERG: Due process and the law don't require us to do that.

JUSTICE NATHAN L. HECHT: But is there any practical reason, I'm wondering?

ATTORNEY ALEXIS F. STEINBERG: Practically I imagine it would be costly.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY ALEXIS F. STEINBERG: I imagine also it gets you right back to the takings issue. You've laid out, well, "you" being the Texas Legislature has laid out the framework for how we recover. If suddenly we start tacking things on and saying, "Well, in addition to them filing the hearing, maybe you have to also go and request it," then we're creating this extra burden. So while you may not be outright taking the -- excuse me, while you may not be destroying the property that we have, you're damaging it, you're making it more costly. The question was asked about the cost of a lawsuit. If you have to go and hire an attorney and prosecute this separately with Chapter 47 hearings, suddenly your property right, your \$250 towing and storage fees are worth significantly less.

JUSTICE DALE WAINWRIGHT: And there may be some vehicles you have no clue are stolen. I mean there's no indication that they're reported stolen, no VIN alteration, you don't know what -- I guess you assume those cars are just fine, there's not going to be a seizure or claim, at least that would be the assumption, I guess?

ATTORNEY ALEXIS F. STEINBERG: Yes, Your Honor, that would be. And I think that gets back to the investment-backed question, the investment-backed expectations of what VSC is looking at when it runs a towing a storage company. From Penn Central that Counselor mentioned, we have in our business plan or model thought about what does it cost to run a towing and storage facility. So if we're suddenly piling on all these extra fees and costs associated with disposing of these vehicles that we lawfully towed, that we have a right to have in our possession waiting for the fees, then suddenly our investment-backed possessory lien is not worth as much to us, and in fact it's costing us so.

JUSTICE DALE WAINWRIGHT: About the argument that the City and its police have to satisfy 501.158(a), that there has to be probable cause to believe that the vehicle is stolen or has had the serial removed or altered. That's their burden. Once they satisfy establishing probable cause, they've done what they need to under the police power to seize the vehicle. Anyone who wants to undo that then has the burden to take action to undo that seizure after the City has satisfied its burden to show probable cause. That doesn't mean proving that the vehicle was stolen, that's probable cause to believe, under the language of the statute, that the vehicle is stolen or the serial number altered or destroyed.

ATTORNEY ALEXIS F. STEINBERG: I'm not sure I understand the gist of your question. Are you asking me is 501 protective of us after a seizure, can we disprove it?

JUSTICE DALE WAINWRIGHT: Well, actually it goes the other way. Is 501.158(a) protective of the City after it shows probable cause to seize the vehicle? For VSC, then the argument would go to come and change that, that VSC would have the burden to initiate the Chapter 47 proceeding because the City has already shown what it needs to, probable cause to get a vehicle that's reported stolen.

ATTORNEY ALEXIS F. STEINBERG: No, Your Honor, I don't think that's correct. Because while 501 authorizes the seizure, Chapter 47 authorizes the disposition and it's mandatory. So once you have the car in your possession, you can treat it as a stolen vehicle under 47, or you can treat it as contraband under 59, but either way both force you to take some action, some positive action as the City you can't merely or the police, you can't merely sit on that car and hold it till the end or till you give it back.

JUSTICE DALE WAINWRIGHT: Presumably, if the police have seized a car because it's been reported stolen, they are going to use it as evidence in a prosecution, and if there's no reason to go forward with the prosecution, then they're going to not want to keep it. But if they're presumably keeping that car, it's for a criminal prosecution purpose, so they're not just taking them and sitting on them.

ATTORNEY ALEXIS F. STEINBERG: Yes.

JUSTICE DALE WAINWRIGHT: And so it's the criminal interest that the City has. What about the argument that for somebody to undo that and take that vehicle back or get some payment based on lost storage fees, they would have the burden to come and say, "Well, actually we have an interest that you need to look after."

ATTORNEY ALEXIS F. STEINBERG: Yes, Your Honor, this gets actually to again AmeriSource and Acadia. They can hold it for the duration and I can't say to them, "I object to you holding it for six months or six years," but at the end of that time, they cannot keep it forever and they cannot simply give it back to the owner. That's where the Acadia and the AmeriSource affect this case directly. Because in there, those plaintiffs were objecting that at the end of the time they held it -- and I believe it was cooling fans in one case. The cooling fans weren't worth anything as fans anymore, they were just worth something as scrap metal, and the government said, "Well, we're sorry, but we're allowed to hold onto this even if it means that the interest in it in terms of the value of the fans as a fan is completely degraded and you

only have the scrap metal."

JUSTICE PAUL W. GREEN: The pawn shop, go to the pawn shop context and police recovered stolen property. A taking, no taking? What's your take?

ATTORNEY ALEXIS F. STEINBERG: Your Honor, I think a pawn shop is entirely a separate --

JUSTICE DON R. WILLETT: It's because there's a statutory scheme that governs --

ATTORNEY ALEXIS F. STEINBERG: We have our own separate statutory scheme; we have 2308 and 2303 of the Texas Occupations Code. And I think one thing important to remember, I think it's important to note that this is really a very fair scheme. The City calls us "a successor in interest to a thief," and they sit here and say, "Well, think of this poor property owner, the poor vehicle owner," and my heart goes out to them. It does, it's terrible to have your car stolen, but it's not like there's no remedy there. They do have remedies. They can come to the Chapter 47 hearing and say, "Well, they shouldn't get it because it's stolen." But ultimately if they feel that they are wronged or that the tow was illegally done or premature, which we do allege that frequently when you have your car towed, a nonconsensual tow, people do report them as stolen when they're not actually stolen, so there's another fact issue there about whether these were actually stolen. But those folks have a remedy; they can request a tow hearing under Chapter 2308 from a justice of the peace from the precinct in which the car was towed. They go to the justice of the peace, they say, "Here is why I don't think this tow was fair and I don't want to have to pay," and then the justice of the peace decides. And having been to those hearings, I can tell you justices of the peace are pretty friendly towards vehicle owners.

JUSTICE NATHAN L. HECHT: You say a Justice of the Peace; Chapter 47 gives the power to all sorts of magistrates. Is that who handles it in Dallas, not the Municipal judges?

ATTORNEY ALEXIS F. STEINBERG: I don't know who handles the Chapter 47 hearings, the hearings that I was talking about were specifically the hearings that are available to a vehicle owner under Chapter 2308.

JUSTICE NATHAN L. HECHT: 2308?

ATTORNEY ALEXIS F. STEINBERG: For a wrongful tow if they feel that the towing fees were wrongfully assessed. I would also like to address a couple other points that we have talked about. The possessory lien. Justice Guzman, I think you asked about, you started your question with what sort of interest or what sort of taking is this? And I think the easiest answer is it doesn't fit really squarely into the physical or into a regulatory taking, because it is a physical seizure of a vehicle, however the interest that we have in those vehicles is a possessory lien which usually possessory liens are dependent on the actual possession of the vehicle. And while it's true that your lien may not be totally destroyed if the possession is seized from you, as it has been in this case, it is impaired. It is much harder to assert a possessory lien against someone when you don't have possession of the vehicle any more. And if filing a lawsuit is our only remedy because the vehicles have not been disposed of via a Chapter 47 hearing, suddenly the cost of asserting that we are owed \$200 or \$300 is much, much greater than the potential benefits are.

JUSTICE EVA GUZMAN: Similarly as it is for the people who's the persons whose cars are unlawfully towed can't protest that and fight that unless they go to Court and spend possibly hundreds of dollars as well. So there's --

ATTORNEY ALEXIS F. STEINBERG: There is a -- I understand that you're saying there is a competing interest there, however I do think the Texas Legislature did balance those interests and it did cover every party in this case, but also if I'm not mistaken, the filing fee for that is negligible. Most people represent themselves pro se, and I think it's about \$20 in filing fees.

JUSTICE EVA GUZMAN: Against a lawyer from the towing company?

ATTORNEY ALEXIS F. STEINBERG: A lot of the towing companies actually go pro se to defend themselves against this. It's very rare, because lawyers' fees are fairly high, that they will call us in to do so. Usually they will only do that if they're concerned that the justice of the peace is unduly favorable towards towed vehicle owners, so it's not as often for us to be called in on that. VSC does have a lien, a possessory lien on the vehicles that it's towed. It's set out, it's statutorily provided for. It's also an equitable lien based on the service we're providing. One person we haven't talked about in this case yet is property owners. What if somebody parks in the Chief Justice's parking spot and we want to get him towed?

JUSTICE DAVID M. MEDINA: That happens all the time.

CHIEF JUSTICE WALLACE B. JEFFERSON: And we tow them all the time too.

JUSTICE DAVID M. MEDINA: And there's no recourse.

ATTORNEY ALEXIS F. STEINBERG: And I'm sure you do tow them; I wouldn't blame you, Your Honor. So someone parks in his parking spot, or what about my house? I don't own a very nice house, however I do own a house and in my neighborhood it would not be unheard of for someone to come and park on my front yard. That would be terrible; I would be really upset about it. So what happens if I call the towing company and they say, "Oh, well, we're sorry, we're not going to come tow your car." "Why not?" "Because it's not consensual, and well, in your neighborhood they probably would report it stolen and then I wouldn't be able to get my fees." And the City asserts that we collect fees from property owners, however it's actually illegal for us to do so, for us to collect fees under Chapter 2308. We cannot collect fees from the property owners, nor can we give them fees. We can have a contract with them, so we can say, "Yes, we're willing to patrol your lot and we will come and take cars for you," but we can't collect fees and they can't take our money either. So as a property owner I can't say, "Well, I'll pay you to tow it." "Well, no, you can't do that; you can't pay me to tow it." Okay, so the Chief Justice or me in my house in, you know, the not-so-nice neighborhood, are suddenly left with this car on my lot when the Texas Legislature has already provided for me to have a right and a recourse so that I'm not stuck with this guy parked on my lot for some indeterminable amount of time until I can get six strong guys to push it into the street. As to the police seizure, I think that the State and the City do make an interesting point about the concept of it being a valid exercise of the police power. We're not contending that it's an invalid exercise of the police power, there's a very important distinction here. We're not making a facial challenge to the regulatory scheme; we're making an as-applied challenge. So this discussion of whether or not it's valid or whether it's an invalid challenge isn't so

important because we're admitting that, yes, indeed this regulatory scheme as it exists and your exercise of the police power under it is valid. What's invalid or inappropriate rather is the way that you are seizing these cars without compensation, which is deserved.

JUSTICE NATHAN L. HECHT: There's a piece of the case still in the Federal Court?

ATTORNEY ALEXIS F. STEINBERG: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Was there a Fourth Amendment claim in the Federal Court?

ATTORNEY ALEXIS F. STEINBERG: I don't recall. Yeah, I think there was some 1983 claims and some tort claims that were held up there is what remains. I might be mistaken, though. Which actually gets us pretty squarely to some of the other points they raised that we didn't address in the bulk of the argument, which is the ripeness based on the remand from the Federal Court and whether or not we should be addressing these issues. I would point out that *San Remo Hotel vs. San Francisco* which is the United States Supreme Court precedent on this matter says that a state and a federal takings claim may properly be brought together in State Court. So these are properly brought together. There is really no question about whether they're unripe to be heard in the Federal Court. It says that *Williamson County* specifically does not prevent that from happening, and in fact the Supreme Court goes on to note that most of its takings jurisprudence is based on state takings cases which are then appealed to the U.S. Supreme Court.

JUSTICE DALE WAINWRIGHT: Counsel, you mentioned that you think there are fact questions in the case. In the plea to the jurisdiction I understand the City submitted evidence, but your client submitted no evidence, just argument. Right?

ATTORNEY ALEXIS F. STEINBERG: I believe that's correct, Your Honor.

JUSTICE DALE WAINWRIGHT: So isn't the City's evidence established for purposes of this proceeding, and you can't -- I mean if there are fact questions that are raised in its own evidence, yes, but you can't raise any by argument without having submitting evidence to contradict some of its evidence, right?

ATTORNEY ALEXIS F. STEINBERG: They put forth theories. I don't believe that they established conclusively any evidence, and in fact, the Appellate Court and the trial court failed to accept their evidence as such.

JUSTICE DALE WAINWRIGHT: Well, the Court of Appeals did say that the affidavits of two police officers that said that the vehicles were reported stolen or the VINS were altered does not establish that the vehicles were stolen. But if that's the only evidence in the case, don't we have to accept that as true?

ATTORNEY ALEXIS F. STEINBERG: I don't think you do. I think if you look at page 126 of the record it doesn't say those vehicles were stolen. It says a lot of them were an unauthorized use of a motor vehicle, however --

JUSTICE DALE WAINWRIGHT: Okay, so take those out of the case, the ones that the affidavit say were reported stolen or the VIN was altered.

ATTORNEY ALEXIS F. STEINBERG: Again, we go back to the problem that a lot of folks report their car stolen when it's towed. However, even --

JUSTICE DALE WAINWRIGHT: Then couldn't you have submitted some evidence that contradicted or attempted to contradict their evidence? We don't typically allow argument to contradict evidence --

ATTORNEY ALEXIS F. STEINBERG: Yes, Your Honor, I understand.

JUSTICE DALE WAINWRIGHT: -- on the issues in evidentiary point.

ATTORNEY ALEXIS F. STEINBERG: I would assert that even if that were accepted as true, which I don't believe it was proven as true, it's not conclusive to anything that is material in this case. The plea to the jurisdiction that we're here on is whether or not a takings was appropriate. A takings under State vs. Holland requires an intentional act of the sovereign to damage, destroy or otherwise take property for the public use. We have asserted that. Saying that I took it under 501 doesn't change the fact that, yes, you took it, but then ultimately what did you do with it? You disposed of it improperly under Chapter 47 or any alternative Chapter 59. That takings claim is valid as a matter of law. Regardless of how they got the property, the way that they dispose of it is not in accordance with the Texas Legislature and it acts as a taking on a vehicle storage facility owner. Your Honors, I see I am way out of time. If there are no further questions, I would ask that the Court find that the plea to the jurisdiction should be denied and that we can go back to the trial court and solve all these big questions. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Steinberg. The Court will now hear rebuttal.

REBUTTAL ARGUMENT OF CHARLES S. ESTEE ON BEHALF OF PETITIONER

ATTORNEY CHARLES S. ESTEE: Let me start by answering the first question, whether or not Chapter 47 is an adequate remedy and whether or not it's dispositive of the case. The simple answer is yes.

JUSTICE NATHAN L. HECHT: I thought I read in your brief that you were worried about the use of the word "possession" in Chapter 47, and there might be some argument that somebody in VSC's position does not have a right to possession, but you think Chapter 47 applies?

ATTORNEY CHARLES S. ESTEE: I believe they have the right as a claimed interested party to seek a Chapter 47 hearing. I don't believe they're entitled to recovery under a Chapter 47 hearing. And it's important to remember why the City did not initiate Chapter 47. Under 4701, our obligation is to hold property unless there is a dispute as to ownership. There was no dispute as to ownership. VSC admits it's not an owner, and under the Motor Vehicle Certificate of Title Act, the registered owner is presumed, or the registered holder is presumed to be the owner, so there was no dispute as to ownership. If they had some type of lien as an interested party, they could initiate a hearing under Chapter 47 and seek whatever relief. It's ironic that they complain about the lack of the City initiating Chapter 47 hearings, in 2002 with our initial pleading all the way through our last pleading we've complained that they have failed to seek relief under Chapter 47 and that they're --

JUSTICE HARRIET O'NEILL: Let's say that 47 doesn't provide them any relief, as you seem to sort of indicate, you don't think that it would, how are they going to get paid, and do we want the situation where we can't get storage facilities for cars that are towed when they're reported stolen?

ATTORNEY CHARLES S. ESTEE: Your Honor, I don't believe they're entitled to any fee for towing the stolen vehicles.

JUSTICE HARRIET O'NEILL: Well, I understand that, but how do you address the public policy argument of it's going to be difficult to have vehicles removed if there's uncertainty as to whether it's stolen? It's going to take away any incentive on the part of vehicle storage facilities to send a tow.

ATTORNEY CHARLES S. ESTEE: Well, initially they can call the police. Whatever property owner, you know, malls or an apartment complex, whoever it is, they can call the police and the police will take custody of the stolen vehicle.

JUSTICE EVA GUZMAN: But from a practical standpoint though, there is some public benefit to having these vehicles towed off freeways. They're dangerous, they can be dangerous in neighborhoods when they're parked where they shouldn't be parked, and police officers, having been married to one for 30 years, aren't going to rush out to tow the car -- for 25 -- to tow the car. It seems like 30.

ATTORNEY CHARLES S. ESTEE: Well, there are a couple different scenarios you just explained. One is the side of the road. Those will be towed no matter what by City or State. Those won't be towed by a private person unless they're under contract, so hopefully those will be immediately disposed of. The issue is a private property owner. Again, they can call the police and get a vehicle out there, or at least get it investigated quickly. One other point that they had made was whether or not the City should have filed schedules. Again, going back to 4703, a schedule should only be needed if there's a pending case. The only time there's going to be a pending case is if there's a Chapter 47 hearing or if there's a pending criminal case. Their pleadings acknowledge there were no pending criminal cases; there were no requirement for us to file schedules if there was no dispute as to the ownership. There was a question about pawn shops. Pawn shops are a little bit different than the vehicle storage facility in that a pawn shop actually pays for whatever they've received. So they have parted with some consideration and have probably dealt with someone trying to be a purported owner. Additionally, Chapter 47 requires that all stolen property that is obtained from a pawn shop is held, and that's a little bit of difference between the setting of a vehicle storage facility. There was an argument about an unauthorized use as not being stolen. Well, I guess I beg to differ, I think theft and unauthorized use are in the same category and I guess we can get out the Penal Code and compare, but I believe a theft and unauthorized use is a stealing of the vehicle. There was the question about whether or not there was a Fourth Amendment claim, yes there was in the Federal Court. There is still a pending search and seizure claim and then there's a defamation claim against the former City Attorney. There are three issues that you know the Court should consider before it decides to, or should consider in reversing this case, unless law enforcement pays, stolen vehicles will end up in a storage facility that can't be processed for fingerprints, other evidence or DNA. We may have a situation where there's a murder or rape, does the City have to pay to get those vehicles out to process the evidence? What happens if there's stolen property in the trunk or in the interior, does the City

have to pay to get the recover that property? It provides tow companies and vehicle storage facilities a tremendous incentive to continue to deal with property that they know or should reasonably know is stolen. It kind of brings to mind an absurd race between the tow company and the police to get to a stolen vehicle. Public policy should not encourage anyone to profit in dealing with stolen property. Furthermore, it won't take very long for smart car thieves to get in the towing and storing business. Either they can delay out of recovery or processing of the evidence, or if the government actually takes the vehicle, they can claim it was a taking and recover from the government. Finally, if this Court doesn't reverse this decision, state and local governments will have to consider the risk that they have to pay a thief's successor if the police recover and return stolen property to the victim. Instead of being encouraged to recover the victim's property and devote all resources to that recovery, law enforcement will have to weigh additional costs that it will have to pay a thief's successor. The City would request that the Court reverse this decision.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Estee. The cause is submitted and the Court will now take a brief recess.

[End of proceedings.]

City of Dallas, Petitioner, v. VSC LLC, Respondent.
2010 WL 303245 (Tex.) (Oral Argument)

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